THE CONSTITUTION
of the
UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

ANALYSIS OF CASES DECIDED BY THE
SUPREME COURT OF THE UNITED STATES
TO JUNE 28, 2002

PREPARED BY THE
CONGRESSIONAL RESEARCH SERVICE
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AUTHORIZATION

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STAT. 1585, 2 U.S.C. § 168

JOINT RESOLUTION Authorizing the preparation and printing of a revised edition of the Constitution of the United States of America--Analysis and Interpretation, of decennial revised editions thereof, and of biennial cumulative supplements to such revised editions.

Whereas the Constitution of the United States of America--Analysis and Interpretation, published in 1964 as Senate Document Numbered 39, Eighty-eighth Congress, serves a very useful purpose by supplying essential information, not only to the Members of Congress but also to the public at large;

Whereas such document contains annotations of cases decided by the Supreme Court of the United States to June 22, 1964;

Whereas many cases bearing significantly upon the analysis and interpretation of the Constitution have been decided by the Supreme Court since June 22, 1964;

Whereas the Congress, in recognition of the usefulness of this type of document, has in the last half century since 1913, ordered the preparation and printing of revised editions of such a document on six occasions at intervals of from ten to fourteen years; and

Whereas the continuing usefulness and importance of such a document will be greatly enhanced by revision at shorter intervals on a regular schedule and thus made more readily available to Members and Committees by means of pocket-part supplements: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Librarian of Congress shall have prepared--

(1) a hardbound revised edition of the Constitution of the United States of America--Analysis and Interpretation, published as Senate Document Numbered 39, Eighty-eighth Congress (referred to hereinafter as the “Constitution Annotated”), which shall contain annotations of decisions of the Supreme Court of the United States through
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the end of the October 1971 term of the Supreme Court, construing provisions of the Constitution;

(2) upon the completion of each of the October 1973, October 1975, October 1977, and October 1979 terms of the Supreme Court, a cumulative pocket-part supplement to the hardbound revised edition of the Constitution Annotated prepared pursuant to clause (1), which shall contain cumulative annotations of all such decisions rendered by the Supreme Court after the end of the October 1971 term;

(3) upon the completion of the October 1981 term of the Supreme Court, and upon the completion of each tenth October term of the Supreme Court thereafter, a hardbound decennial revised edition of the Constitution Annotated, which shall contain annotations of all decisions theretofore rendered by the Supreme Court construing provisions of the Constitution; and

(4) upon the completion of the October 1983 term of the Supreme Court, and upon the completion of each subsequent October term of the Supreme Court beginning in an odd-numbered year (the final digit of which is not a 1), a cumulative pocket-part supplement to the most recent hardbound decennial revised edition of the Constitution Annotated, which shall contain cumulative annotations of all such decisions rendered by the Supreme Court which were not included in that hardbound decennial revised edition of the Constitution Annotated.

Sec. 2. All hardbound revised editions and all cumulative pocket-part supplements shall be printed as Senate documents.

Sec. 3. There shall be printed four thousand eight hundred and seventy additional copies of the hardbound revised editions prepared pursuant to clause (1) of the first section and of all cumulative pocket-part supplements thereto, of which two thousands six hundred and thirty-four copies shall be for the use of the House of Representatives, one thousand two hundred and thirty-six copies shall be for the use of the Senate, and one thousand copies shall be for the use of the Joint Committee on Printing. All Members of the Congress, Vice Presidents of the United States, and Delegates and Resident Commissioners, newly elected subsequent to the issuance of the hardbound revised edition prepared pursuant to such clause and prior to the first hardbound decennial revised edition, who did not receive a copy of the edition prepared pursuant to such clause, shall,
upon timely request, receive one copy of such edition and the then current cumulative pocket-part supplement and any further supplements thereto. All Members of the Congress, Vice Presidents of the United States, and Delegates and Resident Commissioners, no longer serving after the issuance of the hardbound revised edition prepared pursuant to such clause and who received such edition, may receive one copy of each cumulative pocket-part supplement thereto upon timely request.

Sec. 4. Additional copies of each hardbound decennial revised edition and of the cumulative pocket-part supplements thereto shall be printed and distributed in accordance with the provisions of any concurrent resolution hereafter adopted with respect thereto.

Sec. 5. There are authorized to be appropriated such sums, to remain available until expended, as may be necessary to carry out the provisions of this joint resolution.

Approved December 24, 1970.
INTRODUCTION TO THE 2002 EDITION

Fifty years ago, Professor Edward S. Corwin wrote an introduction to this treatise that broadly explored then existent trends of constitutional adjudication. In some respects—the law of federalism, the withdrawal of judicial supervision of economic regulation, the continued expansion of presidential power and the consequent overshadowing of Congress—he has been confirmed in his evaluations. But, in other respects, entire new vistas of fundamental law of which he was largely unaware have opened up. *Brown v. Board of Education* was but two Terms of the Court away, and the revolution in race relations brought about by all three branches of the federal government could have been only dimly perceived. The apportionment-districting decisions were still blanketed in time; abortion as a constitutionally protected liberty was unheralded. The Supreme Court’s application of many provisions of the Bill of Rights to the States was then nascent, and few could anticipate that the expanded meaning and application of these Amendments would prove revolutionary. Fifty years has also exposed the ebb and flow of constitutional law, from the liberal activism of the 1960s and 1970s to a more recent posture of judicial restraint or even conservative activism. Throughout this period of change, however, certain movements, notably expansion of the protection of speech and press, continued apace despite ideological shifts.

This brief survey is primarily a suggestive review of the Court’s treatment of the doctrines of constitutional law over the last fifty years, with a closer focus on issues that have arisen since the last volume of this treatise was published ten years ago. For instance, in previous editions we noted the rise of federalism concerns, but only in the last decade has the strength of the Court’s deference toward states become apparent. Conversely, in this treatise as well as in previous ones, we note the rise of the equal protection clause as a central concept of constitutional jurisprudence in the period 1952-1982. Although that rise has somewhat abated in recent years, the clause remains one of the predominant sources of constitutional constraints upon the Federal Government and the States. Similarly, the due process clauses of the Fifth and Fourteenth Amendments, recently slowed in their expansion, remain significant both in terms of procedural protections for civil and criminal litigants and in terms of the application of substantive due process to personal liberties.

Issues relating to national federalism as a doctrine have proved to be far more pervasive and encompassing than it was possible to anticipate in 1952. In some respects, of course, later cases only confirmed those decisions already on the books. The foremost example of this confirmation has been the enlargement of congressional power under the commerce clause. The expansive reading of that clause’s authorization to Congress to reach many local incidents of business and production was already apparent by 1952. Despite the abundance of new legislation under this power during the 1960s to 1980s, the doctrine itself was scarcely enlarged beyond the limits of that earlier period. Under the commerce clause, Congress can assert legislative jurisdiction on the basis of movement over a state boundary, whether antecedent or subsequent to the point of regulation; can regulate other elements touching upon those transactions, such as instruments of transportation; or can legislate solely upon the premise that certain transactions by their nature alone or as part of a class sufficiently affect interstate commerce to warrant national regulation. Civil rights laws touching public accommodations and housing, environmental laws affecting land use regulation, criminal laws, and employment regulations touching health and safety are only the leading examples of enhanced federal activity under this authority.

Over the last decade, however, the Court has established limits on the seemingly irrevocable expansion of the commerce power. While the Court has declined to overrule even its most expansive rulings regarding “effects” on commerce, it has recently limited the exercise of this authority to the regulation of activities which were both economic in nature and which
had a nontrivial or "substantial" affect on commerce (although regulation of non-economic activity would still be allowed if it is an essential part of a larger economic regulatory scheme). The Court also seems far less likely to defer to Congressional findings of the existence of an economic effect. The relevant cases arose in an area of traditional state concern – the regulation of criminal activity – and the new doctrine resulted in the invalidation of recently-passed federal laws, including a ban on gun possession in schools and the provision of civil remedies to compensate gender-motivated violence.

The exercise of authority over commerce by the states, on the other hand, has over the last fifty years been greatly restricted by federal statutes and a broad doctrine of federal pre-emption, increasingly resulting in the setting of national standards. Only under Chief Justice Burger and Chief Justice Rehnquist was the Court not so readily prepared to favor preemption, especially in the area of labor-management relations. The Court did briefly inhibit federal regulation with respect to the States’ own employees, but this decision failed to secure a stable place in the doctrine of federalism, being overruled in less than a decade. Also noteworthy has been a rather strict application of the negative aspect of the commerce clause to restrain state actions that either discriminate against or too much inhibit interstate commerce.

Much of the same trend toward national standards has resulted from application of the Bill of Rights to the States through the due process clause of the Fourteenth Amendment, a matter dealt with in greater detail below. The Court has again and again held that when a provision of the Bill of Rights is applied, it means the same whether a State or the Federal Government is the challenged party (although a small but consistent minority has argued otherwise). Some flexibility, however, has been afforded the States by the judicial loosening of the standards of some of these provisions, as in the characteristics of the jury trial requirement. Adoption of the exclusionary rule in Fourth Amendment and other cases also looked to a national standard, but the more recent disparagement of the rule by majorities of the Court has relaxed its application to both States and Nation.

While the Tenth Amendment would appear to represent one of the most clear statements of a federalist principle in the Constitution, it has historically had a relatively insignificant role in limiting federal powers. Although the Court briefly interpreted the Tenth Amendment in the 1970s substantively to protect certain "core" state functions from generally applicable laws, this distinction soon proved unworkable, and was overruled a decade late. More recently, the Court reserved the question as to whether a law regulating only state activities would be constitutionally suspect, although a workable test for this distinction has not yet been articulated. However, limits on the process by which the federal government regulates the states, developed over the most recent decade, have proved more resilient. This becomes important when the Congress is unsatisfied with the most common methods of influencing state regulations – grant conditions or conditional imposition of federal regulations (states being given the opportunity to avoid such regulation by effectuating their own regulatory schemes). Only in those cases where the Congress attempts to directly "commandeer" state legislatures or executive branch officials, i.e. ordering states to legislate or execute federal laws, has the Tenth Amendment served as an effective bar.

The concept of state sovereign immunity from citizen suits has also been infused with new potency over the last decade, while exposing deep theoretical differences between the Justices. The concept of state sovereign immunity is limited to the textual restriction articulated in the Eleventh Amendment, which prevents citizens of one state from bringing a federal suit against another state. To five Justices, however, the Eleventh Amendment was merely a technical correction made by Congress after an erroneous approval by the Court of a citizen-state diversity suit in Chisholm v. Georgia. These justices prefer the reasoning of the post-Eleventh Amendment case of Hans v. Louisiana, which, using non-textual precepts of federalism, dismissed a constitutionally-based suit against a state by its own citizens. The true significance of this latter case was not realized until 1992 in Seminole Tribe of Florida v. Florida, where the Court made clear that suits by citizens against states brought under federal statutes also could not stand, at least if the statutes were based on Congress's Article I powers. The "fundamental postulate" of deference to the "dignity" of state sovereignty was also the basis for the
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Court’s recent decisions to prohibit federal claims by citizens against states in either a state’s own courts or federal agencies.

The Court has ruled that Congress can abrogate state sovereign immunity under section 5 of the Fourteenth Amendment. The Court, however, has also recently shown a significant lack of deference to Congress regarding this Civil War era power, requiring a showing of “congruence and proportionality” between the alleged harm to constitutional rights and the legislative remedy. Thus, states have been found to remain immune from federal damage suits for such issues as disability discrimination or patent infringement, while the Congress has been found to be without any power to protect religious institutions from the application of generally applicable state laws. Further, where Congress attempted to create a federal private right of action for victims of gender-related violence, alleging discriminatory treatment of these cases by the state, the Court also found that Congress exceeded its mandate, as the enforcement power of the 14th Amendment can only be applied against state discrimination. In all these cases, the Court found that Congress had not sufficiently identified patterns of unconstitutional conduct by the States.

The overriding view of the present Court is that where it has discretion, even absent constitutional mandate, it will apply federalism concerns to limit federal powers. For instance, the equity powers of the federal courts to interfere in ongoing state court proceedings and to review state court criminal convictions under habeas corpus have been curtailed, invoking a doctrine of comity and prudential restraint. But the critical fact, the scope of congressional power to regulate private activity, remains: the limits on congressional power under the commerce clause and other Article I powers, as well as under the power to enforce the Reconstruction Amendments, remain principally those of congressional self-restraint.

II

For much of the latter half of the 20th century, aggregation of national power in the presidency continued unabated. The trend was not much resisted by congressional majorities, which, indeed, continued to delegate power to the Executive Branch and to the independent agencies at least to the same degree or greater than before. The President himself assumed the existence of a substantial reservoir of inherent power to effectuate his policies, most notably in the field of foreign affairs and national defense. Only in the wake of the Watergate affair did Congress move to assert itself and to attempt to claim some form of partnership with the President. This is most notable with respect to war powers and the declaration of national emergencies, but is also true for domestic presidential concerns, as in the controversy over the power of the President to impound appropriated funds.

Perhaps coincidentally, the Supreme Court during the same period effected a strong judicial interest in the adjudication of separation-of-powers controversies. Previously, despite its use of separation-of-powers language, the Court did little to involve itself in actual controversies, save perhaps the Myers and Humphrey litigations over the President’s power to remove executive branch officials. But that restraint evaporated in 1976. Since then there have been several Court decisions in this area, although in Buckley v. Valeo and subsequent cases the Court appeared to cast the judicial perspective favorably upon presidential prerogative. In other cases statutory construction was utilized to preserve the President’s discretion. Only very recently has the Court evolved an arguably consistent standard in this area, a two-pronged standard of aggrandizement and impairment, but the results still are cast in terms of executive preeminence.

The larger conflict has been political, and the Court resisted many efforts to involve it in litigation over the use of troops in Vietnam. In the context of treaty termination, the Court came close to declaring the resurgence of the political question doctrine to all such executive-congressional disputes. Nevertheless, a significant congressional interest in achieving a new and different balance between the political branches appears to have survived cessation of the Vietnam conflict. Future congressional assertion of this interest may well involve the judiciary to a much greater extent, and, in any event, the congressional branch is not without effective weapons of its own in this regard.
The Court’s practice of overturning economic legislation under principles of substantive due process in order to protect “property” was already in sharp decline when Professor Corwin wrote his introduction in the 1950s. In a few isolated cases, however, especially regarding the obligation of contracts clause and perhaps the expansion of the regulatory takings doctrine, the Court demonstrated that some life is left in the old doctrines. On the other hand, the word “liberty” in the due process clauses of the Fifth and Fourteenth Amendment has been seized upon by the Court to harness substantive due process to the protection of certain personal and familial privacy rights, most controversially in the abortion cases.

Although the decision in Roe v. Wade seemed to foreshadow broad constitutional protections for personal activities, this has not occurred, as much due to conceptual difficulties as to ideological resistance. While early iterations of a right to “privacy” or “to be let alone” seemed to involve both the notion that certain information should be “private” and the idea that certain personal “activities” should only be lightly regulated, the logical limits of these precepts were difficult to discern. Most recently, the Court has rejected the proposition that all “private” conduct, e.g., sexual activities between members of the same sex, is constitutionally protected. In effect, the privacy cases appear to have been limited to issues of marriage, procreation, contraception, family relationships, medical decision making and child rearing.

Whereas much of the Bill of Rights is directed toward prescribing the process of how governments may permissibly deprive one of life, liberty, or property – for example by judgment of a jury of one’s peers or with evidence seized through reasonable searches – the First Amendment is by its terms both substantive and absolute. While the application of the First Amendment has never been presumed to be so absolute, the effect has often been indistinguishable. Thus, the trend over the years has been to withdraw more and more speech and “speech-plus” from the regulatory and prohibitive hand of government and to free not only speech directed to political ends but speech that is totally unrelated to any political purpose.

The constitutionalization of the law of defamation, narrowing the possibility of recovery for damage caused by libelous and slanderous criticism of public officials, political candidates, and public figures, epitomizes this trend. In addition, the government’s right to proscribe the advocacy of violence or unlawful activity has become more restricted. Obscenity abstractly remains outside the protective confines of the First Amendment, but the Court’s changing definitional approach to what may be constitutionally denominated obscenity has closely confined most governmental action taken against the verbal and pictorial representation of matters dealing with sex. The association of the right to spend for political purposes with the right to associate together for political activity has meant that much governmental regulation of campaign finance and of limitations upon the political activities of citizens and public employees had become suspect if not impermissible. Commercial speech, long the outcast of the First Amendment, now enjoys a protected if subordinate place in free speech jurisprudence. Freedom to picket, to broadcast leaflets, and to engage in physical activity representative of one’s political, social, economic, or other views, enjoy wide though not unlimited protection.

It may be that a differently constituted Court would narrow the scope of the Amendment’s protection and enlarge the permissible range of governmental action. But, in contrast to other areas in which the present Court has varied from its predecessor, the record with respect to the First Amendment has been one of substantial though uneven expansion of precedent.
Of worthy attention has been the application of equal protection, now in a three-tier or multi-tier set of standards of review, to legislation and other governmental action classifying on the basis of sex, illegitimacy, and alienage. Of equal importance was the elaboration of the concept of “fundamental” rights, so that when the government restricts one of these rights, it must show not merely a reasonable basis for its actions but a justification based upon compelling necessity. Wealth distinctions in the criminal process, for instance, were viewed with hostility and generally invalidated. The right to vote, nowhere expressly guaranteed in the Constitution (but protected against abridgment on certain grounds in the Fifteenth, Nineteenth, and Twenty-sixth Amendments) nonetheless was found to require the invalidation of all but the most simple voter qualifications; most barriers to ballot access by individuals and parties; and the practice of apportionment of state legislatures on any basis other than population. Recently, in the controversial decision of Bush v. Gore, the Court relied on the right to vote in effectively ending the disputed 2000 presidential election, noting that the Florida Supreme Court had allowed the use of non-uniform standards to evaluate challenged ballots. Although the Court’s decision was of real political import, it was so limited by its own terms that it carries no doctrinal significance.

In other respects, the reconstituted Court has made some tentative rearrangements of equal protection doctrinal developments. The suspicion-of-wealth classification was largely though not entirely limited to the criminal process. Governmental discretion in the political process was enlarged a small degree. But the record generally is one of consolidation and maintenance of the doctrines, a refusal to go forward much but also a disinclination to retreat much. Only very recently has the Court, in decisional law largely cast in remedial terms, begun to dismantle some of the structure of equal protection constraints on institutions, such as schools, prisons, state hospitals, and the like. Now, we see the beginnings of a sea change in the Court's perspective on legislative and executive remedial action, affecting affirmative action and race conscious steps in the electoral process, with the equal protection clause being used to cabin political discretion.

Finally, criminal law and criminal procedure during the 1960s and 1970s was doctrinally unstable. The story of the 1960s was largely one of the imposition of constitutional constraint upon federal and state criminal justice systems. Application of the Bill of Rights to the States was but one aspect of this story, as the Court also constructed new teeth for these guarantees. For example, the privilege against self-incrimination was given new and effective meaning by requiring that it be observed at the police interrogation stage and furthermore that criminal suspects be informed of their rights under it. The right was also expanded, as was the Sixth Amendment guarantee of counsel, by requiring the furnishing of counsel or at least the opportunity to consult counsel at “critical” stages of the criminal process — interrogation, preliminary hearing, and the like — rather than only at and proximate to trial. An expanded exclusionary rule was applied to keep material obtained in violation of the suspect’s search and seizure, self-incrimination, and other rights out of evidence.

In sentencing, substantive as well as procedural guarantees have come in and out of favor. The law of capital punishment, for instance, has followed a course of meandering development, with the Court almost doing away with it and then approving its revival by the States. More recently, awakened legislative interest in the sentencing process, such as providing enhanced sentences for “hate crimes,” has faltered on holdings that increasing the maximum sentence for a crime can only be based on facts submitted to a jury, not a judge, and that such facts must be proved beyond a reasonable doubt.

During the last two decades, however, the Court has also redrawn some of these lines. The self-incrimination and right-to-counsel doctrines have been eroded in part (although in no respect has the Court returned to the constitutional jurisprudence prevailing before the 1960s). The exclusionary rule has been cabin'ed and redefined in several limiting ways. Search and seizure doctrine has been revised to enlarge police powers. And, most recently, for instance, the exception for “special needs” has allowed such practices as suspicionless, random drug-testing in the workplace and at schools.
An expansion of the use of *habeas corpus* powers of the federal courts undergirded the 1960s procedural and substantive development, thus sweeping away many jurisdictional restrictions previously imposed upon the exercise of review of state criminal convictions. Concomitantly with the narrowing of the precedents of the 1950s and 1960s Court, however, came a retraction of federal *habeas* powers, both by the Court and through federal legislation.

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The last five decades were among the most significant in the Court's history. They saw some of the most sustained efforts to change the Court or its decisions or both with respect to a substantial number of issues. On only a few past occasions was the Court so centrally a subject of political debate and controversy in national life or an object of contention in presidential elections. One can doubt that the public any longer perceives the Court as an institution above political dispute, any longer believes that the answers to difficult issues in litigation before the Justices may be found solely in the text of the document entrusted to their keeping. Despite cases such as *Roe v. Wade* and *Bush v. Gore*, however, the Court still seems to enjoy the respect of the bar and the public generally. Its decisions are generally accorded uncoerced acquiescence, and its pronouncements are accepted as authoritative, binding constructions of the constitutional instrument.

Indeed, it can be argued that the disappearance of the myth of the absence of judicial choice strengthens the Court as an institution to the degree that it explains and justifies the exercise of discretion in those areas of controversy in which the Constitution does not speak clearly or in which different sections lead to different answers. The public attitude thus established is then better enabled to understand division within the Court and within the legal profession generally, and all sides are therefore seen to be entitled to the respect accorded the search for answers. Although the Court's workload has declined of late, a significant proportion of its cases are still "hard" cases; while hard cases need not make bad law they do in fact lead to division among the Justices and public controversy. Increased sophistication, then, about the Court's role and its methods can only redound to its benefit.
HISTORICAL NOTE ON FORMATION OF THE CONSTITUTION

In June 1774, the Virginia and Massachusetts assemblies independently proposed an intercolonial meeting of delegates from the several colonies to restore union and harmony between Great Britain and her American Colonies. Pursuant to these calls there met in Philadelphia in September of that year the first Continental Congress, composed of delegates from 12 colonies. On October 14, 1774, the assembly adopted what has become to be known as the Declaration and Resolves of the First Continental Congress. In that instrument, addressed to his Majesty and to the people of Great Britain, there was embodied a statement of rights and principles, many of which were later to be incorporated in the Declaration of Independence and the Federal Constitution.¹

This Congress adjourned in October with a recommendation that another Congress be held in Philadelphia the following May. Before its successor met, the battle of Lexington had been fought. In Massachusetts the colonists had organized their own government in defiance of the royal governor and the Crown. Hence, by general necessity and by common consent, the second Continental Congress assumed control of the “Twelve United Colonies”, soon to become the “Thirteen United Colonies” by the cooperation of Georgia. It became a de facto government; it called upon the other colonies to assist in the defense of Massachusetts; it issued bills of credit; it took steps to organize a military force, and appointed George Washington commander in chief of the Army.

While the declaration of the causes and necessities of taking up arms of July 6, 1775, ² expressed a “wish” to see the union between Great Britain and the colonies “restored”, sentiment for independence was growing. Finally, on May 15, 1776, Virginia instructed her delegates to the Continental Congress to have that body “declare the united colonies free and independent States.”³ Accordingly on June 7 a resolution was introduced in Con-

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¹The colonists, for example, claimed the right “to life, liberty, and property”, “the rights, liberties, and immunities of free and natural-born subjects within the realm of England”; the right to participate in legislative councils; “the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of [the common law of England]”; “the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws”; “a right peaceably to assemble, consider of their grievances, and petition the king.” They further declared that the keeping of a standing army in the colonies in time of peace without the consent of the colony in which the army was kept was “against law”; that it was “indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other”; that certain acts of Parliament in contravention of the foregoing principles were “infringement and violations of the rights of the colonists.” Text in C. Tansill (ed.), Documents Illustrative of the Formation of the Union of the American States, H. Doc. No. 358, 69th Congress, 1st sess. (1927). ¹ See also H. Commager (ed.), Documents of American History (New York; 8th ed. 1964), 82.


³Id. at 19.
gress declaring the union with Great Britain dissolved, proposing the formation of foreign alliances, and suggesting the drafting of a plan of confederation to be submitted to the respective colonies. Some delegates argued for confederation first and declaration afterwards. This counsel did not prevail. Independence was declared on July 4, 1776; the preparation of a plan of confederation was postponed. It was not until November 17, 1777, that the Congress was able to agree on a form of government which stood some chance of being approved by the separate States. The Articles of Confederation were then submitted to the several States, and on July 9, 1778, were finally approved by a sufficient number to become operative.

Weaknesses inherent in the Articles of Confederation became apparent before the Revolution out of which that instrument was born had been concluded. Even before the thirteenth State (Maryland) conditionally joined the “firm league of friendship” on March 1, 1781, the need for a revenue amendment was widely conceded. Congress under the Articles lacked authority to levy taxes. She could only request the States to contribute their fair share to the common treasury, but the requested amounts were not forthcoming. To remedy this defect, Congress applied to the States for power to lay duties and secure the public debts. Twelve States agreed to such an amendment, but Rhode Island refused her consent, thereby defeating the proposal.

Thus was emphasized a second weakness in the Articles of Confederation, namely, the liberum veto which each State possessed whenever amendments to that instrument were proposed. Not only did all amendments have to be ratified by each of the 13 States, but all important legislation needed the approval of 9 States. With several delegations often absent, one or two States were able to defeat legislative proposals of major importance.

Other imperfections in the Articles of Confederation also proved embarrassing. Congress could, for example, negotiate treaties with foreign powers, but all treaties had to be ratified by the several States. Even when a treaty was approved, Congress lacked authority to secure obedience to its stipulations. Congress could not act directly upon the States or upon individuals. Under such circumstances foreign nations doubted the value of a treaty with the new Republic.

Furthermore, Congress had no authority to regulate foreign or interstate commerce. Legislation in this field, subject to unimportant exceptions, was left to the individual States. Disputes between States with common interests in the navigation of certain rivers and bays were inevitable. Discriminatory regulations were followed by reprisals.

Virginia, recognizing the need for an agreement with Maryland respecting the navigation and jurisdiction of the Potomac River, appointed in June 1784, four commissioners to “frame such liberal and equitable regulations concerning the said river as may be mutually advantageous to the two

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*Id. at 21.
Maryland in January 1785 responded to the Virginia resolution by appointing a like number of commissioners for the purpose of settling the navigation and jurisdiction over that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke with full power on behalf of Maryland “to adjudge and settle the jurisdiction to be exercised by the said State, respectively, over the waters and navigations of the same.”

At the invitation of Washington the commissioners met at Mount Vernon, in March 1785, and drafted a compact which, in many of its details relative to the navigation and jurisdiction of the Potomac, is still in force. What is more important, the commissioners submitted to their respective States a report in favor of a convention of all the States “to take into consideration the trade and commerce” of the Confederation. Virginia, in January 1786, advocated such a convention, authorizing its commissioners to meet with those of other States, at a time and place to be agreed on, “to take into consideration the trade of the United States; to examine the relative situations and trade of the said State; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several State, such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.”

This proposal for a general trade convention seemingly met with general approval; nine States appointed commissioners. Under the leadership of the Virginia delegation, which included Randolph and Madison, Annapolis was accepted as the place and the first Monday in September 1786 as the time for the convention. The attendance at Annapolis proved disappointing. Only five States—Virginia, Pennsylvania, Delaware, New Jersey, and New York—were represented; delegates from Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Because of the small representation, the Annapolis convention did not deem “it advisable to proceed on the business of their mission.” After an exchange of views, the Annapolis delegates unanimously submitted to their respective States a report in which they suggested that a convention of representatives from all the States meet at Philadelphia on the second Monday in May 1787 to examine the defects in the existing system of government and formulate “a plan for supplying such defects as may be discovered.”

The Virginia legislature acted promptly upon this recommendation and appointed a delegation to go to Philadelphia. Within a few weeks New Jer-

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5 George Mason, Edmund Randolph, James Madison, and Alexander Henderson were appointed commissioners for Virginia; Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer for Maryland.
6 Text of the resolution and details of the compact may be found in Wheaton v. Wise, 153 U.S. 155 (1894).
7 Transill, op. cit., 38.
8 Id. at 39.
sey, Pennsylvania, North Carolina, Delaware, and Georgia also made appointments. New York and several other States hesitated on the ground that, without the consent of the Continental Congress, the work of the convention would be extra-legal; that Congress alone could propose amendments to the Articles of Confederation. Washington was quite unwilling to attend an irregular convention. Congressional approval of the proposed convention became, therefore, highly important. After some hesitancy Congress approved the suggestion for a convention at Philadelphia “for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union.”

Thereupon, the remaining States, Rhode Island alone excepted, appointed in due course delegates to the Convention, and Washington accepted membership on the Virginia delegation.

Although scheduled to convene on May 14, 1787, it was not until May 25 that enough delegates were present to proceed with the organization of the Convention. Washington was elected as presiding officer. It was agreed that the sessions were to be strictly secret.

On May 29 Randolph, on behalf of the Virginia delegation, submitted to the convention 15 propositions as a plan of government. Despite the fact that the delegates were limited by their instructions to a revision of the Articles, Virginia had really recommended a new instrument of government. For example, provision was made in the Virginia plan for the separation of the three branches of government; under the Articles executive, legislative, and judicial powers were vested in the Congress. Furthermore the legislature was to consist of two houses rather than one.

On May 30 the Convention went into a committee of the whole to consider the 15 propositions of the Virginia plan seriatim. These discussions continued until June 13, when the Virginia resolutions in amended form were reported out of committee. They provided for proportional representation in both houses. The small States were dissatisfied. Therefore, on June 14 when the Convention was ready to consider the report on the Virginia plan, Paterson of New Jersey requested an adjournment to allow certain delegations more time to prepare a substitute plan. The request was granted, and on the next day Paterson submitted nine resolutions embodying important changes in the Articles of Confederation, but strictly amendatory in nature. Vigorous debate followed. On June 19 the States rejected the New Jersey plan and voted to proceed with a discussion of the Virginia plan. The small States became more and more discontented; there were threats of withdrawal. On July 2, the Convention was deadlocked over giving each

The problem was referred to a committee of 11, there being 1 delegate from each State, to effect a compromise. On July 5 the committee submitted its report, which became the basis for the "great compromise" of the Convention. It was recommended that in the upper house each State should have an equal vote, that in the lower branch each State should have one representative for every 40,000 inhabitants, counting three-fifths of the slaves, that money bills should originate in the lower house (not subject to amendment by the upper chamber). When on July 12 the motion of Gouverneur Morris of Pennsylvania that direct taxation should also be in proportion to representation was adopted, a crisis had been successfully surmounted. A compromise spirit began to prevail. The small States were now willing to support a strong national government.

Debates on the Virginia resolutions continued. The 15 original resolutions had been expanded into 23. Since these resolutions were largely declarations of principles, on July 24 a committee of five was elected to draft a detailed constitution embodying the fundamental principles which had thus far been approved. The Convention adjourned from July 26 to August 6 to await the report of its committee of detail. This committee, in preparing its draft of a Constitution, turned for assistance to the State constitutions, to the Articles of Confederation, to the various plans which had been submitted to the Convention and other available material. On the whole the report of the committee conformed to the resolutions adopted by the Convention, though on many clauses the members of the committee left the imprint of their individual and collective judgments. In a few instances the committee avowedly exercised considerable discretion.

From August 6 to September 10 the report of the committee of detail was discussed, section by section, clause by clause. Details were attended to, further compromises were effected. Toward the close of these discussions, on September 8, another committee of five was appointed "to revise the style of and arrange the articles which had been agreed to by the house."

On Wednesday, September 12, the report of the committee of style was ordered printed for the convenience of the delegates. The Convention for 3 days compared this report with the proceedings of the Convention. The Constitution was ordered engrossed on Saturday, September 15.

The Convention met on Monday, September 17, for its final session. Several of the delegates were disappointed in the result. A few deemed the new Constitution a mere makeshift, a series of unfortunate compromises. The advocates of the Constitution, realizing the impending difficulty of ob-

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9 The New Hampshire delegation did not arrive until July 23, 1787.
10 Rutledge of South Carolina, Randolph of Virginia, Gorham of Massachusetts, Ellsworth of Connecticut, and Wilson of Pennsylvania.
taining the consent of the States to the new instrument of Government, were anxious to obtain the unanimous support of the delegations from each State. It was feared that many of the delegates would refuse to give their individual assent to the Constitution. Therefore, in order that the action of the Convention would appear to be unanimous, Gouverneur Morris devised the formula “Done in Convention, by the unanimous consent of the States present the 17th of September...In witness whereof we have hereunto subscribed our names.” Thirty-nine of the forty-two delegates present thereupon “subscribed” to the document. ¹²

The convention had been called to revise the Articles of Confederation. Instead, it reported to the Continental Congress a new Constitution. Furthermore, while the Articles specified that no amendments should be effective until approved by the legislatures of all the States, the Philadelphia Convention suggested that the new Constitution should supplant the Articles of Confederation when ratified by conventions in nine States. For these reasons, it was feared that the new Constitution might arouse opposition in Congress.

Three members of the Convention—Madison, Gorham, and King—were also Members of Congress. They proceeded at once to New York, where Congress was in session, to placate the expected opposition. Aware of their vanishing authority, Congress on September 28, after some debate, decided to submit the Constitution to the States for action. It made no recommendation for or against adoption.

Two parties soon developed, one in opposition and one in support of the Constitution, and the Constitution was debated, criticized, and expounded clause by clause. Hamilton, Madison, and Jay wrote a series of commentaries, now known as the Federalist Papers, in support of the new instrument of government. ¹³ The closeness and bitterness of the struggle over ratification and the conferring of additional powers on the central government can scarcely be exaggerated. In some States ratification was effected only after a bitter struggle in the State convention itself.

Delaware, on December 7, 1787, became the first State to ratify the new Constitution, the vote being unanimous. Pennsylvania ratified on December 12, 1787, by a vote of 46 to 23, a vote scarcely indicative of the struggle which had taken place in that State. New Jersey ratified on December 19, 1787, and Georgia on January 2, 1788, the vote in both States being unanimous. Connecticut ratified on January 9, 1788; yeas 128, nays 40. On February 6, 1788, Massachusetts, by a narrow margin of 19 votes in a convention with a membership of 355, endorsed the new Constitution, but rec-

¹² At least 65 persons had received appointments as delegates to the Convention; 55 actually attended at different times during the course of the proceedings; 39 signed the document. It has been estimated that generally fewer than 30 delegates attended the daily sessions.

¹³ These commentaries on the Constitution, written during the struggle for ratification, have been frequently cited by the Supreme Court as an authoritative contemporary interpretation of the meaning of its provisions.
ommended that a bill of rights be added to protect the States from federal encroachment on individual liberties. Maryland ratified on April 28, 1788; yeas 63, nays 11. South Carolina ratified on May 23, 1788; yeas 149, nays 73. On June 21, 1788, by a vote of 57 to 46, New Hampshire became the ninth State to ratify, but like Massachusetts she suggested a bill of rights.

By the terms of the Constitution nine States were sufficient for its establishment among the States so ratifying. The advocates of the new Constitution realized, however, that the new Government could not succeed without the addition of New York and Virginia, neither of which had ratified. Madison, Marshall, and Randolph led the struggle for ratification in Virginia. On June 25, 1788, by a narrow margin of 10 votes in a convention of 168 members, that State ratified over the objection of such delegates as George Mason and Patrick Henry. In New York an attempt to attach conditions to ratification almost succeeded. But on July 26, 1788, New York ratified, with a recommendation that a bill of rights be appended. The vote was close—yeas 30, nays 27.

Eleven States having thus ratified the Constitution, the Continental Congress—which still functioned at irregular intervals—passed a resolution on September 13, 1788, to put the new Constitution into operation. The first Wednesday of January 1789 was fixed as the day for choosing presidential electors, the first Wednesday of February for the meeting of electors, and the first Wednesday of March (i.e. March 4, 1789) for the opening session of the new Congress. Owing to various delays, Congress was late in assembling, and it was not until April 30, 1789, that George Washington was inaugurated as the first President of the United States.

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14 North Carolina added her ratification on November 21, 1789; yeas 184, nays 77. Rhode Island did not ratify until May 29, 1790; yeas 34, nays 32.
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THE
CONSTITUTION OF THE UNITED STATES
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LITERAL PRINT
CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within
every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make tem-
porary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

   No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

   The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

   The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

   The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

   Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

   Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at
any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning
from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress
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by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
To constitute Tribunals inferior to the supreme Court;
    To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
    To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
    To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
    To provide and maintain a Navy;
    To make Rules for the Government and Regulation of the land and naval Forces;
    To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
    To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
    To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And
    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.
Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.
Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.
No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the
principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.
Section. 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appel-
late Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

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

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.
Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

The Word, “the,” being interlined between the seventh and eighth Lines of the first Page, The Word “Thirty” being partly written on an Erasure in the fifteenth Line of the first Page, The Words “is tried” being interlined between the thirty second and thirty third Lines of the first Page and the Word “the” being interlined between the forty third and forty fourth Lines of the second Page.

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

Attest William Jackson
Secretary

New Hampshire  JOHN LANGDON
               NICHOLAS GILMAN

Massachusetts  NATHANIEL GORHAM
               RUFUS KING

Connecticut  W M SAM L JOHNSON
               ROGER SHERMAN

New York . . . .  ALEXANDER HAMILTON

New Jersey  WIL: LIVINGSTON
               DAVID BREARLEY.
               W M PATTERSON.
               JONA: DAYTON

Pennsylvania  B FRANKLIN
               THOMAS MIFFLIN
               ROB T MORRIS
               GEO. CLYMER
               THO S FITZSIMONS
               JARED INGERSOL
               JAMES WILSON
               GOUV MORRIS
Delaware

GEO: Read
Gunning Bedford Jun
John Dickinson
Richard Bassett
Jacob Broom

Maryland

James McHenry
Dan of St Thos Jenifer
Daniel Carroll

Virginia

John Blair—
James Madison Jr.

North Carolina

Wm Blount
Richp Dobbs Spaight
Hu Williamson
J. Rutledge

South Carolina

Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia

William Few
Abr Baldwin
In Convention Monday, September 17\textsuperscript{th} 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators
should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

Gö: WASHINGTON—Presidt.

W. JACKSON Secretary.
AMENDMENTS
TO THE
CONSTITUTION OF THE UNITED STATES
OF AMERICA
25

In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Supreme Court stated that it would take judicial notice of the date on which a State ratified a proposed constitutional amendment. Accordingly the Court consulted the State journals to determine the dates on which each house of the legislature of certain States ratified the Eighteenth Amendment. It, therefore, follows that the date on which the governor approved the ratification, or the date on which the secretary of state of a given State certified the ratification, or the date on which the Secretary of State of the United States received a copy of said certificate, or the date on which he proclaimed that the amendment had been ratified are not controlling. Hence, the ratification date given in the following notes is the date on which the legislature of a given State approved the ratification (signature by the speaker or presiding officers of both houses being considered a part of the ratification of the “legislature”). When that date is not available, the date given is that on which it was approved by the governor or certified by the secretary of state of the particular State. In each case such fact has been noted. Except as otherwise indicated information as to ratification is based on data supplied by the Department of State.

Bracketed enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment. It will be seen, accordingly, that only the Thirteenth, Fourteenth, Fifteenth, and Sixteenth Amendments were thus technically ratified by number. The first ten amendments along with two others that were not ratified were proposed by Congress on September 25, 1789, when they passed the Senate, having previously passed the House on September 24 (1 *Annals of Congress* 88, 913). They appear officially in 1 Stat. 97. Ratification was completed on December 15, 1791, when the eleventh State (Virginia) approved these amendments, there being then 14 States in the Union.

The several state legislatures ratified the first ten amendments to the Constitution on the following dates: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The two amendments that then failed of ratification prescribed the ratio of representation to population in the House, and specified that no law varying the compensation of members of Congress should be effective until after an intervening election of Representatives. The first was ratified by ten States (one short of the requisite number) and the second, by six States; subsequently, this second proposal was taken up by the States in the period 1980–1992 and was proclaimed as ratified as of May 7, 1992. Connecticut, Georgia, and Massachusetts ratified the first ten amendments in 1939.

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ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

AMENDMENT [I.]²

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

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¹In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Supreme Court stated that it would take judicial notice of the date on which a State ratified a proposed constitutional amendment. Accordingly the Court consulted the State journals to determine the dates on which each house of the legislature of certain States ratified the Eighteenth Amendment. It, therefore, follows that the date on which the governor approved the ratification, or the date on which the secretary of state of a given State certified the ratification, or the date on which the Secretary of State of the United States received a copy of said certificate, or the date on which he proclaimed that the amendment had been ratified are not controlling. Hence, the ratification date given in the following notes is the date on which the legislature of a given State approved the ratification (signature by the speaker or presiding officers of both houses being considered a part of the ratification of the “legislature”). When that date is not available, the date given is that on which it was approved by the governor or certified by the secretary of state of the particular State. In each case such fact has been noted. Except as otherwise indicated information as to ratification is based on data supplied by the Department of State.

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The several state legislatures ratified the first ten amendments to the Constitution on the following dates: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The two amendments that then failed of ratification prescribed the ratio of representation to population in the House, and specified that no law varying the compensation of members of Congress should be effective until after an intervening election of Representatives. The first was ratified by ten States (one short of the requisite number) and the second, by six States; subsequently, this second proposal was taken up by the States in the period 1980–1992 and was proclaimed as ratified as of May 7, 1992. Connecticut, Georgia, and Massachusetts ratified the first ten amendments in 1939.
peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [II.]

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.

AMENDMENT [III.]

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.

AMENDMENT [IV.]

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

AMENDMENT [V.]

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

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

AMENDMENT [VII.]

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.

AMENDMENT [VIII.]

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

AMENDMENT [IX.]

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

AMENDMENT [X.]

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.
AMENDMENT [XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT [XII.]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as
President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a
AMENDMENT XIII. 5

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV. 6

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the

5 The Thirteenth Amendment was proposed by Congress on January 31, 1865, when it passed the House, Cong. Globe (38th Cong., 2d Sess.) 531, having previously passed the Senate on April 8, 1964. Id. (38th con., 1st Sess.), 1940. It appears officially in 13 Stat. 567 under the date of February 1, 1865. Ratification was completed on December 6, 1865, when the legislature of the twenty-seventh State (Georgia) approved the amendment, there being then 36 States in the Union. On December 18, 1865, Secretary of State Seward certified that the Thirteenth Amendment had become a part of the Constitution, 13 Stat. 774.

The several state legislatures ratified the Thirteenth Amendment on the following dates: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Pennsylvania, February 8, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Louisiana, February 15 or 16, 1865; Indiana, February 16, 1865; Nevada, February 16, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865 (date on which it was "approved" by Governor); Tennessee, April 7, 1865; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, June 30, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865 (date on which it was "approved" by Provisional Governor); North Carolina, December 4, 1865; Georgia, December 6, 1865; Oregon, December 11, 1865; California, December 15, 1865; Florida, December 28, 1865 (Florida again ratified this amendment on June 9, 1868, upon its adoption of a new constitution); Iowa, January 17, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 17, 1870; Delaware, February 12, 1901 (after having rejected the amendment on February 8, 1865). The amendment was rejected by Kentucky on February 24, 1865, and by Mississippi on December 2, 1865.

6 The Fourteenth Amendment was proposed by Congress on June 13, 1866, when it passed the House, Cong. Globe (39th Cong., 1st Sess.) 3148, 3149, having previously passed the Senate on June 8. Id., 3042. It appears officially in 14 Stat. 358 under date of June 16, 1866. Ratification was probably completed on July 9, 1868, when the legislature of the twenty-eighth State
United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and
Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV. 7

SECTION. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI. 8

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment

7The Fifteenth Amendment was proposed by Congress on February 26, 1869, when it passed the Senate, Cong. Globe (40th Cong., 3rd Sess.) 1641, having previously passed the House on February 25. Id., 1563, 1564. It appears officially in 15 Stat. 346 under the date of February 27, 1869. Ratification was probably completed on February 3, 1870, when the legislature of the twenty-eighth State (Iowa) approved the amendment, there being then 37 States in the Union. However, New York had prior to that date “withdrawn” its earlier assent to this amendment. Even if this withdrawal were effective, Nebraska’s ratification on February 17, 1870, authorized Secretary of State Fish’s certification of March 30, 1870, that the Fifteenth Amendment had become a part of the Constitution. 16 Stat. 1131.

8The Sixteenth Amendment was proposed by Congress on July 12, 1909, when it passed the House, 44 Cong. Rec. (61st Cong., 1st Sess.) 4390, 4440, 4441, having previously passed the Senate on May 3, 1869; Ohio, May 24, 1869; Iowa, February 2, 1870; Georgia, February 6, 1870; New Hampshire, July 1, 1869; Arkansas, August 14, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (New York “withdrew” its consent to the ratification on January 23, 1870); Indiana, May 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Alabama, November 16, 1869; Missouri, January 7, 1870 (Missouri had ratified the first section of the 15th Amendment on March 1, 1869; it failed to include in its ratification the second section of the amendment); Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870 (Kansas had by a defectively worded resolution previously ratified this amendment on February 27, 1869); Ohio, January 27, 1870 (after having rejected the amendment on May 4, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected the amendment on February 7, 1870); Delaware, February 12, 1901 (date on which approved by Governor; Delaware had previously rejected the amendment on March 18, 1869). The amendment was rejected (and not subsequently ratified) by Kentucky, Maryland, and Tennessee. California ratified this amendment in 1962 and Oregon in 1959.

8The Sixteenth Amendment was proposed by Congress on July 12, 1909, when it passed the House, 44 Cong. Rec. (61st Cong., 1st Sess.) 4390, 4440, 4441, having previously passed the Senate on July 5. Id., 4121. It appears officially in 36 Stat. 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth State (Delaware, Wyoming, or New Mexico) approved the amendment, there being then 48 States in the Union. On February
among the several States, and without regard to any census or enumeration.

**Amendment [XVII.]**

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue

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25, 1913, Secretary of State Knox certified that this amendment had become a part of the Constitution. 37 Stat. 1785.

The several state legislatures ratified the Sixteenth Amendment on the following dates: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 27, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 1, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Kansas, March 2, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected the amendment at the session begun January 9, 1911); Wisconsin, May 16, 1911; New York, July 12, 1911; Arizona, April 3, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; Delaware, February 3, 1913; Wyoming, February 3, 1913; New Mexico, February 3, 1913; New Jersey, February 4, 1913; Vermont, February 19, 1913; Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected the amendment on March 2, 1911). The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island, and Utah.

9 The Seventeenth Amendment was proposed by Congress on May 13, 1912, when it passed the House, 48 Cong. Rec. (62d Cong., 2d Sess.) 6367, having previously passed the Senate on June 12, 1911. 47 Cong. Rec. (62d Cong., 1st Sess.) 1925. It appears officially in 37 Stat. 646. Ratification was completed on April 8, 1913, when the thirty-sixth State (Connecticut) approved the amendment, there being then 48 States in the Union. On May 31, 1913, Secretary of State Bryan certified that it had become a part of the Constitution. 38 Stat 2049.

The several state legislatures ratified the Seventeenth Amendment on the following dates: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Maine, February 20, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 1913; New Jersey, March 17, 1913; Tennessee, April 1, 1913; Pennsylvania, April 2, 1913; Connecticut, April 8, 1913; Louisiana, June 5, 1914. The amendment was rejected by Utah on February 26, 1913.
writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT [XVIII.] 10

SECTION. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

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10 The Eighteenth Amendment was proposed by Congress on December 18, 1917, when it passed the Senate, Cong. Rec. (65th Cong. 2d Sess.) 478, having previously passed the House on December 17. Id., 470. It appears officially in 40 Stat. 1059. Ratification was completed on January 16, 1919, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On January 29, 1919, Acting Secretary of State Polk certified that this amendment had been adopted by the requisite number of States. 40 Stat. 1941. By its terms this amendment did not become effective until 1 year after ratification.

The several state legislatures ratified the Eighteenth Amendment on the following dates: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 28, 1918 (date on which approved by Governor); South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 9, 1918 (date on which approved by Governor); Florida, November 27, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Illinois, January 14, 1919; Indiana, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919; Minnesota, January 17, 1919; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; Pennsylvania, February 25, 1919; Connecticut, May 6, 1919; New Jersey, March 9, 1922; New York, January 29, 1919; Vermont, January 29, 1919.
SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT [XIX.] 11

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT [XX.] 12

SECTION. 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms

11The Nineteenth Amendment was proposed by Congress on June 4, 1919, when it passed the Senate, Cong. Rec. (66th Cong., 1st Sess.) 635, having previously passed the house on May 21. Id., 94. It appears officially in 41 Stat. 362. Ratification was completed on August 18, 1920, when the thirty-sixth State (Tennessee) approved the amendment, there being then 48 States in the Union. On August 26, 1920, Secretary of Colby certified that it had become a part of the Constitution. 41 Stat. 1823.

12The Twentieth Amendment was proposed by Congress on March 2, 1932, when it passed the Senate, Cong. Rec. (72d Cong., 1st Sess.) 5086, having previously passed the House on March 1. Id., 5027. It appears officially in 47 Stat. 745. Ratification was completed on January 23, 1933, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On February 6, 1933, Secretary of State Stimson certified that it had become a part of the Constitution. 47 Stat. 2569.
of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SEC. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

The several state legislatures ratified the Twentieth Amendment on the following dates: Virginia, March 4, 1932; New York, March 11, 1932; Mississippi, March 16, 1932; Arkansas March 17, 1932; Kentucky, March 17, 1932; New Jersey, March 21, 1932; South Carolina, March 25, 1932; Michigan, March 31, 1932; Maine, April 1, 1932; Rhode Island, April 14, 1932; Illinois, April 21, 1932; Louisiana, June 22, 1932; West Virginia, July 30, 1932; Pennsylvania, August 11, 1932; Indiana, August 15, 1932; Texas, September 7, 1932; Alabama, September 13, 1932; California, January 4, 1933; North Carolina, January 5, 1933; North Dakota, January 9, 1933; Minnesota, January 12, 1933; Arizona, January 13, 1933; Montana, January 13, 1933; Nebraska, January 13, 1933; Oklahoma, January 13, 1933; Kansas, January 16, 1933; Oregon, January 16, 1933; Delaware, January 19, 1933; Washington, January 19, 1933; Wyoming, January 19, 1933; Iowa, January 20, 1933; South Dakota, January 20, 1933; Tennessee, January 20, 1933; Idaho, January 21, 1933; New Mexico, January 21, 1933; Georgia, January 23, 1933; Missouri, January 23, 1933; Ohio, January 23, 1933; Utah, January 23, 1933; Colorado, January 24, 1933; Massachusetts, January 24, 1933; Wisconsin, January 24, 1933; Nevada, January 26, 1933; Connecticut, January 27, 1933; New Hampshire, January 31, 1933; Vermont, February 2, 1933; Maryland, March 24, 1933; Florida, April 26, 1933.
SEC. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SEC. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SEC. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT [XXI.]^{13}

SECTION. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use

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^{13}The Twenty-first Amendment was proposed by Congress on February 20, 1933, when it passed the House, Cong. Rec. (72d Cong., 2d Sess.) 4516, having previously passed the Senate on February 16. Id., 4231. It appears officially in 47 Stat. 1625. Ratification was completed on December 5, 1933, when the thirty-sixth State (Utah) approved the amendment, there being then 48 States in the Union. On December 5, 1933, Acting Secretary of State Phillips certified that it had been adopted by the requisite number of States. 48 Stat. 1749.

The several state conventions ratified the Twenty-first Amendment on the following dates: Michigan, April 10, 1933; Wisconsin, April 25, 1933; Rhode Island, May 8, 1933; Wyoming, May 25, 1933; New Jersey, June 1, 1933; Delaware, June 24, 1933; Indiana, June 26, 1933; Massachusetts, June 26, 1933; New York, June 27, 1933; Illinois, July 10, 1933; Iowa, July 10, 1933; Connecticut, July 11, 1933; New Hampshire, July 11, 1933; California, July 24, 1933; West Virginia, July 25, 1933; Arkansas, August 1, 1933; Oregon, August 7, 1933; Alabama, August 8, 1933; Tennessee, August 11, 1933; Missouri, August 29, 1933; Arizona, September 5, 1933; Nevada, September 5, 1933; Vermont, September 23, 1933; Colorado, September 26, 1933; Washington, October 3, 1933; Minnesota, October 10, 1933; Idaho, October 17, 1933; Maryland, October 18, 1933; Virginia, October 25, 1933; New Mexico, November 2, 1933; Florida, November 14, 1933; Texas, November 24, 1933; Kentucky, November 27, 1933; Ohio, December 5, 1933; Pennsylvania, December 5, 1933; Utah, December 5, 1933; Maine, December 6, 1933; Montana, August 6, 1934. The amendment was rejected by a convention in the State of South Carolina, on December 4, 1933. The electorate of the State of North Carolina voted against holding a convention at a general election held on November 7, 1933.
39

The Twenty-second Amendment was proposed by Congress on March 24, 1947, having passed the House on March 21, 1947, Cong. Rec. (80th Cong., 1st Sess.) 2392, and having previously passed the Senate on March 12, 1947. Id., 1978. It appears officially in 61 Stat. 959. Ratification was completed on February 27, 1951, when the thirty-sixth State (Minnesota) approved the amendment, there being then 48 States in the Union. On March 1, 1951, Jess Larson, Administrator of General Services, certified that it had been adopted by the requisite number of States. 16 Fed. Reg. 2019.

A total of 41 state legislatures ratified the Twenty-second Amendment on the following dates: Maine, March 31, 1947; Michigan, March 31, 1947; Iowa, April 1, 1947; Kansas, April 1, 1947; New Hampshire, April 1, 1947; Delaware, April 2, 1947; Illinois, April 3, 1947; Oregon, April 3, 1947; Colorado, April 12, 1947; California, April 15, 1947; New Jersey, April 15, 1947; Vermont, April 15, 1947; Ohio, April 16, 1947; Wisconsin, April 16, 1947; Pennsylvania, April 29, 1947; Connecticut, May 21, 1947; Missouri, May 22, 1947; Nebraska, May 23, 1947; Virginia, January 28, 1948; Mississippi, February 12, 1948; New York, March 9, 1948; South Dakota, January 21, 1949; North Dakota, February 25, 1949; Louisiana, May 17, 1950; Montana, January 25, 1951; Indiana, January 29, 1951; Idaho, January 30, 1951; New Mexico, February 12, 1951; Wyoming, February 12, 1951; Arkansas, February 15, 1951; Georgia, February 17, 1951; Tennessee, February 20, 1951; Texas, February 22, 1951; Utah, February 26, 1951; Nevada, February 26, 1951; Minnesota, February 27, 1951; North Carolina, February 28, 1951; South Carolina, March 13, 1951; Maryland, March 14, 1951; Florida, April 16, 1951; and Alabama, May 4, 1951.

Constitution of the United States
President or acting as President during the remainder of such term.

SEC. 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT [XXIII.] 15

SECTION. 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

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

15The Twenty-third Amendment was proposed by Congress on June 16, 1960, when it passed the Senate, Cong. Rec. (86th Cong., 2d Sess.) 12858, having previously passed the House on June 14. Id., 12571. It appears officially in 74 Stat. 1057. Ratification was completed on March 29, 1961, when the thirty-eighth State (Ohio) approved the amendment, there being then 50 States in the Union. On April 3, 1961, John L. Moore, Administrator of General Services, certified that it had been adopted by the requisite number of States. 26 Fed. Reg. 2808.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT [XXIV.] 16

SECTION. 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT [XXV.] 17

SECTION. 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

16 The Twenty-fourth Amendment was proposed by Congress on September 14, 1962, having passed the House on August 27, 1962. Cong. Rec. (87th Cong., 2d Sess.) 17670 and having previously passed the Senate on March 27, 1962. Id., 5105. It appears officially in 76 Stat. 1259. Ratification was completed on January 23, 1964, when the thirty-eighth State (South Dakota) approved the Amendment, there being then 50 States in the Union. On February 4, 1964, Bernard L. Boutin, Administrator of General Services, certified that it had been adopted by the requisite number of States. 25 Fed. Reg. 1717. President Lyndon B. Johnson signed this certificate.


17 This Amendment was proposed by the Eighty-ninth Congress by Senate Joint Resolution No. 1, which was approved by the Senate on February 19, 1965, and by the House of Representatives, in amended form, on April 13, 1965. The House of Representatives agreed to a Conference Report on June 30, 1965, and the Senate agreed to the Conference Report on July 6, 1965. It was declared by the Administrator of General Services, on February 23, 1967, to have been ratified.
SECTION. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SECTION. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

This Amendment was ratified by the following States:

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on February 25, 1967, F.R. Doc. 67–2208, 32 Fed. Reg. 3287.
Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

**AMENDMENT [XXVI]**

**SECTION. 1.** The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied...
or abridged by the United States or by any State on account of age.

**SECTION. 2.** The Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT [XXVII]**

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


19 This purported amendment was proposed by Congress on September 25, 1789, when it passed the Senate, having previously passed the House on September 24. (1 Annals of Congress 88, 913). It appears officially in 1 Stat. 97. Having received in 1789–1791 only six state ratifications, the proposal then failed of ratification while ten of the 12 sent to the States by Congress were ratified and proclaimed and became the Bill of Rights. The provision was proclaimed as having been ratified and having become the 27th Amendment, when Michigan ratified on May 7, 1992, there being 50 States in the Union. Proclamation was by the Archivist of the United States, pursuant to 1 U.S.C. § 106b, on May 19, 1992. F.R.Doc. 92–11951, 57 FED. REG. 21187. It was also proclaimed by votes of the Senate and House of Representatives. 138 Cong. Rec. (daily ed) S 6948–49, H 3505–06.

PROPOSED AMENDMENTS NOT RATIFIED
BY THE STATES
PROPOSED AMENDMENTS NOT RATIFIED BY THE STATES

During the course of our history, in addition to the 27 amendments which have been ratified by the required three-fourths of the States, six other amendments have been submitted to the States but have not been ratified by them.

Beginning with the proposed Eighteenth Amendment, Congress has customarily included a provision requiring ratification within seven years from the time of the submission to the States. The Supreme Court in Coleman v. Miller, 307 U.S. 433 (1939), declared that the question of the reasonableness of the time within which a sufficient number of States must act is a political question to be determined by the Congress.

In 1789, at the time of the submission of the Bill of Rights, twelve proposed amendments were submitted to the States. Of these, Articles III-XII were ratified and became the first ten amendments to the Constitution. Proposed Articles I and II were not ratified with these ten, but, in 1992, Article II was proclaimed as ratified, 203 years later. The following is the text of proposed Article I:

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

Thereafter, in the 2d session of the 11th Congress, the Congress proposed the following amendment to the Constitution relating to acceptance by citizens of the United States of titles of nobility from any foreign government.

The proposed amendment which was not ratified by three-fourths of the States reads as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), That the following section be submitted to the legislatures of the several states, which, when ratified by the legislatures of three fourths of the states, shall be valid and binding, as a part of the constitution of the United States.

If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them."
During the second session of the 36th Congress on March 2, 1861, the following proposed amendment to the Constitution relating to slavery was signed by the President. It is interesting to note in this connection that this is the only proposed amendment to the Constitution ever signed by the President. The President's signature is considered unnecessary because of the constitutional provision that upon the concurrence of two-thirds of both Houses of Congress the proposal shall be submitted to the States and shall be ratified by three-fourths of the States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as part of the said Constitution, viz:

“ARTICLE THIRTEEN

“No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.”

In more recent times, only three proposed amendments have not been ratified by three-fourths of the States. The first is the proposed child-labor amendment, which was submitted to the States during the 1st session of the 68th Congress in June 1924, as follows:

JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

ARTICLE——

SECTION 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

SECTION 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

The second proposed amendment to have failed of ratification is the equal rights amendment, which formally died on June 30, 1982, after a disputed congressional extension of the original seven-year period for ratification.
Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

“SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

“SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

“SECTION 3. This amendment shall take effect two years after the date of ratification.”

The third proposed amendment relating to representation in Congress for the District of Columbia failed of ratification, 16 States having ratified as of the 1985 expiration date for the ratification period.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

“ARTICLE

“SECTION 1. For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.

“SEC. 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.

“SEC. 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.

“SEC. 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.”
THE
CONSTITUTION OF THE UNITED STATES
OF AMERICA

WITH ANALYSIS
THE PREAMBLE

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Purpose and Effect of the Preamble

Although the preamble is not a source of power for any department of the Federal Government, the Supreme Court has often referred to it as evidence of the origin, scope, and purpose of the Constitution. "Its true office," wrote Joseph Story in his Commentaries, "is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, 'provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to pass any measures which they deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?"
# Article I
## Legislative Department

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LEGISLATIVE DEPARTMENT

ARTICLE I

Section 1 All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SEPARATION OF POWERS AND CHECKS AND BALANCES

The Constitution nowhere contains an express injunction to preserve the boundaries of the three broad powers it grants, nor does it expressly enjoin maintenance of a system of checks and balances. Yet, it does grant to three separate branches the powers to legislate, to execute, and to adjudicate, and it provides throughout the document the means by which each of the branches could resist the blandishments and incursions of the others. The Framers drew up our basic charter against a background rich in the theorizing of scholars and statesmen regarding the proper ordering in a system of government of conferring sufficient power to govern while withholding the ability to abridge the liberties of the governed.¹

The Theory Elaborated and Implemented

When the colonies separated from Great Britain following the Revolution, the framers of their constitutions were imbued with the profound tradition of separation of powers, and they freely and expressly embodied the principle in their charters.² But the theory of checks and balances was not favored because it was drawn from Great Britain, and, as a consequence, violations of the separation-of-powers doctrine by the legislatures of the States were common-

¹ Among the best historical treatments are M. Vile, Constitutionalism and the Separation of Powers (1967), and W. Gwyn, The Meaning of the Separation of Powers (1965).
² Thus the Constitution of Virginia of 1776 provided: “The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time[.]” Reprinted in 10 Sources and Documents of United States Constitutions 52 (W. S. Windler ed., 1979). See also 5 id. at 96, Art. XXX of Part First, Massachusetts Constitution of 1780: “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.”

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place events prior to the convening of the Convention.\textsuperscript{3} Theory as much as experience guided the Framers in the summer of 1787.\textsuperscript{4}

The doctrine of separation of powers, as implemented in drafting the Constitution, was based on several principles generally held: the separation of government into three branches, legislative, executive, and judicial; the conception that each branch performs unique and identifiable functions that are appropriate to each; and the limitation of the personnel of each branch to that branch, so that no one person or group should be able to serve in more than one branch simultaneously. To a great extent, the Constitution effectuated these principles, but critics objected to what they regarded as a curious intermixture of functions, to, for example, the veto power of the President over legislation and to the role of the Senate in the appointment of executive officers and judges and in the treaty-making process. It was to these objections that Madison turned in a powerful series of essays.\textsuperscript{5}

Madison recurred to “the celebrated” Montesquieu, the “oracle who is always consulted,” to disprove the contentions of the critics. “[T]his essential precaution in favor of liberty,” that is, the separation of the three great functions of government, had been achieved, but the doctrine did not demand rigid separation. Montesquieu and other theorists “did not mean that these departments ought to have no partial agency in, or control over, the acts of each other,” but rather liberty was endangered “where the whole power of one department is exercised by the same hands which possess the whole power of another department.”\textsuperscript{6} That the doctrine did not demand absolute separation provided the basis for preservation of separation of powers in action. Neither sharply drawn demarcations of institutional boundaries nor appeals to the electorate were sufficient.\textsuperscript{7} Instead, the security against concentration of powers “consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” Thus, “[a]mbition must be made to

\textsuperscript{3}In republican government the legislative authority, necessarily, predominates.” The Federalist, No. 51 (J. Cooke ed. 1961), 350 (Madison). See also id. at No. 48, 332–334. This theme continues today to influence the Court’s evaluation of congressional initiatives. E.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 273–74, 277 (1991). But compare id. at 286 n. 3 (Justice White dissenting).

\textsuperscript{4}The intellectual history through the state period and the Convention proceedings is detailed in G. Wood, The Creation of the American Republic, 1776–1787 (1969) (see index entries under “separation of powers”).

\textsuperscript{5}The Federalist Nos. 47–51 (J. Cooke ed. 1961), 323–353 (Madison).

\textsuperscript{6}Id. at No. 47, 325–326 (emphasis in original).

\textsuperscript{7}Id. at Nos. 47–49, 325–343.
counteract ambition. The interest of the man must be connected with the constitutional rights of the place." 8

Institutional devices to achieve these principles pervade the Constitution. Bicameralism reduces legislative predominance, while the presidential veto gives to the Chief Magistrate a means of defending himself and of preventing congressional overreaching. The Senate’s role in appointments and treaties checks the President. The courts are assured independence through good behavior tenure and security of compensation, and the judges through judicial review will check the other two branches. The impeachment power gives to Congress the authority to root out corruption and abuse of power in the other two branches. And so on.

Judicial Enforcement

Throughout much of our history, the “political branches” have contended between themselves in application of the separation-of-powers doctrine. Many notable political disputes turned on questions involving the doctrine. Inasmuch as the doctrines of separation of powers and of checks and balances require both separation and intermixture, 9 the role of the Supreme Court in policing the maintenance of the two doctrines is problematic at best. And, indeed, it is only in the last two decades that cases involving the doctrines have regularly been decided by the Court. Previously, informed understandings of the principles have underlain judicial construction of particular clauses or guided formulation of constitutional common law. That is, the nondelegation doctrine was from the beginning suffused with a separation-of-powers premise, 10 and the effective demise of the doctrine as a judicially-enforceable construct reflects the Court’s inability to give any meaningful content to it. 11 On the other hand, periodically, the Court has essayed a strong separation position on behalf of the President, sometimes with lack of success, 12 sometimes successfully.

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8 Id. at No. 51, 349.  
9 “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Justice Jackson concurring).  
10 E.g., Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).  
12 The principal example is Myers v. United States, 272 U.S. 52 (1926), written by Chief Justice Taft, himself a former President. The breadth of the holding was modified in considerable degree in Humphrey’s Executor v. United States, 295 U.S. 602 (1935), and the premise of the decision itself was recast and largely softened in Morrison v. Olson, 487 U.S. 654 (1988).
Following a lengthy period of relative inattention to separation of powers issues, the Court since 1976 has recurred to the doctrine in numerous cases, and the result has been a substantial curtailment of congressional discretion to structure the National Government. Thus, the Court has interposed constitutional barriers to a congressional scheme to provide for a relatively automatic deficit-reduction process because of the critical involvement of an officer with significant legislative ties, to the practice set out in more than 200 congressional enactments establishing a veto of executive actions, and to the vesting of broad judicial powers to handle bankruptcy cases in officers not possessing security of tenure and salary. On the other hand, the highly-debated establishment by Congress of a process by which independent special prosecutors could be established to investigate and prosecute cases of alleged corruption in the Executive Branch was sustained by the Court in an opinion that may presage a judicial approach in separation of powers cases more accepting of some blending of functions at the federal level.

Important as the results were in this series of cases, the development of two separate and inconsistent doctrinal approaches to separation of powers issues occasioned the greatest amount of commentary. The existence of the two approaches, which could apparently be employed in the discretion of the Justices, made difficult the prediction of the outcomes of differences over proposals and alternatives in governmental policy. Significantly, however, it appeared that the Court most often used a more strict analysis in cases in which infringements of executive powers were alleged and a less strict analysis when the powers of the other two Branches were concerned. The special prosecutor decision, followed by the decision sustaining the Sentencing Commission, may signal the adoption of a single analysis, the less strict analysis, for all separation of power cases or it may turn out to be but an exception to the Court’s dual doctrinal approach.

13 Beginning with Buckley v. Valeo, 424 U.S. 1, 109–43 (1976), a relatively easy case, in which Congress had attempted to reserve to itself the power to appoint certain officers charged with enforcement of a law.
18 The tenor of a later case, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991), was decidedly formalistic, but it involved a factual situation and a doctrinal predicate easily rationalized by the principles of Morrison and Mistretta, aggrandizement of its powers by Congress. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), reasserted the fundamental status of Marathon, again in a bankruptcy courts context, although the issue was
While the two doctrines have been variously characterized, the names generally attached to them have been "formalist," applied to the more strict line, and "functional," applied to the less strict. The formalist approach emphasizes the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating. The functional approach emphasizes the core functions of each branch and asks whether the challenged action threatens the essential attributes of the legislative, executive, or judicial function or functions. Under this approach, there is considerable flexibility in the moving branch, usually Congress acting to make structural or institutional change, if there is little significant risk of impairment of a core function or in the case of such a risk if there is a compelling reason for the action.

Chadha used the formalist approach to invalidate the legislative veto device by which Congress could set aside a determination by the Attorney General, pursuant to a delegation from Congress, to suspend deportation of an alien. Central to the decision were two conceptual premises. First, the action Congress had taken was leg-
is legislative, because it had the purpose and effect of altering the legal rights, duties, and relations of persons outside the Legislative Branch, and thus Congress had to comply with the bicameralism and presentment requirements of the Constitution. 21 Second, the Attorney General was performing an executive function in implementing the delegation from Congress, and the legislative veto was an impermissible interference in the execution of the laws. Congress could act only by legislating, by changing the terms of its delegation. 22 In *Bowsher*, the Court held that Congress could not vest even part of the execution of the laws in an officer, the Comptroller General, who was subject to removal by Congress because this would enable Congress to play a role in the execution of the laws. Congress could act only by passing other laws. 23

On the same day that *Bowsher* was decided through a formalist analysis, the Court in *Schor* utilized the less strict, functional approach in resolving a challenge to the power of a regulatory agency to adjudicate as part of a larger canvas a state common-law issue, the very kind of issue that *Northern Pipeline*, in a formalist plurality opinion with a more limited concurrence, had denied to a non-Article III bankruptcy court. 24 Sustaining the agency’s power, the Court emphasized “the principle that ‘practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.’” 25 It held that in evaluating such a separation of powers challenge, the Court had to consider the extent to which the “essential attributes of judicial power” were reserved to Article III courts and conversely the extent to which the non-Article III entity exercised the jurisdiction and powers normally vested only in Article III courts, the origin and importance of the rights to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III. 26 *Bowsher*, the Court said, was not contrary, because “[u]nlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.” 27 The test was a balancing one, whether Congress had impermissibly undermined
Sec. 1—The Congress

Legislative Powers

the role of another branch without appreciable expansion of its own power.

While the Court, in applying one or the other analysis in separation of powers cases, had never indicated its standards for choosing one analysis over the other, beyond inferences that the formalist approach was proper when the Constitution fairly clearly committed a function or duty to a particular branch and the functional approach was proper when the constitutional text was indeterminate and a determination must be made on the basis of the likelihood of impairment of the essential powers of a branch, the overall results had been a strenuous protection of executive powers and a concomitant relaxed view of the possible incursions into the powers of the other branches. It was thus a surprise, then, when in the independent counsel case, the Court, again without stating why it chose that analysis, utilized the functional standard to sustain the creation of the independent counsel. The independent-counsel statute, the Court emphasized, was not an attempt by Congress to increase its own power at the expense of the executive nor did it constitute a judicial usurpation of executive power. Moreover, the Court stated, the law did not “impermissibly undermine” the powers of the Executive Branch nor did it “disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.” Acknowledging that the statute undeniably reduced executive control over what it had previously identified as a core executive function, the execution of the laws through criminal prosecution, through its appointment provisions and its assurance of independence by limitation of removal to a “good cause” standard, the Court nonetheless noticed the circumscribed nature of the reduction, the discretion of the Attorney General to initiate appointment, the limited jurisdiction of the counsel, and the power of the Attorney General to ensure that the laws are faithfully executed by the counsel. This balancing, the Court thought, left the President with sufficient control to ensure that he is able to perform his constitutionally assigned functions. A notably more pragmatic, functional analysis suffused the opinion of the Court when it upheld the con-

28To be sure, the appointments clause did specifically provide that Congress could vest in the courts the power to appoint inferior officers, Morrison v. Olson, 487 U.S. 654, 670–677 (1988), making possible the contention that, unlike Chadha and Bowsher, Morrison is a textual commitment case. But the Court’s separate evaluation of the separation of powers issue does not appear to turn on that distinction. Id. at 685–96. Nevertheless, the existence of this possible distinction should make one wary about lightly reading Morrison as a rejection of formalism when executive powers are litigated.

29487 U.S. at 695 (quoting, respectively, Schor, 478 U.S. at 856, and Nixon v. Administrator of General Services, 433 U.S. at 443).
ART. I—LEGISLATIVE DEPARTMENT

Legislative Powers

Sec. 1—The Congress

charged with promulgating guidelines binding on federal judges in sentencing convicted offenders, the seven-member Commission, three members of which had to be Article III judges, was made an independent entity in the judicial branch. The President appointed all seven members, the judges from a list compiled by the Judicial Conference, and he could remove from the Commission any member for cause. According to the Court, its separation-of-powers jurisprudence is always animated by the concerns of encroachment and aggrandizement. “Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.” Thus, to each of the discrete questions, the placement of the Commission, the appointment of the members, especially the service of federal judges, and the removal power, the Court carefully analyzed whether one branch had been given power it could not exercise or had enlarged its powers impermissibly and whether any branch would have its institutional integrity threatened by the structural arrangement.

Although it is possible, even likely, that Morrison and Mistretta represent a decision by the Court to adopt for all separation-of-powers cases the functional analysis, the history of adjudication since 1976 and the shift of approach between Myers and Humphrey’s Executor suggest caution. Recurrences of the formalist approach have been noted. Additional decisions must be forthcoming before it can be decided that the Court has finally settled on the functional approach.

BICAMERALISM

By providing for a National Legislature of two Houses, the Framers, deliberately or adventitiously, served several functions. Examples of both unicameralism and bicameralism abounded. Some of the ancient republics, to which the Framers often repaired for the learning of experience, had two-house legislatures, and the Parliament of Great Britain was based in two social orders, the hereditary aristocracy represented in the House of Lords and the freeholders of the land represented in the House of Commons. A number of state legislatures, following the Revolution, were created

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30 Mistretta v. United States, 488 U.S. 361 (1989). Significantly, the Court did acknowledge reservations with respect to the placement of the Commission as an independent entity in the judicial branch. Id. at 384, 397, 407–08. As in Morrison, Justice Scalia was the lone dissenter, arguing for a fairly rigorous application of separation-of-powers principles. Id. at 413, 422–27.

31 488 U.S. at 382.
unicameral, and the Continental Congress, limited in power as it was, consisted of one house.

From the beginning in the Convention, in the Virginia Plan, a two-house Congress was called for. The Great Compromise, one of the critical decisions leading to a successful completion of the Convention, resolved the dispute about the national legislature by providing for a House of Representatives apportioned on population and a Senate in which the States were equally represented. The first function served, thus, was federalism. 32 Coextensively important, however, was the separation-of-powers principle served. The legislative power, the Framers both knew and feared, was predominant in a society dependent upon the suffrage of the people, and it was important to have a precaution against the triumph of transient majorities. Hence, the Constitution’s requirement that before lawmakers could be carried out bills must be deliberated in two Houses, their Members beholden to different constituencies, was in pursuit of this observation from experience. 33

Events since 1787, of course, have altered both the separation-of-powers and the federalism bases of bicameralism, in particular the adoption of the Seventeenth Amendment resulting in the popular election of Senators, so that the differences between the two Chambers are today less pronounced.

**ENUMERATED, IMPLIED, RESULTING, AND INHERENT POWERS**

Two important doctrines of constitutional law—that the Federal Government is one of enumerated powers and that legislative powers may not be delegated—are derived in part from this section. The classical statement of the former is that by Chief Justice Marshall in *McCulloch v. Maryland*: “This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.” 34 That, however, “the executive power” is not confined to those items expressly enumerated in Article II was asserted early in the history of the Constitution by Madison and Hamilton alike

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33 Id. at No. 51, 347–353 (Madison). The assurance of the safeguard is built into the presentment clause. Article I, § 7, cl. 2; and see id. at cl. 3. The structure is not often the subject of case law, but it was a foundational matter in INS v. Chadha, 462 U.S. 919, 944–951 (1983).
34 17 U.S. (4 Wheat.) 316, 405 (1819).
and is found in decisions of the Court; a similar latitudinarian conception of “the judicial power of the United States” was voiced in Justice Brewer’s opinion for the Court in Kansas v. Colorado. But even when confined to “the legislative powers herein granted,” the doctrine is severely strained by Marshall’s conception of some of these as set forth in his McCulloch v. Maryland opinion. He asserts that “the sword and the purse, all the external relations and no inconsiderable portion of the industry of the nation, are intrusted to its government;” he characterizes “the power of making war,” of “levying taxes,” and of “regulating commerce” as “great, substantive and independent powers;” and the power conferred by the “necessary and proper” clause embraces, he declares, all legislative “means which are appropriate” to carry out the legitimate ends of the Constitution, unless forbidden by “the letter and spirit of the Constitution.”

Nine years later, Marshall introduced what Story in his Commentaries labels the concept of “resulting powers,” those which “rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specially enumerated.” Story’s reference is to Marshall’s opinion in American Insurance Co. v. Canter, where the latter said, that “the Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.” And from the power to acquire territory, he continues, arises as “the inevitable consequence” the right to govern it.

Subsequently, powers have been repeatedly ascribed to the National Government by the Court on grounds that ill accord with the doctrine of enumerated powers: the power to legislate in effectuation of the “rights expressly given, and duties expressly enjoined” by the Constitution; the power to impart to the paper currency of the Government the quality of legal tender in the payment

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35 See discussion under Article II, § 1, cl. 1, Executive Power: Theory of the Presidential Office, infra.
36 206 U.S. 46, 82 (1907).
38 17 U.S. at 411.
39 17 U.S. at 421.
40 2 J. Story, Commentaries on the Constitution of the United States 1256 (1833). See also id. at 1286 and 1300.
41 26 U.S. (1 Pet.) 511 (1828).
42 26 U.S. at 542.
43 26 U.S. at 543.
of debts; \( ^{45} \) the power to acquire territory by discovery; \( ^{46} \) the power to legislate for the Indian tribes wherever situated in the United States; \( ^{47} \) the power to exclude and deport aliens; \( ^{48} \) and to require that those who are admitted be registered and fingerprinted; \( ^{49} \) and finally the complete powers of sovereignty, both those of war and peace, in the conduct of foreign relations. Thus, in United States v. Curtiss-Wright Corp., \( ^{50} \) decided in 1936, Justice Sutherland asserted the dichotomy of domestic and foreign powers, with the former limited under the enumerated powers doctrine and the latter virtually free of any such restraint. That doctrine has been the source of much scholarly and judicial controversy, but, although limited, it has not been repudiated.

Yet, for the most part, these holdings do not, as Justice Sutherland suggested, directly affect “the internal affairs” of the nation; they touch principally its peripheral relations, as it were. The most serious inroads on the doctrine of enumerated powers are, in fact, those which have taken place under cover of the doctrine—the vast expansion in recent years of national legislative power in the regulation of commerce among the States and in the expenditure of the national revenues. Verbally, at least, Marshall laid the ground for these developments in some of the phraseology above quoted from his opinion in McCulloch v. Maryland.

**DELEGATION OF LEGISLATIVE POWER**

**The History of the Doctrine of Nondelegability**

The Supreme Court has sometimes declared categorically that “the legislative power of Congress cannot be delegated,” \( ^{51} \) and on other occasions has recognized more forthrightly, as Chief Justice Marshall did in 1825, that, although Congress may not delegate powers that “are strictly and exclusively legislative,” it may delegate “powers which [it] may rightfully exercise itself.” \( ^{52} \) The categorical statement has never been literally true, the Court having upheld the delegation at issue in the very case in which the statement was made. \( ^{53} \) The Court has long recognized that administra-


\( ^{46} \) United States v. Jones, 109 U.S. 513 (1883).

\( ^{47} \) United States v. Kagama, 118 U.S. 375 (1886).

\( ^{48} \) Fong Yue Ting v. United States, 149 U.S. 698 (1893).

\( ^{49} \) Hines v. Davidowitz, 312 U.S. 52 (1941).

\( ^{50} \) 299 U.S. 304 (1936).


\( ^{52} \) Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825).

\( ^{53} \) The Court in Shreveport Grain & Elevator upheld a delegation of authority to the FDA to allow reasonable variations, tolerances, and exemptions from mis-
tion of the law requires exercise of discretion, and that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." The real issue is where to draw the line. Chief Justice Marshall recognized "that there is some difficulty in discerning the exact limits," and that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." Accordingly, the Court's solution has been to reject delegation challenges in all but the most extreme cases, and to accept delegations of vast powers to the President or to administrative agencies.

With the exception of a brief period in the 1930's when the Court was striking down New Deal legislation on a variety of grounds, the Court has consistently upheld grants of authority that have been challenged as invalid delegations of legislative power.

The modern doctrine may be traced to the 1928 case J. W. Hampton, Jr. & Co. v. United States, in which the Court, speaking through Chief Justice Taft, upheld Congress' delegation to the President of the authority to set tariff rates that would equalize production costs in the United States and competing countries. Although formally invoking the contingency theory, the Court's opinion also looked forward, emphasizing that in seeking the cooperation of another branch Congress was restrained only according to "common sense and the inherent necessities" of the situation. This vague statement was elaborated somewhat in the statement that the Court would sustain delegations whenever Congress provided an "intelligible principle" to which the President or an agency must conform.

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54 J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination").

55 Mistretta v. United States, 488 U.S. 361, 372 (1989). See also Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility").

56 Wayman v. Southard, 23 U.S. (10 Wheat.) at 42. For particularly useful discussions of delegations, see 1 K. Davis, ADMINISTRATIVE LAW TREATISE Ch. 3 (2d ed., 1978); L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION ch. 2 (1965).

57 276 U.S. 394 (1928).

58 276 U.S. at 406.

59 276 U.S. at 409. The "intelligible principle" test of Hampton is the same as the "legislative standards" test of A. L. A. Schechter Poultry Corp. v. United States,
As characterized by the Court, the delegations struck down in 1935 in the *Panama Refining* and *Schechter* cases were not only broad but unprecedented. Both cases involved provisions of the National Industrial Recovery Act. At issue in *Panama Refining* was a delegation to the President of authority to prohibit interstate transportation of what was known as “hot oil” – oil produced in excess of quotas set by state law. The problem was that the Act provided no guidance to the President in determining whether or when to exercise this authority, and required no finding by the President as a condition of exercise of the authority. Congress “declared no policy, ... established no standard, [and] laid down no rule,” but rather “left the matter to the President without standard or rule, to be dealt with as he pleased.” At issue in *Schechter* was a delegation to the President of authority to promulgate codes of fair competition that could be drawn up by industry groups or prescribed by the President on his own initiative. The codes were required to implement the policies of the Act, but those policies were so general as to be nothing more than an endorsement of whatever might be thought to promote the recovery and expansion of the particular trade or industry. The President’s authority to approve, condition, or adopt codes on his own initiative was similarly devoid of meaningful standards, and “virtually unfettered.” This broad delegation was “without precedent.” The Act supplied “no standards” for any trade or industry group, and, unlike other broad delegations that had been upheld, did not set policies that could be implemented by an administrative agency required to follow “appropriate administrative procedure.” “Instead of prescribing rules of conduct, [the Act] authorize[d] the making of codes to prescribe them.”

Since 1935, the Court has not struck down a delegation to an administrative agency. Rather, the Court has approved, “without deviation, Congress’ ability to delegate power under broad stand-
The Court has upheld, for example, delegations to administrative agencies to determine “excessive profits” during wartime, to determine “unfair and inequitable distribution of voting power” among securities holders, to fix “fair and equitable” commodities prices, to determine “just and reasonable” rates, and to regulate broadcast licensing as the “public interest, convenience, or necessity require.” During all this time the Court “has not seen fit ... to enlarge in the slightest [the] relatively narrow holdings” of Panama Refining and Schechter. Again and again, the Court has distinguished the two cases, sometimes by finding adequate standards in the challenged statute, sometimes by contrasting the vast scope of the power delegated by the National Industrial Recovery Act, and sometimes by pointing to required administrative findings and procedures that were absent in the NIRA. The Court has also relied on the constitutional doubt principle of statutory construction to narrow interpretations of statutes that, interpreted broadly, might have presented delegation issues.

Concerns in the scholarly literature with respect to the scope of the delegation doctrine have been reflected in the opinions of

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74 See, e.g., Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (contrasting the delegation to deal with “unprecedented economic problems of varied industries” with the delegation of authority to deal with problems of the banking industry, where there was “accumulated experience” derived from long regulation and close supervision); Whitman v. American Trucking Ass’n, 531 U.S. 457, 474 (2001) (the NIRA “conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition’”).
75 See, e.g., Yakus v. United States, 321 U.S. 414, 424-25 (1944) (Schechter involved delegation “not to a public official ... but to private individuals”; it suffices if Congress has sufficiently marked the field within which an administrator may act “so it may be known whether he has kept within it in compliance with the legislative will.”)
76 See, e.g., Industrial Union Dep’t v. American Petroleum Inst., 448 U.S. 607, 645-46 (1980) (plurality opinion) (invalidating an occupational safety and health regulation, and observing that the statute should not be interpreted to authorize enforcement of a standard that is not based on an “understandable” quantification of risk); National Cable Television Ass’n v. United States, 415 U.S. 336, 342 (1974) (“hurdles revealed in [Schechter and J. W. Hampton, Jr. & Co. v. United States] lead us to read the Act narrowly to avoid constitutional problems”).
some of the Justices. Nonetheless, the Court’s decisions continue to approve very broad delegations, and the practice will likely remain settled.

The fact that the Court has gone so long without holding a statute to be an invalid delegation does not mean that the nondelegation doctrine is a dead letter. The long list of rejected challenges does suggest, however, that the doctrine applies only to standardless delegations of the most sweeping nature.

**The Nature and Scope of Permissible Delegations**

Application of two distinct constitutional principles contributed to the development of the nondelegation doctrine: separation of powers and due process. A rigid application of separation of powers would prevent the lawmaking branch from divesting itself of any of its power and conferring it on one of the other branches. But the doctrine is not so rigidly applied as to prevent conferral of significant authority on the executive branch. In *J. W. Hampton, Jr. & Co. v. United States*, Chief Justice Taft explained the doctrine’s import in the delegation context. “The Federal Constitution ... divide[s] the governmental power into three branches.... [I]n carrying out that constitutional division ... it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either

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Notice Clinton v. City of New York, 524 U.S. 417 (1998), in which the Court struck down the Line Item Veto Act, intended by Congress to be a delegation to the President, finding that the authority conferred on the President was legislative power, not executive power, which failed because the presentment clause had not and could not have been complied with. The dissenting Justices argued that the law was properly treated as a delegation and was clearly constitutional. Id. at 453 (Justice Scalia concurring in part and dissenting in part), 469 (Justice Breyer dissenting).

80 Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

81 276 U.S. 394, 405–06 (1928).
tive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.\textsuperscript{82}

In \textit{Loving v. United States},\textsuperscript{83} the Court distinguished between its usual separation-of-powers doctrine—emphasizing arrogation of power by a branch and impairment of another branch’s ability to carry out its functions—and the delegation doctrine, “another branch of our separation of powers jurisdiction,” which is informed not by the arrogation and impairment analyses but solely by the provision of standards.\textsuperscript{84} This confirmed what had long been evident— that the delegation doctrine is unmoored to traditional separation-of-powers principles.

The second principle underlying delegation law is a due process conception that undergirds delegations to administrative agencies. The Court has contrasted the delegation of authority to a public agency, which typically is required to follow established procedures in building a public record to explain its decisions and to enable a reviewing court to determine whether the agency has stayed within its ambit and complied with the legislative mandate, with delegations to private entities, which typically are not required to adhere to such procedural safeguards.\textsuperscript{85}

Two theories suggested themselves to the early Court to justify the results of sustaining delegations. The Chief Justice alluded to the first in \textit{Wayman v. Southard}.\textsuperscript{86} He distinguished between “important” subjects, “which must be entirely regulated by the legislature itself,” and subjects “of less interest, in which a general provi-

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\textsuperscript{82}Chief Justice Taft traced the \textit{separation of powers} doctrine to the maxim \textit{delegata potestas non potest delegari} (a delegated power may not be delegated), 276 U.S. at 405, but the maxim does not help differentiate between permissible and impermissible delegations, and Court has not repeated this reference in later delegation cases.

\textsuperscript{83}517 U.S. 748 (1996).

\textsuperscript{84}517 U.S. at 758–59.


\textsuperscript{86}23 U.S. (10 Wheat.) 1, 41 (1825).
tion may be made, and power given to those who are to act under such general provisions, to fill up the details.” While his distinction may be lost, the theory of the power “to fill up the details” remains current. A second theory, formulated even earlier, is that Congress may legislate contingently, leaving to others the task of ascertaining the facts that bring its declared policy into operation. 87

**Filling Up the Details.**—In finding a power to “fill up the details,” the Court in *Wayman v. Southard* 88 rejected the contention that Congress had unconstitutionally delegated power to the federal courts to establish rules of practice. 89 Chief Justice Marshall agreed that the rule-making power was a legislative function and that Congress could have formulated the rules itself, but he denied that the delegation was impermissible. Since then, of course, Congress has authorized the Supreme Court to prescribe rules of procedure for the lower federal courts. 90

Filling up the details of statutes has long been the standard. For example, the Court upheld a statute requiring the manufacturers of oleomargarine to have their packages “marked, stamped and branded as the Commissioner of Internal Revenue ... shall prescribe,” rejecting a contention that the prosecution was not for violation of law but for violation of a regulation. 91 “The criminal offence,” said Chief Justice Fuller, “is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail.” 92 *Kollock* was not the first such case, 93 and it was followed by a multitude of delegations that the Court sustained. In one such case, for example, the Court upheld an act directing the Secretary of the Treasury to promulgate minimum standards of quality and purity for tea imported into the United States. 94

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87 The *Brig Aurora*, 11 U.S. (7 Cr.) 382 (1813).
89 Act of May 8, 1792, § 2, 1 Stat. 275, 276.
90 The power to promulgate rules of civil procedure was conferred by the Act of June 19, 1934, 48 Stat. 1064; the power to promulgate rules of criminal procedure was conferred by the Act of June 29, 1940, 54 Stat. 688. These authorities are now subsumed under 28 U.S.C. § 2072. In both instances Congress provided for submission of the rules to it, presumably reserving the power to change or to veto the rules. Additionally, Congress has occasionally legislated rules itself. See, e.g., 82 Stat. 197 (1968), 18 U.S.C. §§ 3501–02 (admissibility of confessions in federal courts).
91 In re *Kollock*, 165 U.S. 526 (1897).
92 165 U.S. at 533.
Contingent Legislation.—An entirely different problem arises when, instead of directing another department of government to apply a general statute to individual cases, or to supplement it by detailed regulation, Congress commands that a previously enacted statute be revived, suspended, or modified, or that a new rule be put into operation, upon the finding of certain facts by an executive or administrative officer. Since the delegated function in such cases is not that of “filling up the details” of a statute, authority for it must be sought under some other theory.

Contingent delegation was approved in an early case, The Brig Aurora,95 upholding the revival of a law upon the issuance of a presidential proclamation. After previous restraints on British shipping had lapsed, Congress passed a new law stating that those restrictions should be renewed in the event the President found and proclaimed that France had abandoned certain practices that violated the neutral commerce of the United States. To the objection that this was an invalid delegation of legislative power, the Court answered briefly that “we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct.”96

The theory was utilized again in Field v. Clark,97 where the Tariff Act of 1890 was assailed as unconstitutional because it directed the President to suspend the free importation of enumerated commodities “for such time as he shall deem just” if he found that other countries imposed upon agricultural or other products of the United States duties or other exactions, which “he may deem to be reciprocally unequal and unjust.” In sustaining this statute the Court relied heavily upon two factors: (1) legislative precedents, which demonstrated that “in the judgment of the legislative branch of the government, it is often desirable, if not essential, ... to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations;”98 (2) that the act did “not, in any real sense, invest the President with the power of legislation.... Congress itself prescribed, in advance, the duties to be levied, ... while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President.... He had no discretion in the premises except in respect to the dura-
tion of the suspension so ordered.” By similar reasoning, the Court sustained the flexible provisions of the Tariff Act of 1922 whereby duties were increased or decreased to reflect differences in cost of production at home and abroad, as such differences were ascertained and proclaimed by the President.

**Standards.**—Implicit in the concept of filling in the details is the idea that there is some intelligible guiding principle or framework to apply. Indeed, the requirement that Congress set forth “intelligible principles” or “standards” to guide as well as limit the agency or official in the performance of its assigned task has been critical to the Court’s acceptance of legislative delegations. In theory, the requirement of standards serves two purposes: “it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people, [and] it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.”

The only two instances in which the Court has found an unconstitutional delegation to a public entity have involved grants of discretion that the Court found to be unbounded, hence standardless. Thus, in *Panama Refining Co. v. Ryan*, the President was authorized to prohibit the shipment in interstate commerce of “hot oil”—oil produced in excess of state quotas. Nowhere—not in the language conferring the authority, nor in the “declaration of policy,” nor in any other provision—did the statute specify a policy to guide the President in determining when and under what circumstances to exercise the power. While the scope of granted authority in *Panama Refining* was narrow, the grant in *A.L.A. Schechter Poultry Corp. v. United States* was sweeping. The National Industrial Recovery Act devolved on the executive branch the power to formulate codes of “fair competition” for all industry in order to promote “the policy of this title.” The policy was “to eliminate unfair competitive practices, to promote the fullest possible

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99 143 U.S. at 692, 693.
100 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).
102 293 U.S. 388 (1935).
103 The Court, in the view of many observers, was influenced heavily by the fact that the President’s orders were nowhere published and notice of regulations bearing criminal penalties for their violations was spotty at best. Cf. E. Corwin, THE PRESIDENT—OFFICE AND POWERS 1787–1957 394–95 (4th ed. 1958). The result of the Government’s discomfiture in Court was enactment of the Federal Register Act, 49 Stat. 500 (1935), 44 U.S.C. § 301, providing for publication of Executive Orders and agency regulations in the daily Federal Register.
104 295 U.S. 495 (1935).
utilization of the present productive capacity of industries, . . . and otherwise to rehabilitate industry....” 105 Though much of the opinion is written in terms of the failure of these policy statements to provide meaningful standards, the Court was also concerned with the delegation’s vast scope – the “virtually unfettered” discretion conferred on the President of “enacting laws for the government of trade and industry throughout the country.” 106

Typically the Court looks to the entire statute to determine whether there is an intelligible standard to guide administrators, and a statute’s declaration of policies or statement of purposes can provide the necessary guidance. If a statute’s declared policies are not open-ended, then a delegation of authority to implement those policies can be upheld. For example, in United States v. Rock Royal Co-operative, 107 the Court contrasted the National Industrial Recovery Act’s statement of policy, “couches in most general terms” and found lacking in Schechter, with the narrower policy that an agricultural marketing law directed the Secretary of Agriculture to implement. 108 Similarly, the Court found ascertainable standards in the Emergency Price Control Act’s conferral of authority to set prices for commodities if their prices had risen in a manner “inconsistent with the purposes of this Act.” 109

The Court has been notably successful in finding standards that are constitutionally adequate. Standards have been ascertained to exist in such formulations as “just and reasonable,” 110 “public interest,” 111 “public convenience, interest, or ne-
“unfair methods of competition,” and “requisite to protect the public health [with] an adequate margin of safety.” Thus, in National Broadcasting Co. v. United States, the Court found that the discretion conferred on the Federal Communications Commission to license broadcasting stations to promote the “public interest, convenience, or necessity” conveyed a standard “as complete as the complicated factors for judgment in such a field of delegated authority permit.” Yet the regulations upheld were directed to the contractual relations between networks and stations and were designed to reduce the effect of monopoly in the industry, a policy on which the statute was silent. When in the Economic Stabilization Act of 1970, Congress authorized the President “to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries,” and the President responded by imposing broad national controls, the lower court decision sustaining the action was not even appealed to the Supreme Court. Explicit standards are not even required in all situations, the Court having found standards reasonably implicit in a delegation to the Federal Home Loan Bank Board to regulate banking associations.

The Court has recently emphatically rejected the idea that administrative implementation of a congressional enactment may provide the intelligible standard necessary to uphold a delegation. The Court’s decision in Lichter v. United States could be read as approving of a bootstrap theory, the Court in that case having upheld the validity of a delegation of authority to recover “excessive profits” as applied to profits earned prior to Congress’s incorporation into the statute of the administrative interpretation.

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115 319 U.S. 190 (1943).
116 319 U.S. at 216.
117 Similarly, the promulgation by the FCC of rules creating a “fairness doctrine” and a “right to reply” rule has been sustained, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), as well as a rule requiring the carrying of anti-smoking commercials. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied sub nom. Tobacco Institute v. FCC, 396 U.S. 842 (1969).
119 Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (the Court explained that both the problems of the banking industry and the authorized remedies were well known).
120 334 U.S. 742 (1948).
121 In upholding the delegation as applied to the pre-incorporation administrative definition, the Court explained that “[t]he statutory term ‘excessive profits,’ in its context, was a sufficient expression of legislative policy and standards to render it constitutional.” 334 U.S. at 783. The “excessive profits” standard, prior to defini-
man v. American Trucking Associations, however, the Court asserted that Lichter mentioned agency regulations only “because a subsequent Congress had incorporated the regulations into a revised version of the statute.” We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction . . . “ the Court concluded.

Even in “sweeping regulatory schemes” that affect the entire economy, the Court has “never demanded . . . that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’” Thus Congress need not quantify how “imminent” is too imminent, how “necessary” is necessary enough, how “hazardous” is too hazardous, or how much profit is “excess.” Rather, discretion to make such determinations may be conferred on administrative agencies.

While Congress must ordinarily provide some guidance that indicates broad policy objectives, there is no general prohibition on delegating authority that includes the exercise of policy judgment. In Mistretta v. United States, the Court approved congressional delegations to the Sentencing Commission, an independent agency in the judicial branch, to develop and promulgate guidelines binding federal judges and cabining their discretion in sentencing criminal defendants. Although the Court enumerated the standards Congress had provided, it admitted that significant discretion existed with respect to making policy judgments about the relative severity of different crimes and the relative weight of the characteristics of offenders that are to be considered, and stated forthrightly that delegations may carry with them “the need to exercise judgment on matters of policy.” A number of cases illustrate the point. Thus, the Court has upheld complex economic regulations of industries in instances in which the agencies had first denied possession of such power, had unsuccessfully sought authorization from Congress, and had finally acted without the requested congressional guidance. The Court has also recognized that when
Administrations change, new officials may have sufficient discretion under governing statutes to change or even reverse agency policies.  

It seems therefore reasonably clear that the Court does not really require much in the way of standards from Congress. The minimum which the Court usually insists on is that Congress employ a delegation which “sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.” Where the congressional standards are combined with requirements of notice and hearing and statements of findings and considerations by the administrators, so that judicial review under due process standards is possible, the constitutional requirements of delegation have been fulfilled. This requirement may be met through the provisions of the Administrative Procedure Act, but where that Act is inapplicable or where the Court sees the necessity for exceeding its provisions, due process can supply the safeguards of required hearing, notice, supporting statements, and the like.

**Preemptive Reach of Delegated Authority.**—In exercising a delegated power the President or another officer may effectively suspend or rescind a law passed by Congress, or may preempt state law. A rule or regulation properly promulgated under authority received from Congress is law, and under the supremacy clause of the Constitution can preempt state law. Similarly, a valid regul-
lation can supersede a federal statute. Early cases sustained contingency legislation giving the President power, upon the finding of certain facts, to revive or suspend a law, and the President’s power to raise or lower tariff rates equipped him to alter statutory law. The Court in Opp Cotton Mills v. Administrator upheld Congress’ decision to delegate to the Wage and Hour Administrator of the Labor Department the authority to establish a minimum wage in particular industries greater than the statutory minimum but no higher than a prescribed figure. Congress has not often expressly addressed the issue of repeals or supersessions, but in authorizing the Supreme Court to promulgate rules of civil and criminal procedure and of evidence it directed that such rules supersede previously enacted statutes with which they conflict.

Delegations to the President in Areas of Shared Authority

Foreign Affairs.—That the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns was asserted in United States v. Curtiss-Wright Corporation. There the Court upheld a joint resolution of Congress making it unlawful to sell arms to certain warring countries upon certain findings by the President, a typically contingent type of delegation. But Justice Sutherland for the Court proclaimed that the President is largely free of the constitutional constraints imposed by the nondelegation doctrine when he acts in foreign affairs. Sixty years later, the Court, relying on Curtiss-Wright, reinforced such a distinction in a case involving the President’s authority over military justice.

Whether or not the President is the “sole organ of the nation” in its foreign relations, as asserted in Curtiss-Wright, a lesser
standard of delegation is applied in areas of power shared by the President and Congress.

Military.—Superintendence of the military is another area in which shared power with the President affects delegation doctrine. The Court in Loving v. United States\(^{144}\) approved a virtually standardless delegation to the President.

Article 118 of the Uniform Code of Military Justice (UCMJ)\(^{145}\) provides for the death penalty for premeditated murder and felony murder for persons subject to the Act, but the statute does not comport with the Court’s capital punishment jurisdiction, which requires the death sentence to be cabined by standards so that the sentencing authority must narrow the class of convicted persons to be so sentenced and must justify the individual imposition of the sentence.\(^{146}\) However, the President in 1984 had promulgated standards that purported to supply the constitutional validity the UCMJ needed.\(^{147}\)

The Court in Loving held that Congress could delegate to the President the authority to prescribe standards for the imposition of the death penalty – Congress’ power under Article I, § 8, cl. 14, is not exclusive – and that Congress had done so in the UCMJ by providing that the punishment imposed by a court-martial may not exceed “such limits as the President may prescribe.”\(^{148}\) Acknowledging that a delegation must contain some “intelligible principle” to guide the recipient of the delegation, the Court nonetheless held this not to be true when the delegation was made to the President in his role as Commander-in-Chief. “The same limitations on delegation do not apply” if the entity authorized to exercise delegated authority itself possesses independent authority over the subject matter. The President’s responsibilities as Commander-in-Chief require him to superintend the military, including the courts-martial, and thus the delegated duty is interlinked with duties already assigned the President by the Constitution.\(^{149}\)

\(^{144}\) 517 U.S. 748 (1996).

\(^{145}\) 10 U.S.C. §§ 918(1), (4).

\(^{146}\) The Court assumed the applicability of Furman v. Georgia, 408 U.S. 238 (1972), and its progeny, to the military, 517 U.S. at 755–56, a point on which Justice Thomas disagreed, id. at 777.

\(^{147}\) Rule for Courts-Martial; see 517 U.S. at 754.

\(^{148}\) 10 U.S.C. §§ 818, 836(a), 856.

\(^{149}\) 517 U.S. at 771–74. See also United States v. Mazurie, 419 U.S. 544, 556-57 (1974) (limits on delegation are “less stringent” when delegation is made to an Indian tribe that can exercise independent sovereign authority over the subject matter).
Delegations to States and to Private Entities

Delegations to the States.—Beginning in the Nation’s early years, Congress has enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws. Challenges to the practice have been uniformly rejected. While the Court early expressed its doubt that Congress could compel state officers to act, it entertained no such thoughts about the propriety of authorizing them to act if they chose. When, in the Selective Draft Law Cases, the contention was made that the act was invalid because of its delegations of duties to state officers, the argument was rejected as “too wanting in merit to require further notice.” Congress continues to empower state officers to act. Presidents who have objected have done so not on delegation grounds, but rather on the basis of the Appointments Clause.

Delegations to Private Entities.—Statutory delegations to private persons in the form of contingency legislation have passed Court tests. Thus, statutes providing that restrictions upon the production or marketing of agricultural commodities are to become operative only upon a favorable vote by a prescribed majority of those persons affected have been upheld. The rationale of the Court is that such a provision does not involve any delegation of legislative authority, since Congress has merely placed a restriction upon its own regulation by withholding its operation unless it is approved in a referendum.

Statutes that have given private entities actual regulatory power, rather than merely made regulation contingent on their approval, have also been upheld. The Court upheld a statute that de-
egated to the American Railway Association, a trade group, the authority to determine the standard height of draw bars for freight cars and to certify the figure to the Interstate Commerce Commission, which was required to accept it. The Court simply cited *Buttfeld v. Stranahan*, in which it had sustained a delegation to the Secretary of the Treasury to promulgate minimum standards of quality and purity for imported tea, as a case “completely in point” and resolving the issue without need of further consideration. Similarly, the Court had enforced statutes that gave legal effect to local customs of miners with respect to claims on public lands.

The Court has struck down delegations to private entities, but not solely because they were to private entities. The *Schechter* case condemned the involvement of private trade groups in the drawing up of binding codes of competition in conjunction with governmental agencies, but the Court’s principal objection was to the statute’s lack of adequate standards. In *Carter v. Carter Coal Co.*, the Court struck down the Bituminous Coal Conservation Act in part because the statute penalized persons who failed to observe minimum wage and maximum hour regulations drawn up by prescribed majorities of coal producers and coal employees. But the problem for the Court apparently was not so much that the statute delegated to private entities as that it delegated to private entities whose interests were adverse to the interests of those regulated, thereby denying the latter due process. And several later cases have upheld delegations to private entities.

158 192 U.S. 470 (1904).
159 210 U.S. at 287.

But compare *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (upholding a delegation in the Bituminous Coal Act of 1937). And several later cases have upheld delegations to private entities.

163 “One person may not be entrusted with the power to regulate the business of another, and especially of a competitor.” 298 U.S. at 311.
164 See, e.g., Schweiker v. McClure, 456 U.S. 188 (1992) (adjudication of Medicare claims, without right of appeal, by hearing officer appointed by private insurance carrier upheld under due process challenge); Association of Amer. Physicians & Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill.) (three-judge court) (delegation to Professional Standards Review Organization), aff’d per curiam, 423 U.S. 975 (1975); Noblecraft Industries v. Secretary of Labor, 614 F.2d 199 (9th Cir. 1980) (Secretary authorized to adopt interim OSHA standards produced by private organization). Executive Branch objections to these kinds of delegations have involved appointments clause arguments rather than delegation issues per se.
Even though the Court has upheld some private delegations by reference to cases involving delegations to public agencies, some uncertainty remains as to whether identical standards apply. The Schechter Court contrasted the National Industrial Recovery Act’s broad and virtually standardless delegation to the President, assisted by private trade groups,165 with other broad delegations of authority to administrative agencies, characterized by the Court as bodies of experts “required to act upon notice and hearing,” and further limited by the requirement that binding orders must be “supported by findings of fact which in turn are sustained by evidence.”166 The absence of these procedural protections, designed to ensure fairness – as well as the possible absence of impartiality identified in Carter Coal – could be cited to support closer scrutiny of private delegations. While the Court has emphasized the importance of administrative procedures in upholding broad delegations to administrative agencies,167 it has not, since Schechter and Carter Coal, relied on the distinction to strike down a private delegation.

**Particular Subjects or Concerns – Closer Scrutiny or Uniform Standard?**

The Court has strongly implied that the same principles govern the validity of a delegation regardless of the subject matter of the delegation. “[A] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.”168 Holding that “the delegation of discretionary authority under Congress’ taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges,” the Court explained in Skinner v. Mid-America Pipeline Company169 that

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165 The Act conferred authority on the President to approve the codes of competition, either as proposed by the appropriate trade group, or with conditions that he added. Thus the principal delegation was to the President, with the private trade groups being delegated only recommendatory authority. 295 U.S. at 538-39.
166 295 U.S. at 539.
169 490 U.S. 212, 223 (1989). In National Cable Television Ass’n v. United States, 415 U.S. 336, 342 (1974), and FPC v. New England Power Co., 415 U.S. 345 (1974), the Court had appeared to suggest that delegation of the taxing power would be fraught with constitutional difficulties. How this conclusion could have been thought viable after the many cases sustaining delegations to fix tariff rates, which are in fact and law taxes, J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892); and see FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (delegation to President to raise license “fees” on imports when necessary to protect national security), is difficult to discern. Nor should doubt exist respecting the appropriations power. See Synar v. United States, 626 F. Supp. 1374, 1385–86 (D.D.C.) (three-judge court), aff’d on other grounds sub nom. Bowsher v. Synar, 478 U.S. 714 (1986).
there was “nothing in the placement of the Taxing Clause” in Article I, § 8 that would distinguish it, for purposes of delegation, from the other powers enumerated in that clause.\(^{170}\) Thus, the test in the taxing area is the same as for other areas – whether the statute has provided the administrative agency with standards to guide its actions in such a way that a court can determine whether the congressional policy has been followed.

This does not mean that Congress may delegate its power to determine whether taxes should be imposed. What was upheld in \textit{Skinner} was delegation of authority to the Secretary of Transportation to collect “pipeline safety user fees” for users of natural gas and hazardous liquid pipelines. “Multiple restrictions” placed on the Secretary's discretion left no doubt that the constitutional requirement of an intelligible standard had been met. Cases involving the power to impose criminal penalties, described below, further illustrate the difference between delegating the underlying power to set basic policy – whether it be the decision to impose taxes or the decision to declare that certain activities are crimes – and the authority to exercise discretion in administering the policy.

\textbf{Crime and Punishment}.—The Court has confessed that its “cases are not entirely clear as to whether more specific guidance is in fact required” for delegations relating to the imposition of criminal sanctions.\(^{171}\) It is clear, however, that some essence of the power to define crimes and set a range of punishments is not delegable, but must be exercised by Congress. This conclusion derives in part from the time-honored principle that penal statutes are to be strictly construed, and that no one should be “subjected to a penalty unless the words of the statute plainly impose it.”\(^{172}\) Both \textit{Schechter}\(^{173}\) and \textit{Panama Refining} \(^{174}\) – the only two cases in which the Court has invalidated delegations – involved broad delegations of power to “make federal crimes of acts that never had been such before.”\(^{175}\) Thus, Congress must provide by statute that violation of the statute’s terms – or of valid regulations issued pursuant thereto – shall constitute a crime, and the statute must also specify a permissible range of penalties. Punishment in addition to that

\(^{170}\) 490 U.S. at 221. Nor is there basis for distinguishing the other powers enumerated in § 8. See, e.g., Loving v. United States, 517 U.S. 748 (1996). \textit{But see} Touby v. United States, 500 U.S. 160, 166 (1991) (it is “unclear” whether a higher standard applies to delegations of authority to issue regulations that contemplate criminal sanctions), discussed in the next section.


\(^{174}\) Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

authorized in the statute may not be imposed by administrative action. 176

However, once Congress has exercised its power to declare certain acts criminal, and has set a range of punishment for violations, authority to flesh out the details may be delegated. Congress may provide that violation of valid administrative regulations shall be punished as a crime. 177 For example, the Court has upheld a delegation of authority to classify drugs as “controlled substances,” and thereby to trigger imposition of criminal penalties, set by statute, that vary according to the level of a drug’s classification by the Attorney General. 178

Congress may also confer on administrators authority to prescribe criteria for ascertaining an appropriate sentence within the range between the maximum and minimum penalties that are set by statute. The Court upheld Congress’s conferral of “significant discretion” on the Sentencing Commission to set binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses and defendants. 179 Although the Commission was given significant discretionary authority “to determine the relative severity of federal crimes, . . . assess the relative weight of the offender characteristics listed by Congress, . . . to determine which crimes have been punished too leniently and which too severely, [and] which types of criminals are to be considered similar,” Congress also gave the Commission extensive guidance in the Act, and did not confer authority to create new crimes or to enact a federal death penalty for any offense. 180

176 L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, 404 (1944) (“[I]t is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute”).

177 United States v. Grimaud, 220 U.S. 506 (1911). The Forest Reserve Act at issue in Grimaud clearly provided for punishment for violation of “rules and regulations of the Secretary.” The Court in Grimaud distinguished United States v. Eaton, 144 U.S. 677 (1892), which had held that authority to punish for violation of a regulation was lacking in more general language authorizing punishment for failure to do what was “required by law.” 220 U.S. at 519. Extension of the principle that penal statutes should be strictly construed requires that the prohibited acts be clearly identified in the regulation. M. Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946). The Court summarized these cases in Loving v. United States, 517 U.S. 748 (1996), drawing the conclusion that “there is no absolute rule . . . against Congress’ delegation of authority to define criminal punishments.”


180 488 U.S. at 377-78. “As for every other offense within the Commission’s jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments.” Id. at 378 n.11.
Delegation and Individual Liberties.—It has been argued in separate opinions by some Justices that delegations by Congress of power to affect the exercise of “fundamental freedoms” by citizens must be closely scrutinized to require the exercise of a congressional judgment about meaningful standards. The only pronouncement in a majority opinion, however, is that even with regard to the regulation of liberty the standards of the delegation “must be adequate to pass scrutiny by the accepted tests.” The standard practice of the Court has been to interpret the delegation narrowly so as to avoid constitutional problems.

Perhaps refining the delegation doctrine, at least in cases where Fifth Amendment due process interests are implicated, the Court held that a government agency charged with the efficient administration of the executive branch could not assert the broader interests that Congress or the President might have in barring lawfully resident aliens from government employment. The agency could assert only those interests Congress charged it with promoting, and if the action could be justified by other interests, the office with responsibility for promoting those interests must take the action.

CONGRESSIONAL INVESTIGATIONS

Source of the Power to Investigate

No provision of the Constitution expressly authorizes either House of Congress to make investigations and exact testimony to the end that it may exercise its legislative functions effectively and advisedly. But such a power had been frequently exercised by the British Parliament and by the Assemblies of the American Colonies prior to the adoption of the Constitution. It was asserted by the House of Representatives as early as 1792 when it appointed a...
committee to investigate the defeat of General St. Clair and his army by the Indians in the Northwest and empowered it to “call for such persons, papers, and records, as may be necessary to assist their inquiries.”\textsuperscript{186}

The Court has long since accorded its agreement with Congress that the investigatory power is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. “We are of the opinion,” wrote Justice Van Devanter, for a unanimous Court, “that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.”\textsuperscript{187}

And in a 1957 opinion generally hostile to the exercise of the investigatory power in the post-War years, Chief Justice Warren did not question the basic power. “The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”\textsuperscript{188} Justice Harlan summarized the matter in 1959. “The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might

\textsuperscript{186} 3 Annals of Congress 490–494 (1792); 3 A. Hinds’ Precedents of the House of Representatives 1725 (1907).
legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.  

Broad as the power of inquiry is, it is not unlimited. The power of investigation may properly be employed only "in aid of the legislative function." Its outermost boundaries are marked, then, by the outermost boundaries of the power to legislate. In principle, the Court is clear on the limitations, clear "that neither house of Congress possesses a 'general power of making inquiry into the private affairs of the citizen'; that the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it rightfully may take other action; that if the inquiry relates to 'a matter wherein relief or redress could be had only by a judicial proceeding' it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers; and that for the purpose of determining the essential character of the inquiry recourse must be had to the resolution or order under which it is made."  

In practice, much of the litigated dispute has been about the reach of the power to inquire into the activities of private citizens; inquiry into the administration of laws and departmental corruption, while of substantial political consequence, has given rise to fewer judicial precedents.

Investigations of Conduct of Executive Department

For many years the investigating function of Congress was limited to inquiries into the administration of the Executive Department or of instrumentalities of the Government. Until the administration of Andrew Jackson this power was not seriously challenged. During the controversy over renewal of the charter of the Bank of the United States, John Quincy Adams contended that an unlimited inquiry into the operations of the bank would be beyond the power of the House. Four years later the legislative
power of investigation was challenged by the President. A committee appointed by the House of Representatives “with power to send for persons and papers, and with instructions to inquire into the condition of the various executive departments, the ability and integrity with which they have been conducted, . . .” \(^{194}\) called upon the President and the heads of departments for lists of persons appointed without the consent of the Senate and the amounts paid to them. Resentful of this attempt “to invade the just rights of the Executive Departments,” the President refused to comply and the majority of the committee acquiesced. \(^{195}\) Nevertheless, congressional investigations of Executive Departments have continued to the present day. Shortly before the Civil War, contempt proceedings against a witness who refused to testify in an investigation of John Brown’s raid upon the arsenal at Harper’s Ferry occasioned a thorough consideration by the Senate of the basis of this power. After a protracted debate, which cut sharply across sectional and party lines, the Senate voted overwhelmingly to imprison the contumacious witness. \(^{196}\) Notwithstanding this firmly established legislative practice, the Supreme Court took a narrow view of the power in the case of \textit{Kilbourn v. Thompson}. \(^{197}\) It held that the House of Representatives had overstepped its jurisdiction when it instituted an investigation of losses suffered by the United States as a creditor of Jay Cooke and Company, whose estate was being administered in bankruptcy by a federal court. \(^{198}\) But nearly half a century later, in \textit{McGrain v. Daugherty}, \(^{199}\) it ratified in sweeping terms, the power of Congress to inquire into the administration of an executive department and to sift charges of malfeasance in such administration. \(^{200}\)

\(^{194}\) 13 CONG. DEB. 1057–1067 (1836).
\(^{195}\) H. R. Rep. No. 194, 24th Congress, 2d sess., 1, 12, 31 (1837).
\(^{196}\) CONG. GLOBE, 36th Congress, 1st sess., 1100–1109 (1860).
\(^{197}\) 103 U.S. 168 (1881).
\(^{198}\) The Court held that inasmuch as the entire proceedings arising out of the bankruptcy were pending in court, as the authorizing resolution contained no suggestion of contemplated legislation, as in fact no valid legislation could be enacted on the subject, and as the only relief which the United States could seek was judicial relief in the bankruptcy proceeding, the House had exceeded its powers in authorizing the inquiry. \textit{But see} Hutcheson v. United States, 369 U.S. 599 (1962).
\(^{199}\) 273 U.S. 135, 177, 178 (1927).
\(^{200}\) We consider elsewhere the topic of executive privilege, the claimed right of the President and at least some of his executive branch officers to withhold from Congress information desired by it or by one of its committees. Although the issue has been one of contention between the two branches of Government since Washington’s refusal in 1796 to submit certain correspondence to the House of Representatives relating to treaty negotiations, it has only recently become a judicial issue.
Investigations of Members of Congress

When either House exercises a judicial function, as in judging of elections or determining whether a member should be expelled, it is clearly entitled to compel the attendance of witnesses to disclose the facts upon which its action must be based. Thus, the Court held that since a House had a right to expel a member for any offense which it deemed incompatible with his trust and duty as a member, it was entitled to investigate such conduct and to summon private individuals to give testimony concerning it. The decision in Barry v. United States ex rel. Cunningham sanctioned the exercise of a similar power in investigating a senatorial election.

Investigations in Aid of Legislation

Purpose.—Beginning with the resolution adopted by the House of Representatives in 1827, which vested its Committee on Manufactures “with the power to send for persons and papers with a view to ascertain and report to this House in relation to a revision of the tariff duties on imported goods,” the two Houses have asserted the right to collect information from private persons as well as from governmental agencies when necessary to enlighten their judgment on proposed legislation. The first case to review the assertion saw a narrow view of the power taken and the Court held that the purpose of the inquiry was to pry improperly into private affairs without any possibility of legislating on the basis of what might be learned and further that the inquiry overstepped the bounds of legislative jurisdiction and invaded the provinces of the judiciary.

Subsequent cases, however, have given the Congress the benefit of a presumption that its object is legitimate and related to the possible enactment of legislation. Shortly after Kilbourn, the Court declared that “it was certainly not necessary that the resolution should declare in advance what the Senate meditated doing when the investigation was concluded” in order that the inquiry be under a lawful exercise of power. Similarly, in McGrain v. Daugherty, the investigation was presumed to have been undertaken in good faith to aid the Senate in legislating. Then, in Sinclair v. United States, on its facts presenting a close parallel to

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201 In re Chapman, 166 U.S. 661 (1897).
203 4 CONG. DEB. 862, 868, 888, 889 (1827).
204 Kilbourn v. Thompson, 103 U.S. 168 (1881).
205 In re Chapman, 166 U.S. 661, 670 (1897).
207 279 U.S. 263 (1929).
Kilbourn, the Court affirmed the right of the Senate to carry out investigations of fraudulent leases of government property after suit for recovery had been instituted. The president of the lessee corporation had refused to testify on the ground that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, asserting that the inquiry was not actually in aid of legislation. The Senate had prudently directed the investigating committee to ascertain what, if any, legislation might be advisable. Conceding “that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits,” the Court declared that the authority “to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.” 208

While Sinclair and McGrain involved inquiries into the activities and dealings of private persons, these activities and dealings were in connection with property belonging to the United States Government, so that it could hardly be said that the inquiries concerned the merely personal or private affairs of any individual. 209 But where the business, the activities and conduct, the behavior of individuals are subject to congressional regulation, there exists the power of inquiry, 210 and in practice the areas of any individual’s life immune from inquiry are probably fairly limited. “In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also contributed to the changed scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens.” 211 Inasmuch as Congress clearly has power to legislate to protect the Nation and its citizens from subversion, espionage, and sedition, 212 it has power to inquire into the existence of the dangers of domestic or foreign-based subversive activities in many areas of American

208 279 U.S. at 295.
209 279 U.S. at 294.
210 The first case so holding is ICC v. Brimson, 154 U.S. 447 (1894), which asserts that inasmuch as Congress could itself have made the inquiry to appraise its regulatory activities it could delegate the power of inquiry to the agency to which it had delegated the regulatory function.
Because its powers to regulate interstate commerce afford Congress the power to regulate corruption in labor-management relations, congressional committees may inquire into the extent of corruption in labor unions. Because of its powers to legislate to protect the civil rights of its citizens, Congress may investigate organizations which allegedly act to deny those civil rights. It is difficult in fact to conceive of areas into which congressional inquiry might not be carried, which is not the same, of course, as saying that the exercise of the power is unlimited.

One limitation on the power of inquiry which has been much discussed in the cases concerns the contention that congressional investigations often have no legislative purpose but rather are aimed at achieving results through “exposure” of disapproved persons and activities: “We have no doubt,” wrote Chief Justice Warren, “that there is no congressional power to expose for the sake of exposure.” Although some Justices, always in dissent, have attempted to assert limitations in practice based upon this concept, the majority of Justices has adhered to the traditional precept that courts will not inquire into legislators’ motives but will look only


218 Watkins v. United States, 354 U.S. 178, 200 (1957). The Chief Justice, however, noted: “We are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government when he wrote: ‘The informing function of Congress should be preferred even to its legislative function.’ Id. at 303. From the earliest times in its history, the Congress has assiduously performed an ‘informing function’ of this nature.” Id. at 200 n. 33.

In his book, Wilson continued, following the sentence quoted by the Chief Justice: “The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration.…. It would be hard to conceive of there being too much talk about the practical concerns … of government.” Congressional Government (1885), 303–304. For contrasting views of the reach of this statement, compare United States v. Rumely, 345 U.S. 41, 43 (1953), with Russell v. United States, 369 U.S. 749, 777–778 (1962) (Justice Douglas dissenting).

to the question of power. 220 “So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.” 221

**Protection of Witnesses; Pertinency and Related Matters.**—A witness appearing before a congressional committee is entitled to require of the committee a demonstration of its authority to inquire with regard to his activities and a showing that the questions asked of him are pertinent to the committee’s area of inquiry. A congressional committee possesses only those powers delegated to it by its parent body. The enabling resolution that has given it life also contains the grant and limitations of the committee’s power. 222 In *Watkins v. United States*, 223 Chief Justice Warren cautioned that “[b]roadly drafted and loosely worded ... resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee’s charter is, the greater becomes the possibility that the committee’s specific actions are not in conformity with the will of the parent House of Congress.” Speaking directly of the authorizing resolution, which created the House Un-American Activities Committee, 224 the Chief Justice thought it “difficult to imagine a less explicit authorizing resolution.” 225 But the far-reaching implications of these remarks were circumscribed by *Barenblatt v. United States*, 226 in which the Court, “[g]ranting the vagueness of the Rule,” noted that Congress had long since put upon it a persuasive gloss of legislative history through practice and interpretation, which, read with the enabling resolution, showed that “the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country.” 227 “[W]e must conclude that [the Committee’s] authority to conduct the inquiry presently under contro-
sideration is unassailable, and that ... the Rule cannot be said to be constitutionally infirm on the score of vagueness.”

Because of the usual precision with which authorizing resolutions have generally been drafted, few controversies have arisen about whether a committee has projected its inquiry into an area not sanctioned by the parent body. But in United States v. Rumely, the Court held that the House of Representatives, in authorizing a select committee to investigate lobbying activities devoted to the promotion or defeat of legislation, did not thereby intend to empower the committee to probe activities of a lobbyist that were unconnected with his representations directly to Congress but rather designed to influence public opinion by distribution of literature. Consequently the committee was without authority to compel the representative of a private organization to disclose the names of all who had purchased such literature in quantity.

Still another example of lack of proper authority is Gojack v. United States, in which the Court reversed a contempt citation because there was no showing that the parent committee had delegated to the subcommittee before whom the witness had appeared the authority to make the inquiry and neither had the full committee specified the area of inquiry. Watkins v. United States, remains the leading case on pertinency, although it has not the influence on congressional investigations that some hoped and some feared in the wake of its announcement. When questioned by a Subcommittee of the House Un-American Activities Committee, Watkins refused to supply the names of past associates, who, to his knowledge, had terminated their membership in the Communist Party and supported his non-compliance by, inter alia, contending that the questions were unrelated to the work of the Committee. Sustaining the witness, the Court emphasized that inasmuch as a witness by his refusal exposes himself to a criminal prosecution for contempt, he is entitled

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228 360 U.S. at 122–23. But note that in Stamler v. Willis, 415 F. 2d 1365 (7th Cir. 1969), cert. denied, 399 U.S. 929 (1970), the court ordered to trial a civil suit contesting the constitutionality of the Rule establishing the Committee on allegations of overbreadth and overbroad application, holding that Barenblatt did not foreclose the contention.


231 The Court intimated that if the authorizing resolution did confer such power upon the committee, the validity of the resolution would be subject to doubt on First Amendment principles. Justices Black and Douglas would have construed the resolution as granting the authority and would have voided it under the First Amendment. 345 U.S. at 48 (concurring opinion).


to be informed of the relation of the question to the subject of the investigation with the same precision as the due process clause requires of statutes defining crimes. 234

For ascertainment of the subject matter of an investigation, the witness might look, noted the Court, to several sources, including (1) the authorizing resolution, (2) the resolution by which the full committee authorized the subcommittee to proceed, (3) the introductory remarks of the chairman or other members, (4) the nature of the proceedings, (5) the chairman’s response to the witness when the witness objects to the line of question on grounds of pertinency. 235 Whether a precise delineation of the subject matter of the investigation in but one of these sources would satisfy the requirements of due process was left unresolved, since the Court ruled that in this case all of them were deficient in providing Watkins with the guidance to which he was entitled. The sources had informed Watkins that the questions were asked in a course of investigation of something that ranged from a narrow inquiry into Communist infiltration into the labor movement to a vague and unlimited inquiry into “subversion and subversive propaganda.” 236

By and large, the subsequent cases demonstrated that Watkins did not represent a determination by the Justices to restrain broadly the course of congressional investigations, though several contempt citations were reversed on narrow holdings. But with regard to pertinency, the implications of Watkins were held in check and, without amending its rules or its authorizing resolution, the Un-American Activities Committee was successful in convincing a majority of the Court that its subsequent investigations were authorized and that the questions asked of recalcitrant witnesses were pertinent to the inquiries. 237

234 354 U.S. at 208–09.
236 Id. See also Sacher v. United States, 356 U.S. 576 (1958), a per curiam reversal of a contempt conviction on the ground that the questions did not relate to a subject “within the subcommittee’s scope of inquiry,” arising out of a hearing pertaining to a recantation of testimony by a witness in which the inquiry drifted into a discussion of legislation barring Communists from practice at the federal bar, the unanswered questions being asked then; and Flaxer v. United States, 358 U.S. 147 (1958), a reversal for refusal to produce membership lists because of an ambiguity in the committee’s ruling on the time of performance; and Scull v. Virginia ex rel. Committee, 359 U.S. 344 (1959), a reversal on a contempt citation before a state legislative investigating committee on pertinency grounds.
237 Notice should be taken, however, of two cases which, though decided four and five years after Watkins, involved persons who were witnesses before the Un-American Activities Committee either shortly prior to or shortly following Watkins’ appearance and who were cited for contempt before the Supreme Court decided Watkins’ case.

In Deutch v. United States, 367 U.S. 456 (1961), involving an otherwise cooperative witness who had refused to identify certain persons with whom he had been
Thus, in *Barenblatt v. United States*, 238 the Court concluded that the history of the Un-American Activities Committee's activities, viewed in conjunction with the Rule establishing it, evinced clear investigatory authority to inquire into Communist infiltration in the field of education, an authority with which the witness had shown familiarity. Additionally, the opening statement of the chairman had pinpointed that subject as the nature of the inquiry that day and the opening witness had testified on the subject and had named Barenblatt as a member of the Communist Party at the University of Michigan. Thus, pertinency and the witness' knowledge of the pertinency of the questions asked him was shown. Similarly, in *Wilkinson v. United States*, 239 the Court held that when the witness was apprised at the hearing that the Committee was empowered to investigate Communist infiltration of the textile industry in the South, that it was gathering information with a view to ascertaining the manner of administration and need to amend various laws directed at subversive activities, that Congress hitherto had enacted many of its recommendations in this field, and that it was possessed of information about his Party membership, he was notified effectively that a question about that affiliation was relevant to a valid inquiry. A companion case was held to be controlled by *Wilkinson*, 240 and in both cases the majority rejected the contention that the Committee inquiry was invalid because both

associated at Cornell in Communist Party activities, the Court agreed that Deutch had refused on grounds of moral scruples to answer the questions and had not challenged them as not pertinent to the inquiry, but the majority ruled that the Government had failed to establish at trial the pertinency of the questions, thus vitiating the conviction. Justices Frankfurter, Clark, Harlan, and Whitaker dissented, arguing that any argument on pertinency had been waived but in any event thinking it had been established. Id. at 472, 475.

In *Russell v. United States*, 369 U.S. 749 (1962), the Court struck down contempt convictions for insufficiency of the indictments. Indictments, which merely set forth the offense in the words of the contempt statute, the Court asserted, in alleging that the unanswered questions were pertinent to the subject under inquiry but not identifying the subject in detail, are defective because they do not inform defendants what they must be prepared to meet and do not enable courts to decide whether the facts alleged are sufficient to support convictions. Justice Stewart for the Court noted that the indicia of subject matter under inquiry were varied and contradictory, thus necessitating a precise governmental statement of particulars. Justices Harlan and Clark in dissent contended that it was sufficient for the Government to establish pertinency at trial and noted that no objections relating to pertinency had been made at the hearings. Id. at 781, 789–793. Russell was cited in the *per curiam* reversals in *Grumman v. United States*, 370 U.S. 288 (1962), and *Silber v. United States*, 370 U.S. 717 (1962).

Wilkinson and Braden, when they were called, were engaged in organizing activities against the Committee. 241

Related to the cases discussed in this section are those cases requiring that congressional committees observe strictly their own rules. Thus, in Yellin v. United States, 242 a contempt conviction was reversed because the Committee had failed to observe its rule providing for a closed session if a majority of the Committee believed that a witness’ appearance in public session might unjustly injure his reputation. The Court ruled that the Committee had ignored the rule when it subpoenaed the witness for a public hearing and then in failing to consider as a Committee his request for a closed session. 243

Finally, it should be noted that the Court has blown hot and cold on the issue of a quorum as a prerequisite to a valid contempt citation and that no firm statement of a rule is possible, although it seems probable that ordinarily no quorum is necessary. 244

Protection of Witnesses; Constitutional Guarantees.—

"[T]he Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights." 245 Just as the Constitution places limitations on Congress’ power to legislate, so it limits the power to investigate. In this section, we

241 The majority denied that the witness’ participation in a lawful and protected course of action, such as petitioning Congress to abolish the Committee, limited the Committee’s right of inquiry. "[W]e cannot say that, simply because the petitioner at the moment may have been engaged in lawful conduct, his Communist activities in connection therewith could not be investigated. The subcommittee had reasonable ground to suppose that the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation. As the Barenblatt opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government’s overbalancing interest." Wilkinson v. United States, 365 U.S. 399, 414 (1961). In both cases, the dissenters, Chief Justice Warren and Justices Black, Douglas, and Brennan argued that the Committee action was invalid because it was intended to harass persons who had publicly criticized committee activities. Id. at 415, 423, 429.


243 Failure to follow its own rules was again an issue in Gojack v. United States, 384 U.S. 702 (1966), in which the Court noted that while a committee rule required the approval of a majority of the Committee before a “major” investigation was initiated, such approval had not been sought before a Subcommittee proceeded.

244 In Christoffel v. United States, 338 U.S. 84 (1949), the Court held that a witness can be found guilty of perjury only where a quorum of the committee is present at the time the perjury is committed; it is not enough to prove that a quorum was present when the hearing began. But in United States v. Bryan, 339 U.S. 323 (1950), the Court ruled that a quorum was not required under the statute punishing refusal to honor a valid subpoena issued by an authorized committee.

are concerned with the limitations the Bill of Rights places on the scope and nature of the congressional power to inquire.

The most extensive amount of litigation in this area has involved the privilege against self-incrimination guaranteed against governmental abridgment by the Fifth Amendment. Observance of the privilege by congressional committees has been so uniform that no court has ever held that it must be observed, though the dicta are plentiful. Thus, the cases have explored not the issue of the right to rely on the privilege but rather the manner and extent of its application.

There is no prescribed form in which one must plead the privilege. When a witness refused to answer a question about Communist Party affiliations and based his refusal upon the assertion by a prior witness of "the first amendment supplemented by the fifth," the Court held that he had sufficiently invoked the privilege, at least in the absence of committee inquiry seeking to force him to adopt a more precise stand. If the committee suspected that the witness was being purposely vague, in order perhaps to avoid the stigma attached to a forthright claim of the privilege, it should have requested him to state specifically the ground of his refusal to testify. Another witness, who was threatened with prosecution for his Communist activities, could claim the privilege even to some questions the answers to which he might have been able to explain away as unrelated to criminal conduct; if an answer might tend to be incriminatory, the witness is not deprived of the privilege merely because he might have been able to refute inferences of guilt. In still another case, the Court held that the Committee had not clearly overruled the claim of privilege and directed an answer.

The privilege against self-incrimination is not available as a defense to an organizational officer who refuses to turn over organization documents and records to an investigating committee.

In *Hutcheson v. United States*, the Court rejected a challenge to a Senate Committee inquiry into union corruption on the part of a witness who was under indictment in state court on charges relating to the same matters about which the Committee sought to interrogate him. The witness did not plead his privilege against self-incrimination but contended that by questioning him about matters which would aid the state prosecutor the Committee

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had denied him due process. The plurality opinion of the Court rejected his ground for refusing to answer, noting that if the Committee's public hearings rendered the witness' state trial unfair, then he could properly raise that issue on review of his state conviction. 252

Claims relating to the First Amendment have been frequently asserted and as frequently denied. It is not that the First Amendment is inapplicable to congressional investigations, it is that under the prevailing Court interpretation the First Amendment does not bar all legislative restrictions of the rights guaranteed by it. 253 "[T]he protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." 254

Thus, the Court has declined to rule that under the circumstances of the cases investigating committees are precluded from making inquiries simply because the subject area was education 255 or because the witnesses at the time they were called were engaged in protected activities such as petitioning Congress to abolish the inquiring committee. 256 However, in an earlier case, the Court intimated that it was taking a narrow view of the committee's authority because a determination that authority existed

252 Justice Harlan wrote the opinion of the Court which Justices Clark and Stewart joined. Justice Brennan concurred solely because the witness had not claimed the privilege against self-incrimination but he would have voted to reverse the conviction had there been a claim. Chief Justice Warren and Justice Douglas dissented on due process grounds. Justices Black, Frankfurter, and White did not participate. At the time of the decision, the self-incrimination clause did not restrain the States through the Fourteenth Amendment so that it was no violation of the clause for either the Federal Government or the States to compel testimony which would incriminate the witness in the other jurisdiction. Cf. United States v. Murdock, 284 U.S. 141 (1931); Knapp v. Schweitzer, 357 U.S. 371 (1958). The Court has since reversed itself, Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), thus leaving the vitality of Hutcheson doubtful.

253 The matter is discussed fully in the section on the First Amendment but a good statement of the balancing rule may be found in Younger v. Harris, 401 U.S. 37, 51 (1971). by Justice Black, supposedly an absolutist on the subject: "Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

would raise a serious First Amendment issue. And in a state legislative investigating committee case, the majority of the Court held that an inquiry seeking the membership lists of the National Association for the Advancement of Colored People was so lacking in a “nexus” between the organization and the Communist Party that the inquiry infringed the First Amendment.

Dicta in the Court’s opinions acknowledge that the Fourth Amendment guarantees against unreasonable searches and seizures are applicable to congressional committees. The issue would most often arise in the context of subpoenas, inasmuch as that procedure is the usual way by which committees obtain documentary material and inasmuch as Fourth Amendment standards apply as well to subpoenas as to search warrants. But there are no cases in which a holding turns on this issue.

Other constitutional rights of witnesses have been asserted at various times, but without success or even substantial minority support.

Sanctions of the Investigatory Power: Contempt

Explicit judicial recognition of the right of either House of Congress to commit for contempt a witness who ignores its summons or refuses to answer its inquiries dates from McGrain v. Daugherty. But the principle there applied had its roots in an early case, Anderson v. Dunn, which stated in broad terms the right of either branch of the legislature to attach and punish a person other than a member for contempt of its authority. The right to punish a contumacious witness was conceded in Marshall v. Gordon, although the Court there held that the implied power to

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260 See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and cases cited.
263 19 U.S. (6 Wheat.) 204 (1821).
264 The contempt consisted of an alleged attempt to bribe a Member of the House for his assistance in passing a claims bill. The case was a civil suit brought by Anderson against the Sergeant at Arms of the House for assault and battery and false imprisonment. Cf. Kilbourn v. Thompson, 103 U.S. 168 (1881). The power of a legislative body to punish for contempt one who disrupts legislative business was reaffirmed in Groppi v. Leslie, 404 U.S. 496 (1972), but a unanimous Court there held that due process required a legislative body to give a contemnor notice and an opportunity to be heard prior to conviction and sentencing. Although this case dealt with a state legislature, there is no question it would apply to Congress as well.
265 243 U.S. 521 (1917).
deal with contempt did not extend to the arrest of a person who published matter defamatory of the House.

The cases emphasize that the power to punish for contempt rests upon the right of self-preservation. That is, in the words of Chief Justice White, “the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed” necessitates the contempt power. Thus, in *Jurney v. MacCracken*, the Court turned aside an argument that the Senate had no power to punish a witness who, having been commanded to produce papers, destroyed them after service of the subpoena. The punishment would not be efficacious in obtaining the papers in this particular case, but the power to punish for a past contempt is an appropriate means of vindicating “the established and essential privilege of requiring the production of evidence.”

Under the rule laid down by *Anderson v. Dunn*, imprisonment by one of the Houses of Congress could not extend beyond the adjournment of the body which ordered it. Because of this limitation and because contempt trials before the bar of the House charging were time-consuming, in 1857 Congress enacted a statute providing for criminal process in the federal courts with prescribed penalties for contempt of Congress.

The Supreme Court has held that the purpose of this statute is merely supplementary of the power retained by Congress, and all constitutional objections to it were overruled. “We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved.”

Because Congress has invoked the aid of the federal judicial system in protecting itself against contumacious conduct, the consequence, the Court has asserted numerous times, is that the duty has been conferred upon the federal courts to accord a person prosecuted for his statutory offense every safeguard which the law ac-

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266 243 U.S. at 542.
267 294 U.S. 125 (1935).
268 294 U.S. at 150.
269 19 U.S. (6 Wheat.) 204 (1821).
271 In re Chapman, 166 U.S. 661, 671–672 (1897).
Sec. 2—House of Representatives

CORDS IN ALL OTHER FEDERAL CRIMINAL CASES, and the discussion in previous sections of many reversals of contempt convictions bears witness to the assertion in practice. What constitutional protections ordinarily necessitated by due process requirements, such as notice, right to counsel, confrontation, and the like, prevail in a contempt trial before the bar of one House or the other is an open question.

It has long been settled that the courts may not intervene directly to restrain the carrying out of an investigation or the manner of an investigation, and that a witness who believes the inquiry to be illegal or otherwise invalid in order to raise the issue must place himself in contempt and raise his beliefs as affirmative defenses on his criminal prosecution. This understanding was sharply reinforced when the Court held that the speech-or-debate clause utterly foreclosed judicial interference with the conduct of a congressional investigation, through review of the propriety of subpoenas or otherwise. It is only with regard to the trial of contempts that the courts may review the carrying out of congressional investigations and may impose constitutional and other constraints.

SECTION 2. Clause 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

CONGRESSIONAL DISTRICTING

A major innovation in constitutional law in recent years has been the development of a requirement that election districts in each State be so structured that each elected representative should represent substantially equal populations. While this require-

272 Sinclair v. United States, 279 U.S. 263, 296–297 (1929); Watkins v. United States, 354 U.S. 178, 207 (1957); Sacher v. United States, 356 U.S. 576, 577 (1958); Flaxer v. United States, 358 U.S. 147, 151 (1958); Deutch v. United States, 367 U.S. 456, 471 (1961); Russell v. United States, 369 U.S. 749, 755 (1962). Protesting the Court’s reversal of several contempt convictions over a period of years, Justice Clark was moved to suggest that “[t]his continued frustration of the Congress in the use of the judicial process to punish those who are contemptuous of its committees indicates to me that the time may have come for Congress to revert to its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House [affected].” Id. at 781; Watkins, 354 U.S. at 225.


275 The phrase “one person, one vote” which came out of this litigation might well seem to refer to election districts drawn to contain equal numbers of voters
ment has generally been gleaned from the equal protection clause of the Fourteenth Amendment, in *Wesberry v. Sanders*, the Court held that "construed in its historical context, the command of Art. 1, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."  

Court involvement in this issue developed slowly. In our early history, state congressional delegations were generally elected at-large instead of by districts, and even when Congress required single-member districting and later added a provision for equally populated districts the relief sought by voters was action by the House refusing to seat Members-elect selected under systems not in compliance with the federal laws. The first series of cases did not reach the Supreme Court, in fact, until the States began redistricting through the 1930 Census, and these were resolved without reaching constitutional issues and indeed without resolving the issue whether such voter complaints were justiciable at all. In the late 1940s and the early 1950s, the Court utilized the "political question" doctrine to decline to adjudicate districting and apportionment suits, a position changed in *Baker v. Carr*. For the Court in *Wesberry*, Justice Black argued that a reading of the debates of the Constitutional Convention conclusively demonstrated that the Framers had meant, in using the phrase "by the People," to guarantee equality of representation in rather than equal numbers of persons. But it seems clear from a consideration of all the Court's opinions and the results of its rulings that the statement in the text accurately reflects the constitutional requirement. The case expressly holding that total population, or the exclusion only of transients, is the standard is *Burns v. Richardson*, 384 U.S. 73 (1966), a legislative apportionment case. Notice that considerable population disparities exist from State to State, as a result of the requirement that each State receive at least one Member and the fact that state lines cannot be crossed in districting. At least under present circumstances, these disparities do not violate the Constitution. U.S. Department of Commerce v. Montana, 503 U.S. 442 (1992).  

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278 376 U.S. at 7.  
the election of Members of the House of Representatives. Justice Harlan in dissent argued that the statements relied on by the majority had uniformly been in the context of the Great Compromise—Senate representation of the States with Members elected by the state legislatures, House representation according to the population of the States, qualified by the guarantee of at least one Member per State and the counting of slaves as three-fifths of persons—and not at all in the context of intrastate districting. Further, he thought the Convention debates clear to the effect that Article I, § 4, had vested exclusive control over state districting practices in Congress, and that the Court action overrode a congressional decision not to require equally-populated districts.

The most important issue, of course, was how strict a standard of equality the Court would adhere to. At first, the Justices seemed inclined to some form of de minimis rule with a requirement that the State present a principled justification for the deviations from equality which any districting plan presented. But in Kirkpatrick v. Preisler, a sharply divided Court announced the rule that a State must make a “good-faith effort to achieve precise mathematical equality.” Therefore, “[u]nless population variances among congressional districts are shown to have resulted despite such [good-faith] effort [to achieve precise mathematical equality], the State must justify each variance, no matter how small.” The strictness of the test was revealed not only by the phrasing of the test but by the fact that the majority rejected every proffer of a justification which the State had made and which could likely be made. Thus, it was not an adequate justification that deviations resulted from (1) an effort to draw districts to maintain intact areas with distinct economic and social interests, (2) the requirements of legislative compromise, (3) a desire to maintain the integrity of political subdivision lines, (4) the exclusion from total population figures of certain military personnel and students...
not residents of the areas in which they were found, or an attempt to compensate for population shifts since the last census, or an effort to achieve geographical compactness.

Illustrating the strictness of the standard, the Court upheld a lower court voiding of a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons. Adhering to the principle of strict population equality in a subsequent case, the Court refused to find a plan valid simply because the variations were smaller than the estimated census undercount. Rejecting the plan, the difference in population between the most and least populous districts being 3,674 people, in a State in which the average district population was 526,059 people, the Court opined that, given rapid advances in computer technology, it is now “relatively simple to draw contiguous districts of equal population and at the same time . . . further whatever secondary goals the State has.”

Attacks on partisan gerrymandering have proceeded under equal-protection analysis, and, while the Court has held justiciable claims of denial of effective representation, the standards are so high neither voters nor minority parties have yet benefitted from the development.

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294 394 U.S. at 534–35. Justice Brennan questioned whether anything less than a total population basis was permissible but noted that the legislature in any event had made no consistent application of the rationale.

295 394 U.S. at 535. This justification would be acceptable if an attempt to establish shifts with reasonable accuracy had been made.

296 394 U.S. at 536. Justifications based upon “the unaesthetic appearance” of the map will not be accepted.

297 White v. Weiser, 412 U.S. 783 (1973). The Court did set aside the district court’s own plan for districting, instructing that court to adhere more closely to the legislature’s own plan insofar as it reflected permissible goals of the legislators, reflecting an ongoing deference to legislatures in this area to the extent possible.

298 Karcher v. Daggett, 462 U.S. 725 (1983). Illustrating the point about computer-generated plans containing absolute population equality is Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court), in which the court adopted a congressional-districting plan in which 18 of the 20 districts had 571,530 people each and each of the other two had 571,531 people.

ELECTOR QUALIFICATIONS

It was the original constitutional scheme to vest the determination of qualifications for electors in congressional elections solely in the discretion of the States, save only for the express requirement that the States could prescribe no qualifications other than those provided for voters for the more numerous branch of the legislature. This language has never been expressly changed, but the discretion of the States, and not only with regard to the qualifications of congressional electors, has long been circumscribed by express constitutional limitations and by judicial decisions. Further, beyond the limitation of discretion on the part of the States, Congress has assumed the power, with judicial acquiescence, to legislate to provide qualifications at least with regard to some elections. Thus, in the Voting Rights Act of 1965 Congress legislated changes of a limited nature in the literacy laws of some of the States, and in the Voting Rights Act Amendments of 1970 Congress successfully lowered the minimum voting age in federal elections and prescribed residency qualifications for presidential elections, the Court striking down an attempt to lower the minimum voting age for all elections. These developments greatly limited the discretion granted in Article I, § 2, cl. 1, and are more fully dealt with in the treatment of § 5 of the Fourteenth Amendment.

Notwithstanding the vesting of discretion to prescribe voting qualifications in the States, conceptually the right to vote for United States Representatives is derived from the Federal Con-

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300 The clause refers only to elections to the House of Representatives, of course, and, inasmuch as Senators were originally chosen by state legislatures and presidential electors as the States would provide, it was only with the qualifications for these voters with which the Constitution was originally concerned.
302 The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments limited the States in the setting of qualifications in terms of race, sex, payment of poll taxes, and age.
303 The Supreme Court’s interpretation of the equal protection clause has excluded certain qualifications. E.g., Carrington v. Rash, 380 U.S. 89 (1965); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). The excluded qualifications were in regard to all elections.
304 The power has been held to exist under § 5 of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980).
Clause 2. No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen.

QUALIFICATIONS OF MEMBERS OF CONGRESS

When the Qualifications Must Be Possessed

A question much disputed but now seemingly settled is whether a condition of eligibility must exist at the time of the election or whether it is sufficient that eligibility exist when the Member-elect presents himself to take the oath of office. While the language of the clause expressly makes residency in the State a condition at the time of election, it now appears established in congressional practice that the age and citizenship qualifications need only be met when the Member-elect is to be sworn. Exclusivity of Constitutional Qualifications

Congressional Additions. — Writing in The Federalist with reference to the election of Members of Congress, Hamilton firmly stated that “[t]he qualifications of the persons who may . . . be chosen . . . are defined and fixed in the constitution; and are unalterable by the legislature.” Until the Civil War, the issue was not
raised, the only actions taken by either House conforming to the idea that the qualifications for membership could not be enlarged by statute or practice. But in the passions aroused by the fratricidal conflict, Congress enacted a law requiring its members to take an oath that they had never been disloyal to the National Government. Several persons were refused seats by both Houses because of charges of disloyalty, and thereafter House practice, and Senate practice as well, was erratic. But in Powell v. McCormack, it was conclusively established that the qualifications listed in cl. 2 are exclusive and that Congress could not add to them by excluding Members-elect not meeting the additional qualifications.

Powell was excluded from the 90th Congress on grounds that he had asserted an unwarranted privilege and immunity from the process of a state court, that he had wrongfully diverted House funds for his own uses, and that he had made false reports on the expenditures of foreign currency. The Court determination that he had been wrongfully excluded proceeded in the main from the Court’s analysis of historical developments, the Convention de-
bates, and textual considerations. This process led the Court to conclude that Congress’ power under Article I, § 5 to judge the qualifications of its Members was limited to ascertaining the presence or absence of the standing qualifications prescribed in Article I, § 2, cl. 2, and perhaps in other express provisions of the Constitution. The conclusion followed because the English parliamentary practice and the colonial legislative practice at the time of the drafting of the Constitution, after some earlier deviations, had settled into a policy that exclusion was a power exercisable only when the Member-elect failed to meet a standing qualification because in the Constitutional Convention the Framers had defeated provisions allowing Congress by statute either to create property qualifications or to create additional qualifications without limitation, and because both Hamilton and Madison in the Federalist Papers and Hamilton in the New York ratifying convention had strongly urged that the Constitution prescribed exclusive qualifications for Members of Congress.

Further, the Court observed that the early practice of Congress, with many of the Framers serving, was consistently limited to the view that exclusion could be exercised only with regard to a Member-elect failing to meet a qualification expressly prescribed in the Constitution. Not until the Civil War did contrary precedents appear, and later practice was mixed. Finally, even were the intent of the Framers less clear, said the Court, it would still be compelled to interpret the power to exclude narrowly. “A fundamental principle of our representative democracy is, in Hamilton’s words, ‘that the people should choose whom they please to govern them.’ 2 Elliot’s Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison’s warning, borne out in the Wilkes case and some of Congress’ own post-Civil War exclusion cases, against ‘vesting an improper and dangerous power in the Legislature.’ 2 Farrand 249.”

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327 395 U.S. at 532–39.
328 395 U.S. at 539–41.
329 395 U.S. at 541–47.
in effective participation in the electoral process, an interest which could be protected by a narrow interpretation of Congressional power.\footnote{331}

The result in the \textit{Powell} case had been foreshadowed earlier when the Court held that the exclusion of a Member-elect by a state legislature because of objections he had uttered to certain national policies constituted a violation of the First Amendment and was void.\footnote{332} In the course of that decision, the Court denied state legislators the power to look behind the willingness of any legislator to take the oath to support the Constitution of the United States, prescribed by Article VI, cl. 3, to test his sincerity in taking it.\footnote{333} The unanimous Court noted the views of Madison and Hamilton on the exclusivity of the qualifications set out in the Constitution and alluded to Madison's view that the unfettered discretion of the legislative branch to exclude members could be abused in behalf of political, religious or other orthodoxies.\footnote{334} The First Amendment holding and the holding with regard to testing the sincerity with which the oath of office is taken is no doubt as applicable to the United States Congress as to state legislatures.

\textit{State Additions}.—However much Congress may have deviated from the principle that the qualifications listed in the Constitution are exclusive when the issue has been congressional enlargement of those qualifications, it has been uniform in rejecting efforts by the States to enlarge the qualifications. Thus, the House in 1807 seated a Member-elect who was challenged as not being in compliance with a state law imposing a twelve-month durational residency requirement in the district, rather than the federal requirement of being an inhabitant of the State at the time of election; the state requirement, the House resolved, was unconstitutional.\footnote{335} Similarly, both the House and Senate have seated other Members-elect who did not meet additional state qualifications or who suffered particular state disqualifications on eligibility, such as running for Congress while holding particular state offices.

\footnote{331}{The protection of the voters' interest in being represented by the person of their choice is thus analogized to their constitutionally secured right to cast a ballot and have it counted in general elections, \textit{Ex parte Yarbrough}, 110 U.S. 651 (1884), and in primary elections, \textit{United States v. Classic}, 313 U.S. 299 (1941), to cast a ballot undiluted in strength because of unequally populated districts, \textit{Wesberry v. Sanders}, 376 U.S. 1 (1964), and to cast a vote for candidates of their choice unfettered by onerous restrictions on candidate qualification for the ballot, \textit{Williams v. Rhodes}, 393 U.S. 23 (1968).}

\footnote{332}{\textit{Bond v. Floyd}, 385 U.S. 116 (1966).}

\footnote{333}{385 U.S. at 129–31, 132, 135.}

\footnote{334}{385 U.S. at 135 n.13.}

\footnote{335}{1 \textit{Hinds' Precedents of the House of Representatives} § 414 (1907).}
The Supreme Court reached the same conclusion as to state power, albeit by a surprisingly close 5-4 vote, in *U.S. Term Limits, Inc. v. Thornton.* The majority was composed of Justice Stevens (writing the opinion of the Court) and Justices Kennedy, Souter, Ginsburg, and Breyer. Dissenting were Justice Thomas (writing the opinion) and Chief Justice Rehnquist and Justices O'Connor and Scalia.

Article I, § 2, cl. 2, provides that a person may qualify as a Representative if she is at least 25 years old, has been a United States citizen for at least 7 years, and is an inhabitant, at the time of the election, of the State in which she is chosen. The qualifications established for Senators, Article I, § 3, cl. 3, are an age of 30 years, nine years' citizenship, and being an inhabitant of the State at the time of election.

The four-Justice dissent argued that while Congress has no power to increase qualifications, the States do. 514 U.S. at 845.

Six years later, the Court relied on *Thornton* to invalidate a Missouri law requiring that labels be placed on ballots alongside the names of congressional candidates who had “disregarded voters' instruction on term limits” or declined to pledge support for term limits.

Both majority and dissenting opinions in *Thornton* were richly embellished with disputatious arguments about the text of the Constitution, the history of its drafting and ratification, and the practices of Congress and the States in the nation's early years, and these differences over text, creation, and practice derived from disagreement about the fundamental principle underlying the Constitution's adoption.

In the dissent's view, the Constitution was the result of the resolution of the peoples of the separate States to create the National Government. The conclusion to be drawn from this was that the peoples in the States agreed to surrender only those powers expressly forbidden them and those limited powers that they had delegated to the Federal Government expressly or by necessary implication. They retained all other powers and still retain them. Thus, "where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it." The Constitution's silence

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336 514 U.S. 779 (1995). The majority was composed of Justice Stevens (writing the opinion of the Court) and Justices Kennedy, Souter, Ginsburg, and Breyer. Dissenting were Justice Thomas (writing the opinion) and Chief Justice Rehnquist and Justices O'Connor and Scalia. Id. at 845.

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338 The four-Justice dissent argued that while Congress has no power to increase qualifications, the States do. 514 U.S. at 845.

339 514 U.S. at 848 (Justice Thomas dissenting).


341 514 U.S. at 848 (Justice Thomas dissenting). See generally id. at 846–65.
as to authority to impose additional qualifications meant that this power resides in the states.

The majority’s views were radically different. After the adoption of the Constitution, the states had two kinds of powers: reserved powers that they had before the founding and that were not surrendered to the Federal Government, and those powers delegated to them by the Constitution. It followed that the States could have no reserved powers with respect to the Federal Government. “As Justice Story recognized, ‘the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.’” 342 The States could not before the founding have possessed powers to legislate respecting the Federal Government, and since the Constitution did not delegate to the States the power to prescribe qualifications for Members of Congress, the States did not have any such power. 343

Evidently, the opinions in this case reflect more than a decision on this particular dispute. They rather represent conflicting philosophies within the Court respecting the scope of national power in relation to the States, an issue at the core of many controversies today.

Clause 3. [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons]. 344

The actual Enumeration shall be made within three Years after

342 514 U.S. at 802. 343 514 U.S. at 798-805. And see id. at 838–45 (Justice Kennedy concurring). The Court applied similar reasoning in Cook v. Gralike, 531 U.S. 510, 522-23 (2001), invalidating ballot labels identifying congressional candidates who had not pledged to support term limits. Because congressional offices arise from the Constitution, the Court explained, no authority to regulate these offices could have preceded the Constitution and been reserved to the states, and the ballot labels were not valid exercise of the power granted by Article I, § 4 to regulate the “manner” of holding elections. See discussion under Federal Legislation Protecting Electoral Process, infra. 344 The part of this clause relating to the mode of apportionment of representatives among the several States was changed by the Fourteenth Amendment, § 2 and as to taxes on incomes without apportionment, by the Sixteenth Amendment.
the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut, five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

**APPORTIONMENT OF SEATS IN THE HOUSE**

**The Census Requirement**

The Census Clause “reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; and that Congress, not the States, would determine the manner of conducting the census.”

These determinations “all suggest a strong constitutional interest in accuracy.” The language employed – “actual enumeration” – requires an actual count, but gives Congress wide discretion in determining the methodology of that count. The word “enumeration” refers to a counting process without describing the count’s methodological details. The word “actual” merely refers to the enumeration to be used for apportioning the Third Congress, and thereby distinguishes “a deliberately taken count” from the conjectural approach that had been used for the First Congress. Finally, the conferral of authority on Congress to “direct” the “manner” of enumeration underscores “the breadth of congressional methodological authority.” Thus, the Court held in *Utah v. Evans*, “hot deck imputation,” a method used to fill in missing data by imputing to an address the number of persons found at a nearby address or unit of the same type, does not run

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346 Id.
afoul of the “actual enumeration” requirement. The Court distinguished imputation from statistical sampling, and indicated that its holding was relatively narrow. Imputation was permissible “where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely.”

While the Census Clause expressly provides for an enumeration of persons, Congress has expanded the scope of the census by including not only the free persons in the States, but also those in the territories, and by requiring all persons over eighteen years of age to answer an ever-lengthening list of inquiries concerning their personal and economic affairs. This extended scope of the census has received the implied approval of the Supreme Court, and is one of the methods whereby the national legislature exercises its inherent power to obtain the information necessary for intelligent legislative action.

Although taking an enlarged view of its census power, Congress has not always complied with its positive mandate to reapportion representatives among the States after the census is taken. It failed to make such a reapportionment after the census of 1920, being unable to reach agreement for allotting representation without further increasing the size of the House. Ultimately, by the act of June 18, 1929, it provided that the membership of the House of Representatives should henceforth be restricted to 435 members, to be distributed among the States by the so-called “method of major fractions,” which had been earlier employed in the apportionment of 1911, and which has now been replaced with

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348 See also Wisconsin v. City of New York, 517 U.S. 1 (1996), in which the Court held that the decision of the Secretary of Commerce not to conduct a post-enumeration survey and statistical adjustment for an undercount in the 1990 Census was reasonable and within the bounds of discretion conferred by the Constitution and statute; and Franklin v. Massachusetts, 505 U.S. 788 (1992), upholding the practice of the Secretary of Commerce in allocating overseas federal employees and military personnel to the States of last residence. The mandate of an enumeration of “their respective numbers” was complied with, having been the practice since the first enumeration to allocate persons to the place of their “usual residence,” and to construe both this term and the word “inhabitant” broadly to include people temporarily absent.
349 Knox v. Lee (Legal Tender Cases). 79 U.S. (12 Wall.) 457, 536 (1871) (“Who questions the power to [count persons in the territories or] collect[ ] ... statistics respecting age, sex, and production?”).
350 For an extensive history of the subject, see L. Schmeckebier, CONGRESSIONAL APPORTIONMENT (1941).
the “method of equal proportions.” Following the 1990 census, a State that had lost a House seat as a result of the use of this formula sued, alleging a violation of the “one person, one vote” rule derived from Article I, § 2. Exhibiting considerable deference to Congress and a stated appreciation of the difficulties in achieving interstate equalities, the Supreme Court upheld the formula and the resultant apportionment. The goal of absolute population equality among districts “is realistic and appropriate” within a single state, but the constitutional guarantee of one Representative for each state constrains application to districts in different states, and makes the goal “illusory for the Nation as a whole.”

While requiring the election of Representatives by districts, Congress has left it to the States to draw district boundaries. This has occasioned a number of disputes. In *Ohio ex rel. Davis v. Hildebrant*, a requirement that a redistricting law be submitted to a popular referendum was challenged and sustained. After the reapportionment made pursuant to the 1930 census, deadlocks between the Governor and legislature in several States produced a series of cases in which the right of the Governor to veto a reapportionment bill was questioned. Contrasting this function with other duties committed to state legislatures by the Constitution, the Court decided that it was legislative in character and subject to gubernatorial veto to the same extent as ordinary legislation under the terms of the state constitution.

Clause 4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

**IN GENERAL**

The Supreme Court has not interpreted this clause.

Clause 5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

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353 503 U.S. at 463. “The need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50,” the Court explained. Id.
SECTION 3. Clause 1. [The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six Years; and each Senator shall have one vote].

Clause 2. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year, [and if Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies].

IN GENERAL

Clause 1 has been completely superseded by the Seventeenth Amendment, and Clause 2 has been partially superseded.

Clause 3. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Clause 4. The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

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356 See Seventeenth Amendment.
357 See Seventeenth Amendment.
358 See Seventeenth Amendment.
Clause 5. The Senate shall choose their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of the President of the United States.

IN GENERAL
The Supreme Court has not interpreted these clauses.

Clause 6. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Clause 7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

IN GENERAL
See analysis of impeachment under Article II, sec. 4.

SECTION 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators.

LEGISLATION PROTECTING ELECTORAL PROCESS
By its terms, Art. I, § 4, cl. 1 empowers both Congress and state legislatures to regulate the “times, places and manner of holding elections for Senators and Representatives.” Not until 1842, when it passed a law requiring the election of Representa-
Art. I—Legislative Department

Sec. 4—Elections  Cl. 1—Times, Places, and Manner

tives by districts, did Congress undertake to exercise this power. In subsequent years, Congress expanded on the requirements, successively adding contiguity, compactness, and substantial equality of population to the districting requirements. However, no challenge to the seating of Members-elect selected in violation of these requirements was ever successful, and Congress deleted the standards from the 1929 apportionment act.

In 1866 Congress was more successful in legislating to remedy a situation under which deadlocks in state legislatures over the election of Senators were creating vacancies in the office. The act required the two houses of each legislature to meet in joint session on a specified day and to meet every day thereafter until a Senator was selected.

The first comprehensive federal statute dealing with elections was adopted in 1870 as a means of enforcing the Fifteenth Amendment’s guarantee against racial discrimination in granting suffrage rights. Under the Enforcement Act of 1870, and subsequent laws, false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required

\[\text{ART. I—LEGISLATIVE DEPARTMENT} 125\]

\[\text{Sec. 4—Elections} \quad \text{Cl. 1—Times, Places, and Manner}\]

\[\text{359} \quad \text{5 Stat. 491 (1842). The requirement was omitted in 1850, 9 Stat. 428, but was adopted again in 1862. 12 Stat. 572.}\]

\[\text{360} \quad \text{The 1872 Act, 17 Stat. 28, provided that districts should contain “as nearly as practicable” equal numbers of inhabitants, a provision thereafter retained. In 1901, 31 Stat. 733, a requirement that districts be composed of “compact territory” was added. These provisions were repeated in the next Act, 37 Stat. 13 (1911), there was no apportionment following the 1920 Census, and the permanent 1929 Act omitted the requirements. 46 Stat. 13. Cf. Wood v. Broom, 287 U.S. 1 (1932).}\]

\[\text{361} \quad \text{The first challenge was made in 1843. The committee appointed to inquire into the matter divided, the majority resolving that Congress had no power to bind the States in regard to their manner of districting, the minority contending to the contrary. H. Rep. No. 60, 28th Congress, 1st sess. (1843). The basis of the majority view was that while Article I, § 4 might give Congress the power to create the districts itself, the clause did not authorize Congress to tell the state legislatures how to do it if the legislatures were left the task of drawing the lines. L. Schmeckebier, Congressional Apportionment 135–138 (1941). This argument would not appear to be maintainable in light of the language in Ex parte Siebold, 100 U.S. 371, 383–386 (1880).}\]

\[\text{362} \quad \text{46 Stat. 13 (1929). In 1967, Congress restored the single-member district requirement. 81 Stat. 581, 2 U.S.C. § 2c.}\]

\[\text{363} \quad \text{14 Stat. 243 (1866). Still another such regulation was the congressional specification of a common day for the election of Representatives in all the States. 17 Stat. 28 (1872), 2 U.S.C. § 7.}\]

\[\text{364} \quad \text{Article I, § 4, and the Fifteenth Amendment have had quite different applications. The Court insisted that under the latter, while Congress could legislate to protect the suffrage in all elections, it could do so only against state interference based on race, color, or previous condition of servitude, James v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1876), whereas under the former it could also legislate against private interference for whatever motive, but only in federal elections. Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Yarbrough, 110 U.S. 651 (1884).}\]
of him by state or federal law were made federal offenses. Provi-

365 Provision was made for the appointment by federal judges of persons to

attend at places of registration and at elections with authority to

challenge any person proposing to register or vote unlawfully, to

witness the counting of votes, and to identify by their signatures

the registration of voters and election tally sheets. When the

Democratic Party regained control of Congress, these pieces of Re-

construction legislation dealing specifically with elections were re-

pealed, but other statutes prohibiting interference with civil

rights generally were retained and these were utilized in later

years. More recently, Congress has enacted, in 1957, 1960, 1964,


the right to vote in all elections, federal, state, and local, through

the assignment of federal registrars and poll watchers, suspension

of literacy and other tests, and the broad proscription of intimidat-

ion and reprisal, whether with or without state action. 368

Another chapter was begun in 1907 when Congress passed the

Tillman Act, prohibiting national banks and corporations from

making contributions in federal elections. 369 The Corrupt Prac-

tices Act, first enacted in 1910 and replaced by another law in 1925,

extended federal regulation of campaign contributions and expendi-

tures in federal elections, 370 and other acts have similarly provided

other regulations. 371

365 The Enforcement Act of May 31, 1870, 16 Stat. 140; The Force Act of Feb-


The text of these and other laws and the history of the enactments and subsequent
developments are set out in R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST
FOR A SWORD (1947).

366 The constitutionality of sections pertaining to federal elections was sustained

in Ex parte Siebold, 100 U.S. 371 (1880), and Ex parte Yarbrough, 110 U.S. 651

(1884). The legislation pertaining to all elections was struck down as going beyond

Congress’ power to enforce the Fifteenth Amendment. United States v. Reese, 92

U.S. 214 (1876).

367 28 Stat. 144 (1894).

368 P.L. 85–315, Part IV, § 131, 71 Stat. 634, 637 (1957); P.L. 86–449, Title III,


205, 96 Stat. 131 (1982). Most of these statutes are codified in 42 U.S.C. § 1971 et


regulation is now provided by the Federal Election Campaign Act of 1971, 86 Stat.

3, and the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, as

amended, 90 Stat. 475, found in titles 2, 5, 18, and 26 of the U.S. Code. See Buckley


371 E.g., the Hatch Act, relating principally to federal employees and state and

local governmental employees engaged in programs at least partially financed with

As we have noted above, although § 2, cl. 1, of this Article vests in the States the responsibility, now limited, to establish voter qualifications for congressional elections, the Court has held that the right to vote for Members of Congress is derived from the Federal Constitution, and that Congress therefore may legislate under this section of the Article to protect the integrity of this right. Congress may protect the right of suffrage against both official and private abridgment. Where a primary election is an integral part of the procedure of choice, the right to vote in that primary election is subject to congressional protection. The right embraces, of course, the opportunity to cast a ballot and to have it counted honestly. Freedom from personal violence and intimidation may be secured. The integrity of the process may be safeguarded against a failure to count ballots lawfully cast or the dilution of their value by the stuffing of the ballot box with fraudulent ballots. But the bribery of voters, although within reach of congressional power under other clauses of the Constitution, has been held not to be an interference with the rights guaranteed by this section to other qualified voters.

To accomplish the ends under this clause, Congress may adopt the statutes of the States and enforce them by its own sanctions. It may punish a state election officer for violating his duty under a state law governing congressional elections. It may, in short, utilize its power under this clause, combined with the necessary-and-proper clause, to regulate the times, places, and manner of electing Members of Congress so as to fully safeguard the integrity of the process; it may not, however, under this clause, provide different qualifications for electors than those provided by the States.

373 313 U.S. at 315; Buckley v. Valeo, 424 U. S. 1, 13 n.16 (1976).
376 Ex parte Yarbrough, 110 U.S. 651 (1884).
380 Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Clarke, 100 U.S. 399 (1880); United States v. Gale, 109 U.S. 65 (1883); In re Coy, 127 U.S. 731 (1888).
381 Ex parte Siebold, 100 U.S. 371 (1880).
382 But in Oregon v. Mitchell, 400 U.S. 112 (1970), Justice Black grounded his vote to uphold the age reduction in federal elections and the presidential voting residency provision sections of the Voting Rights Act Amendments of 1970 on this clause. Id. at 119–35. Four Justices specifically rejected this construction, id. at
State authority to regulate the “times, places, and manner” of holding congressional elections has also been tested, and has been described by the Court as “embrac[ing] authority to provide a complete code for congressional elections ...; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.” 383 The Court has upheld a variety of state laws designed to ensure that elections – including federal elections – are fair and honest and orderly. 384 But the Court distinguished state laws that go beyond “protection of the integrity and regularity of the election process,” and instead operate to disadvantage a particular class of candidates. 385 Term limits, viewed as serving the dual purposes of “disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clause,” crossed this line, 386 as did ballot labels identifying candidates who disregarded voters’ instructions on term limits or declined to pledge support for them. 387 “[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.” 388

Clause 2. [The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by law appoint a different Day]. 389

IN GENERAL

This Clause was superseded by the Twentieth Amendment.

SECTION 5. Clause 1. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business;

209–12, 288–92, and the other four implicitly rejected it by relying on totally different sections of the Constitution in coming to the same conclusions as did Justice Black.


388 See Twentieth Amendment.
Sec. 5—Powers and Duties of the Houses

but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Clause 2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Clause 3. Each House shall keep a Journal of its Proceedings and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Clause 4. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

POWERS AND DUTIES OF THE HOUSES

Power To Judge Elections

Each House, in judging of elections under this clause, acts as a judicial tribunal, with like power to compel attendance of witnesses. In the exercise of its discretion, it may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there is good reason to believe that otherwise such witness would not be forthcoming. It may punish perjury committed in testifying before a notary public upon a contested election. The power to judge elections extends to an investigation of expenditures made to influence nominations at a primary election. Refusal to permit a person presenting credentials in due form to take the oath of office does not oust the jurisdiction of the

391 In re Loney, 134 U.S. 372 (1890).
Senate to inquire into the legality of the election. Nor does such refusal unlawfully deprive the State which elected such person of its equal suffrage in the Senate.

“A Quorum To Do Business”

For many years the view prevailed in the House of Representatives that it was necessary for a majority of the members to vote on any proposition submitted to the House in order to satisfy the constitutional requirement for a quorum. It was a common practice for the opposition to break a quorum by refusing to vote. This was changed in 1890, by a ruling made by Speaker Reed and later embodied in Rule XV of the House, that members present in the chamber but not voting would be counted in determining the presence of a quorum. The Supreme Court upheld this rule in United States v. Ballin, saying that the capacity of the House to transact business is “created by the mere presence of a majority,” and that since the Constitution does not prescribe any method for determining the presence of such majority “it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact.” The rules of the Senate provide for the ascertainment of a quorum only by a roll call, but in a few cases it has held that if a quorum is present, a proposition can be determined by the vote of a lesser number of members.

Rules of Proceedings

In the exercise of their constitutional power to determine their rules of proceedings, the Houses of Congress may not “ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House ... The power to make rules is not one which once exercised is exhausted. It is a contin-
Sec. 5—Powers and Duties of the Houses

uous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal." Where a rule affects private rights, the construction thereof becomes a judicial question. In *United States v. Smith*, the Court held that the Senate’s attempt to reconsider its confirmation of a person nominated by the President as Chairman of the Federal Power Commission was not warranted by its rules and did not deprive the appointee of his title to the office. In *Christoffel v. United States*, a sharply divided Court upset a conviction for perjury in the district courts of one who had denied under oath before a House committee any affiliation with Communism. The reversal was based on the ground that inasmuch as a quorum of the committee, while present at the outset, was not present at the time of the alleged perjury, testimony before it was not before a “competent tribunal” within the sense of the District of Columbia Code. Four Justices, speaking by Justice Jackson, dissented, arguing that under the rules and practices of the House, “a quorum once established is presumed to continue unless and until a point of no quorum is raised” and that the Court was, in effect, invalidating this rule, thereby invalidating at the same time the rule of self-limitation observed by courts “where such an issue is tendered.”

**Powers of the Houses Over Members**

Congress has authority to make it an offense against the United States for a Member, during his continuance in office, to receive compensation for services before a government department in relation to proceedings in which the United States is interested. Such a statute does not interfere with the legitimate authority of the Senate or House over its own Members. In upholding the power of the Senate to investigate charges that some Senators had been speculating in sugar stocks during the consideration of a tariff bill, the Supreme Court asserted that “the right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a Member.” It cited with apparent approval the action of the Senate in expelling

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400 United States v. Ballin, 144 U.S. 1, 5 (1892). The Senate is “a continuing body.” McGrain v. Daugherty, 273 U.S. 135, 181–182 (1927). Hence its rules remain in force from Congress to Congress except as they are changed from time to time, whereas those of the House are readopted at the outset of each new Congress.

401 286 U.S. 6 (1932).

402 338 U.S. 84 (1949).

403 338 U.S. at 87–90.

404 338 U.S. at 92–95.

405 Burton v. United States, 202 U.S. 344 (1906).

406 In re Chapman, 166 U.S. 661 (1897).
William Blount in 1797 for attempting to seduce from his duty an American agent among the Indians and for negotiating for services in behalf of the British Government among the Indians—conduct which was not a “statutable offense” and which was not committed in his official character, nor during the session of Congress nor at the seat of government.  

In *Powell v. McCormack*, a suit challenging the exclusion of a Member-elect from the House of Representatives, it was argued that inasmuch as the vote to exclude was actually in excess of two-thirds of the Members it should be treated simply as an expulsion. The Court rejected the argument, noting that the House precedents were to the effect that it had no power to expel for misconduct occurring prior to the Congress in which the expulsion is proposed, as was the case of Mr. Powell’s alleged misconduct, but basing its rejection on its inability to conclude that if the Members of the House had been voting to expel they would still have cast an affirmative vote in excess of two-thirds.

**Duty To Keep a Journal**

The object of the clause requiring the keeping of a Journal is “to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents.” When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was present, though not disclosed by the yeas and nays, is final. But when an enrolled bill, which has been signed by the Speaker of the House and by the President of the Senate, in open session receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the Journals of either House that an act so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.

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409 395 U.S. at 506–512.
411 United States v. Ballin, 144 U.S. 1, 4 (1892).
412 *Field v. Clark*, 143 U.S. 649 (1892); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911). See the dispute in the Court with regard to the application of *Field* in an origination clause dispute. United States v. Munoz-Flores, 495 U.S. 385, 391 n. 4 (1990), and id. at 408 (Justice Scalia concurring in the judgment). A parallel rule
SECTION 6. Clause 1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

COMPENSATION AND IMMUNITIES OF MEMBERS

Congressional Pay

With the surprise ratification of the Twenty-Seventh Amendment, it is now the rule that congressional legislation "varying"—note that the Amendment applies to decreases as well as increases—the level of legislators' pay may not take effect until an intervening election has occurred. The only real controversy likely to arise in the interpretation of the new rule is whether pay increases that result from automatic alterations in pay are subject to the same requirement or whether it is only the initial enactment of the automatic device that is covered. That is, from the founding to 1967, congressional pay was determined directly by Congress in specific legislation setting specific rates of pay. In 1967, a law was passed that created a quadrennial commission with the responsibility to propose to the President salary levels for top officials of the Government, including Members of Congress. In 1975, Congress legislated to bring Members of Congress within a separate commission system authorizing the President to recommend annual increases for civil servants to maintain pay comparability with private-sector employees. These devices were attacked by dissenting Members of Congress as violating the mandate of clause 1 that compensation be "ascertained by Law[.]" However, these chal-

413 Leser v. Garnett, 258 U.S. 130, 137 (1922); see also Coleman v. Miller, 307 U.S. 433 (1939).
415 P. L. 94–82, § 204(a), 89 Stat. 421.
Thereafter, prior to ratification of the Amendment, Congress in the Ethics Reform Act of 1989, altered both the pay-increase and the cost-of-living-increase provisions of law, making quadrennial pay increases effective only after an intervening congressional election and making cost-of-living increases dependent upon a specific congressional vote. Litigation of the effect of the Amendment is ongoing.

Privilege From Arrest

This clause is practically obsolete. It applies only to arrests in civil suits, which were still common in this country at the time the Constitution was adopted. It does not apply to service of process in either civil or criminal cases. Nor does it apply to arrest in any criminal case. The phrase “treason, felony or breach of the peace” is interpreted to withdraw all criminal offenses from the operation of the privilege.

Privilege of Speech or Debate

Members.—This clause represents “the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.” So Justice Harlan explained the significance of the speech-and-debate clause, the ancestry of which traces back to a clause in the English Bill of Rights of 1689 and the history of which traces back almost to the beginning of the development of Parliament as an independent force. “In the American govern-

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419 Long v. Ansell, 293 U.S. 76 (1934).
420 293 U.S. at 83.
424 “That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.” 1 W. & M., Sess. 2, c. 2.
mental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.”

“The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.”

The protection of this clause is not limited to words spoken in debate. “Committee reports, resolutions, and the act of voting are equally covered, as are ‘things generally done in a session of the House by one of its members in relation to the business before it.’” Thus, so long as legislators are “acting in the sphere of legitimate legislative activity,” they are “protected not only from the consequence of litigation’s results but also from the burden of defending themselves.”

But the scope of the meaning “of ‘legislative activity’ has its limits. “The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.” Immunity from civil suit, both in law and equity, and from criminal action based on the performance of legislative duties flows from a determination that a challenged act is within the definition of legislative activity, but the Court in the more recent cases appears to have narrowed the concept somewhat.

In Kilbourn v. Thompson, Members of the House of Representatives were held immune in a suit for false imprisonment brought about by a vote of the Members on a resolution charging

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430 Gravel v. United States, 408 U.S. 606, 625 (1972). The critical nature of the clause is shown by the holding in Davis v. Passman, 442 U.S. 228, 235 n.11 (1979), that when a Member is sued under the Fifth Amendment for employment discrimination on the basis of gender, only the clause could shield such an employment decision, and not the separation of powers doctrine or emanations from it. Whether the clause would be a shield the Court had no occasion to decide and the case was settled on remand without a decision being reached.
contempt of one of its committees and under which the plaintiff was arrested and detained, even though the Court found that the contempt was wrongly voted. Kilbourn was relied on in Powell v. McCormack, in which the plaintiff was not allowed to maintain an action for declaratory judgment against certain Members of the House of Representatives to challenge his exclusion by a vote of the entire House. Because the power of inquiry is so vital to performance of the legislative function, the Court held that the clause precluded suit against the Chairman and Members of a Senate subcommittee and staff personnel, to enjoin enforcement of a subpoena directed to a third party, a bank, to obtain the financial records of the suing organization. The investigation was a proper exercise of Congress' power of inquiry, the subpoena was a legitimate part of the inquiry, and the clause therefore was an absolute bar to judicial review of the subcommittee's actions prior to the possible institution of contempt actions in the courts. And in Dombrowski v. Eastland, the Court affirmed the dismissal of an action against the chairman of a Senate committee brought on allegations that he wrongfully conspired with state officials to violate the civil rights of plaintiff.

Through an inquiry into the nature of the "legislative acts" performed by Members and staff, the Court held that the clause did not defeat a suit to enjoin the public dissemination of legislative materials outside the halls of Congress. A committee had conducted an authorized investigation into conditions in the schools of the District of Columbia and had issued a report that the House of Representatives routinely ordered printed. In the report, named students were dealt with in an allegedly defamatory manner, and their parents sued various committee Members and staff and other personnel, including the Superintendent of Documents and the Public Printer, seeking to restrain further publication, dissemination, and distribution of the report until the objectionable material was deleted and also seeking damages. The Court held that the Members of Congress and the staff employees had been properly dismissed from the suit, inasmuch as their actions—conducting the hearings, preparing the report, and authorizing its publication—

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432 395 U.S. 486 (1969). The Court found sufficient the presence of other defendants to enable it to review Powell's exclusion but reserved the question whether in the absence of someone the clause would still preclude suit. Id. at 506 n.26. See also Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).
were protected by the clause. The Superintendant of Documents and the Public Printer were held, however, to have been properly named, because, as congressional employees, they had no broader immunity than Members of Congress would have. At this point, the Court distinguished between those legislative acts, such as voting, speaking on the floor or in committee, issuing reports, which are within the protection of the clause, and those acts which enjoy no such protection. Public dissemination of materials outside the halls of Congress is not protected, the Court held, because it is unnecessary to the performance of official legislative actions. Dissemination of the report within the body was protected, whereas dissemination in normal channels outside it was not. 436

Bifurcation of the legislative process in this way resulted in holding unprotected the republication by a Member of allegedly defamatory remarks outside the legislative body, here through newsletters and press releases. 437 The clause protects more than speech or debate in either House, the Court affirmed, but in order for the other matters to be covered “they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.” 438 Press releases and newsletters are “[v]aluable and desirable” in “inform[ing] the public and other Members,” but neither are essential to the deliberations of the legislative body nor part of the deliberative process. 439

Parallel developments may be discerned with respect to the application of a general criminal statute to call into question the leg-

436 Difficulty attends an assessment of the effect of the decision, inasmuch as the Justices in the majority adopted mutually inconsistent stands, 412 U.S. at 325 (concurring opinion), and four Justices dissented. Id. at 331, 332, 338. The case leaves unresolved as well the propriety of injunctive relief. Compare id. at 330 (Justice Douglas concurring), with id. at 343–45 (three dissenters arguing that separation of powers doctrine forbade injunctive relief). Also compare Davis v. Passman, 442 U.S. 228, 245, 246 n.24 (1979), with id. at 250–51 (Chief Justice Burger dissenting).


islative conduct and motivation of a Member. Thus, in *United States v. Johnson*, the Court voided the conviction of a Member for conspiracy to impair lawful governmental functions, in the course of seeking to divert a governmental inquiry into alleged wrongdoing, by accepting a bribe to make a speech on the floor of the House of Representatives. The speech was charged as part of the conspiracy and extensive evidence concerning it was introduced at a trial. It was this examination into the context of the speech—its authorship, motivation, and content—which the Court found foreclosed by the speech-or-debate clause.

However, in *United States v. Brewster*, while continuing to assert that the clause “must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch,” the Court substantially reduced the scope of the coverage of the clause. In upholding the validity of an indictment of a Member, which charged that he accepted a bribe to be “influenced in his performance of official acts in respect to his action, vote, and decision” on legislation, the Court drew a distinction between a prosecution that caused an inquiry into legislative acts or the motivation for performance of such acts and a prosecution for taking or agreeing to take money for a promise to act in a certain way. The former is proscribed, the latter is not. “Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator ... Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman’s influence with the Executive Branch.” In other words, it is the fact of having taken a bribe, not the act the bribe is intended to influence, which is the subject of the prosecution, and the speech-or-debate clause interposes no obstacle to this type of prosecution.

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441 Reserved was the question whether a prosecution that entailed inquiry into legislative acts or motivation could be founded upon “a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.” 383 U.S. at 185. The question was similarly reserved in *United States v. Brewster*, 408 U.S. 501, 529 n.18 (1972), although Justices Brennan and Douglas would have answered negatively. Id. at 529, 540.
443 408 U.S. at 516.
444 408 U.S. at 526.
445 The holding was reaffirmed in *United States v. Helstoski*, 442 U.S. 477 (1979). On the other hand, the Court did hold that the protection of the clause is so fundamental that, assuming a Member may waive it, a waiver could be found...
Applying in the criminal context the distinction developed in the civil cases between protected "legislative activity" and unprotected conduct prior to or subsequent to engaging in "legislative activity," the Court in *Gravel v. United States*, held that a grand jury could validly inquire into the processes by which the Member obtained classified government documents and into the arrangements for subsequent private republication of these documents, since neither action involved protected conduct. "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts."

**Congressional Employees.**—Until recently, it was seemingly the basis of the decisions that while Members of Congress may be immune from suit arising out of their legislative activities, legislative employees who participate in the same activities under the direction of the Member or otherwise are responsible for their acts if those acts be wrongful. Thus, in *Kilbourn v. Thompson*, the sergeant at arms of the House was held liable for false imprisonment because he executed the resolution ordering Kilbourn arrested and imprisoned. *Dombrowski v. Eastland* held that a subcommittee counsel might be liable in damages for actions as to which the chairman of the committee was immune from suit. And in *Powell v. McCormack*, the Court held that the presence of House of Representative employees as defendants in a suit for declaratory judgment gave the federal courts jurisdiction to review the propriety of the plaintiff’s exclusion from office by vote of the House. Upon full consideration of the question, however, the Court, in *Gravel v. United States*, accepted a series of contentions urged only after explicit and unequivocal renunciation, rather than by failure to assert it at any particular point. Similarly, *Helstoski v. Meanor*, 442 U.S. 500 (1979), held that since the clause properly applied is intended to protect a Member from even having to defend himself, he may appeal immediately from a judicial ruling of non-applicability rather than wait to appeal after conviction.

446 408 U.S. 606 (1972).
447 408 U.S. at 626.
448 Language in some of the Court’s earlier opinions had indicated that the privilege “is less absolute, although applicable,” when a legislative aide is sued, without elaboration of what was meant. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). In *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), the Court had imposed substantial obstacles to the possibility of recovery in appropriate situations by holding that a federal cause of action was lacking and remitting litigants to state courts and state law grounds. The case is probably no longer viable, however, after *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971).

449 103 U.S. 168 (1881).
450 387 U.S. 92 (1967).
452 408 U.S. 606 (1972).
upon it not only by the individual Senator but by the Senate itself appearing by counsel as amicus: “that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members’ performance that they must be treated as the latters’ alter ego; and that if they are not so recognized, the central role of the Speech or Debate clause . . . will inevitably be diminished and frustrated.”

Therefore, the Court held “that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.”

The Gravel holding, however, does not so much extend congressional immunity to employees as it narrows the actual immunity available to both aides and Members in some important respects. Thus, the Court says, the legislators in Kilbourn were immune because adoption of the resolution was clearly a legislative act but the execution of the resolution—the arrest and detention—was not a legislative act immune from liability, so that the House officer was in fact liable as would have been any Member who had executed it. Dombrowski was interpreted as having held that no evidence implicated the Senator involved, whereas the committee counsel had been accused of “conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize.” And Powell was interpreted as simply holding that voting to exclude plaintiff, which was all the House defendants had done, was a legislative act immune from Member liability but not from judicial inquiry. “None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection…. [N]o prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they

453 408 U.S. at 616–17.
454 408 U.S. at 618.
455 408 U.S. at 618–19.
nor their aides should be immune from liability or questioning in such circumstances." 457

Clause 2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

DISABILITIES OF MEMBERS

Appointment to Executive Office

“The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only ‘during the time, for which he was elected’; thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination.” 458 As might be expected, there is no judicial interpretation of the language of the clause and indeed it has seldom surfaced as an issue.

In 1909, after having increased the salary of the Secretary of State, 459 Congress reduced it to the former figure so that a Member of the Senate at the time the increase was voted would be eligible for that office. 460 The clause became a subject of discussion in 1937, when Justice Black was appointed to the Court, because Congress had recently increased the amount of pension available to Justices retiring at seventy and Mr. Black’s Senate term had still

457 408 U.S. at 620–21.
458 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 864 (1833).
459 34 Stat. 948 (1907).
460 35 Stat. 626 (1909). Congress followed this precedent when the President wished to appoint a Senator as Attorney General and the salary had been increased pursuant to a process under which Congress did not need to vote to approve but could vote to disapprove. The salary was temporarily reduced to its previous level. 87 Stat. 697 (1975). See also 89 Stat. 1108 (1975) (reducing the salary of a member of the Federal Maritime Commission in order to qualify a Representative).
some time to run. The appointment was defended, however, with the argument that inasmuch as Mr. Black was only fifty-one years of age at the time, he would be ineligible for the “increased emolument” for nineteen years and it was not as to him an increased emolument. In 1969, it was briefly questioned whether a Member of the House of Representatives could be appointed Secretary of Defense because, under a salary bill enacted in the previous Congress, the President would propose a salary increase, including that of cabinet officers, early in the new Congress which would take effect if Congress did not disapprove it. The Attorney General ruled that inasmuch as the clause would not apply if the increase were proposed and approved subsequent to the appointment, it similarly would not apply in a situation in which it was uncertain whether the increase would be approved.

Incompatible Offices

This second part of the second clause elicited little discussion at the Convention and was universally understood to be a safeguard against executive influence on Members of Congress and the prevention of the corruption of the separation of powers. Congress has at various times confronted the issue in regard to seating or expelling persons who have or obtain office in another branch. Thus, it has determined that visitors to academies, regents, directors, and trustees of public institutions, and members of temporary commissions who receive no compensation as members are not officers within the constitutional inhibition. Government contractors and federal officers who resign before presenting their credentials may be seated as Members of Congress.

One of the more recurrent problems which Congress has had with this clause is the compatibility of congressional office with service as an officer of some military organization—militia, reserves, and the like. Members have been unseated for accepting appointment to military office during their terms of congressional

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461 The matter gave rise to a case, Ex parte Albert Levitt, 302 U.S. 633 (1937), in which the Court declined to pass upon the validity of Justice Black’s appointment. The Court denied the complainant standing, but strangely it did not advert to the fact that it was being asked to assume original jurisdiction contrary to Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).


464 1 Hinds’ Precedents of the House of Representatives § 493 (1907); 6 Cannon’s Precedents of the House of Representatives §§ 63–64 (1936).

465 Hinda’s, supra §§ 496–499.

office, but there are apparently no instances in which a Member-elect has been excluded for this reason. Because of the difficulty of successfully claiming standing, the issue has never been a litigatable matter.

SECTION 7. Clause 1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Clause 2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Clause 3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may
be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitation prescribed in the Case of a Bill.

THE LEGISLATIVE PROCESS

Revenue Bills

Insertion of this clause was another of the devices sanctioned by the Framers to preserve and enforce the separation of powers. It applies, in the context of the permissibility of Senate amendments to a House-passed bill, to all bills for collecting revenue—revenue decreasing as well as revenue increasing—rather than simply to just those bills that increase revenue.

Only bills to levy taxes in the strict sense of the word are comprehended by the phrase “all bills for raising revenue”; bills for other purposes, which incidentally create revenue, are not included. Thus, a Senate-initiated bill that provided for a monetary “special assessment” to pay into a crime victims fund did not violate the clause, because it was a statute that created and raised revenue to support a particular governmental program and was not a law raising revenue to support Government generally. An act providing a national currency secured by a pledge of bonds of the United States, which, “in the furtherance of that object, and also to meet the expenses attending the execution of the act,” imposed a tax on the circulating notes of national banks was held not to be a revenue measure which must originate in the House of Representatives. Neither was a bill that provided that the District of Columbia should raise by taxation and pay to designated rail-

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470 The issue of coverage is sometimes important, as in the case of the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324, in which the House passed a bill that provided for a net loss in revenue and the Senate amended the bill to provide a revenue increase of more than $98 billion over three years. Attacks on the law as a violation of the origination clause failed before assertions of political question, standing, and other doctrines. E.g., Texas Ass’n of Concerned Taxpayers v. United States, 772 F.2d 163 (5th Cir. 1985); Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985).


road companies a specified sum for the elimination of grade crossings and the construction of a railway station. The substitution of a corporation tax for an inheritance tax, and the addition of a section imposing an excise tax upon the use of foreign-built pleasure yachts, have been held to be within the Senate’s constitutional power to propose amendments.

Approval by the President

The President is not restricted to signing a bill on a day when Congress is in session. He may sign within ten days (Sundays excepted) after the bill is presented to him, even if that period extends beyond the date of the final adjournment of Congress. His duty in case of approval of a measure is merely to sign it. He need not write on the bill the word “approved” nor the date. If no date appears on the face of the roll, the Court may ascertain the fact by resort to any source of information capable of furnishing a satisfactory answer. A bill becomes a law on the date of its approval by the President. When no time is fixed by the act it is effective from the date of its approval, which usually is taken to be the first moment of the day, fractions of a day being disregarded.

The Veto Power

The veto provisions, the Supreme Court has told us, serve two functions. On the one hand, they ensure that “the President shall have suitable opportunity to consider the bills presented to him. ... It is to safeguard the President’s opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become law if the adjournment of the Congress prevents their return.” At the same time, the sections ensure “that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.” The Court asserted that “[w]e...

477 La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899).
480 73 U.S. at 504. See also Burgess v. Salmon, 97 U.S. 381, 383 (1878).
482 Lapeyre v. United States, 84 U.S. (17 Wall.) 191, 198 (1873).
483 Wright v. United States, 302 U.S. 583, 596 (1938).
484 302 U.S. at 596.
should not adopt a construction which would frustrate either of these purposes." 485

In one major respect, however, the President's actual desires may be frustrated by the presentation to him of omnibus bills or of bills containing extraneous riders. During the 1980s, on several occasions, Congress lumped all the appropriations for the operation of the Government into one gargantuan bill. But the President must sign or veto the entire bill; doing the former may mean he has to accept provisions he would not sign standing alone, and doing the latter may have other adverse consequences. Numerous Presidents from Grant on have unsuccessfully sought by constitutional amendment a "line-item veto" by which individual items in an appropriations bill or a substantive bill could be extracted and vetoed. More recently, beginning in the FDR Administration, it has been debated whether Congress could by statute authorize a form of the line-item veto, but, again, nothing passed. 486

That the interpretation of the provisions has not been entirely consistent is evident from a review of the only two Supreme Court decisions construing them. In The Pocket Veto Case, 487 the Court held that the return of a bill to the Senate, where it originated, had been prevented when the Congress adjourned its first session sine die fewer than ten days after presenting the bill to the President. The word "adjournment" was seen to have been used in the Constitution not in the sense of final adjournments but to any occasion on which a House of Congress is not in session. "We think that under the constitutional provision the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed." 488 Because neither House was in session to receive the bill, the President was prevented from returning it. It had been argued to the Court that the return may be validly accomplished to a proper agent of the house of origin for consideration when that body convenes. After first noting that Con-

485 Id.
486 See Line Item Veto: Hearing Before the Senate Committee on Rules and Administration, 99th Cong., 1st sess. (1985), esp. 10–20 (CRS memoranda detailing the issues). Some publicists have even contended, through a strained interpretation of clause 3, actually from its intended purpose to prevent Congress from subverting the veto power by calling a bill by some other name, that the President already possesses the line-item veto, but no President could be brought to test the thesis. See Pork Barrels and Principles - The Politics of the Presidential Veto, (Natl.Legal Center for the Public Interest, 19–28) (collecting essays).
487 279 U.S. 655 (1929).
488 279 U.S. at 680.
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gress had never authorized an agent to receive bills during adjournment, the Court opined that "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate." 489

However, in Wright v. United States, 490 the Court held that the President's return of a bill on the tenth day after presentment, during a three-day adjournment by the originating House only, to the Secretary of the Senate was an effective return. In the first place, the Court thought, the pocket veto clause referred only to an adjournment of "the Congress," and here only the Senate, the originating body, had adjourned. The President can return the bill to the originating House if that body be in an intrasession adjournment, because there is no "practical difficulty" in effectuating the return. "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive the bill." 491 Such a procedure complied with the constitutional provisions. "The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return." 492 The concerns activating the Court in The Pocket Veto Case were not present. There was no indefinite period in which a bill was in a state of suspended animation with public uncertainty over the outcome. "When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over." 493

The tension between the two cases, even though at a certain level of generality they are consistent because of factual differences, has existed without the Supreme Court yet having occasion to review the issue again. But in Kennedy v. Sampson, 494 an

489 279 U.S. at 684.
490 302 U.S. 583 (1938).
491 302 U.S. at 589–90.
492 302 U.S. at 589.
493 302 U.S. at 595.
494 511 F. 2d 430 (D.C. Cir. 1974). The Administration declined to appeal the case to the Supreme Court. The adjournment here was for five days. Subsequently, the President attempted to pocket veto two other bills, one during a 32 day recess and one during the period which Congress had adjourned sine die from the first to the second session of the 93d Congress. After renewed litigation, the Administration entered its consent to a judgment that both bills had become law, Kennedy v. Jones, Civil Action No. 74–194 (D.D.C., decree entered April 13, 1976), and it was announced that President Ford "will use the return veto rather than the pocket veto during intra-session and intersession recesses and adjournments of the Congress", provided that the House to which the bill must be returned has authorized an officer to receive vetoes during the period it is not in session. President Reagan repudi-
appellate court held that a return is not prevented by an intrasession adjournment of any length by one or both Houses of Congress, so long as the originating House arranged for receipt of veto messages. The court stressed that the absence of the evils deemed to bottom the Court’s premises in The Pocket Veto Case—long delay and public uncertainty—made possible the result.

The two-thirds vote of each House required to pass a bill over a veto means two-thirds of a quorum.\textsuperscript{495} After a bill becomes law, of course, the President has no authority to repeal it. Asserting this truism, the Court in The Confiscation Cases\textsuperscript{496} held that the immunity proclamation issued by the President in 1868 did not require reversal of a decree condemning property seized under the Confiscation Act of 1862.\textsuperscript{497}

**Presentation of Resolutions**

Concerned that Congress might endeavor to evade the veto clause by designating a measure having legislative import as something other than a bill, the Framers inserted cl. 3.\textsuperscript{498} Obviously, if construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments regarding it. On the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the clause had been interpreted over the years, and in the same manner it is treated today. Briefly, it was shown that the word “necessary” in the clause had come to refer to the necessity required by the Constitution of law-making; that is, any “order, resolution, or vote” if it is to have the force of law must be submitted. But “votes” taken in either House preliminary to the final passage of legislation need not be submitted to the other House or to the President nor must resolutions passed by the Houses concurrently expressing merely the views of Congress.\textsuperscript{499} Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being

\begin{itemize}
\item [\textsuperscript{495}] Missouri Pacific Ry. v. Kansas, 248 U.S. 276 (1919).
\item [\textsuperscript{496}] 87 U.S. (20 Wall.) 92 (1874).
\item [\textsuperscript{497}] 12 Stat. 589 (1862).
\end{itemize}
laid before President Washington for his approval—a procedure the Court ratified in due course. 500

**The Legislative Veto.**—Beginning in the 1930s, the concurrent resolution (as well as the simple resolution) was put to a new use—serving as the instrument to terminate powers delegated to the Chief Executive or to disapprove particular exercises of power by him or his agents. The “legislative veto” or “congressional veto” was first developed in context of the delegation to the Executive of power to reorganize governmental agencies, 501 and was really furthered by the necessities of providing for national security and foreign affairs immediately prior to and during World War II. 502 The proliferation of “congressional veto” provisions in legislation over the years raised a series of interrelated constitutional questions. 503 Congress until relatively recently had applied the veto provisions to some action taken by the President or another executive officer—such as a reorganization of an agency, the lowering or raising of tariff rates, the disposal of federal property—then began expanding the device to give itself a negative over regulations issued by executive branch agencies, and proposals were made to give Congress a negative over all regulations issued by executive branch independent agencies. 504

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500 Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).
In INS v. Chadha, the Court held a one-House congressional veto to be unconstitutional as violating both the bicameralism principles reflected in Art. I, §§ 1 and 7, and the presentment provisions of § 7, cl. 2 and 3. The provision in question was § 244(c)(2) of the Immigration and Nationality Act, which authorized either House of Congress by resolution to veto the decision of the Attorney General to allow a particular deportable alien to remain in the country. The Court’s analysis of the presentment issue made clear, however, that two-House veto provisions, despite their compliance with bicameralism, and committee veto provisions suffer the same constitutional infirmity. In the words of dissenting Justice White, the Court in Chadha “sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a ‘legislative veto.”

In determining that veto of the Attorney General’s decision on suspension of deportation was a legislative action requiring presentment to the President for approval or veto, the Court set forth the general standard. “Whether actions taken by either House are, in law and in fact, an exercise of legislative power depends not on their form but upon ‘whether they contain matter which is properly to be regarded as legislative in its character and effect.’ [T]he action taken here … was essentially legislative,” the Court concluded, because “it had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch.”

The other major component of the Court’s reasoning in Chadha stemmed from its reading of the Constitution as making only “explicit and unambiguous” exceptions to the bicameralism and presentment requirements. Thus the House alone was given power of impeachment, and the Senate alone was given power to convict upon impeachment, to advise and consent to executive ap-

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507 Chadha, 462 U.S. at 967. Justice Powell concurred separately, asserting that Congress had violated separation of powers principles by assuming a judicial function in determining that a particular individual should be deported. Justice Powell therefore found it unnecessary to express his view on “the broader question of whether legislative vetoes are invalid under the Presentment Clauses.” Id. at 959.
508 462 U.S. at 952 (citation omitted).
pointments, and to advise and consent to treaties; similarly, the Congress may propose a constitutional amendment without the President’s approval, and each House is given autonomy over certain “internal matters,” e.g., judging the qualifications of its members. By implication then, exercises of legislative power not falling within any of these “narrow, explicit, and separately justified” exceptions must conform to the prescribed procedures: “passage by a majority of both Houses and presentment to the President.”

The breadth of the Court’s ruling in Chadha was evidenced in its 1986 decision in Bowsher v. Synar. Among the rationales for holding the Deficit Control Act unconstitutional was the Court’s assertion that Congress had, in effect, retained control over executive action in a manner resembling a congressional veto. “[A]s Chadha makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.” Congress had offended this principle by retaining removal authority over the Comptroller General, charged with executing important aspects of the Budget Act.

That Chadha does not spell the end of some forms of the legislative veto is evident from events since 1983, which have seen the enactment of various devices, such as “report and wait” provisions and requirements for various consultative steps before action may be undertaken. But the decision has stymied the efforts in Congress to confine the discretion it confers through delegation by giving it a method of reviewing and if necessary voiding actions and rules promulgated after delegations.

The Line Item Veto.—For more than a century, United States Presidents had sought the authority to strike out of appropriations bills particular items, to veto “line items” of money bills and sometimes legislative measures as well. Finally, in 1996, Congress approved and the President signed the Line Item Veto Act. The law empowered the President, within five days of signing a bill, to “cancel in whole” spending items and targeted, defined tax benefits. In acting on this authority, the President was to determine that the cancellation of each item would “(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.” In Clinton v. City of New York, the Supreme Court ruled that the Line Item Veto Act was unconstitutional under the Constitution’s delegation clause because it gave the President too much power without sufficient checks and balances.

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509 462 U.S. at 955–56.
511 Bowsher v. Synar, 478 U.S. 714, 733 (1986). This position was developed at greater length in the concurring opinion of Justice Stevens. Id. at 736.
513 Id. at § 691(a)(A).
York, the Court held the Act to be unconstitutional because it did not comply with the presentment clause.

Although Congress in passing the Act considered itself to have been delegating power, and although the dissenting Justices would have upheld the Act as a valid delegation, the Court instead analyzed the statute under the presentment clause. In the Court’s view, the two bills from which the President subsequently struck items became law the moment the President signed them. His cancellations thus amended and in part repealed the two federal laws. Under its most immediate precedent, the Court continued, statutory repeals must conform to the presentment clauses’s “single, finely wrought and exhaustively considered, procedure” for enacting or repealing a law. In no respect did the procedures in the Act comply with that clause, and in no way could they. The President was acting in a legislative capacity, altering a law in the manner prescribed, and legislation must, in the way Congress acted, be bicameral and be presented to the President after Congress acted. Nothing in the Constitution authorized the President to amend or repeal a statute unilaterally, and the Court could construe both constitutional silence and the historical practice over 200 years as “an express prohibition” of the President’s action.

SECTION 8. Clause 1. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

POWER TO TAX AND SPEND

Kinds of Taxes Permitted

By the terms of the Constitution, the power of Congress to levy taxes is subject to but one exception and two qualifications. Articles exported from any State may not be taxed at all. Direct taxes must be levied by the rule of apportionment and indirect taxes by the rule of uniformity. The Court has emphasized the sweeping char-

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516 524 U.S. at 453 (Justice Scalia concurring in part and dissenting in part); id. at 469 (Justice Breyer dissenting).
518 524 U.S. at 439.
acter of this power by saying from time to time that it "reaches every subject," \(^{519}\) that it is "exhaustive" \(^{520}\) or that it "embraces every conceivable power of taxation." \(^{521}\) Despite these generalizations, the power has been at times substantially curtailed by judicial decision with respect to the subject matter of taxation, the manner in which taxes are imposed, and the objects for which they may be levied.

**Decline of the Forbidden Subject Matter Test.**—The Supreme Court has restored to Congress the power to tax most of the subject matter which had previously been withdrawn from its reach by judicial decision. The holding of *Evans v. Gore* \(^{522}\) and *Miles v. Graham* \(^{523}\) that the inclusion of the salaries received by federal judges in measuring the liability for a nondiscriminatory income tax violated the constitutional mandate that the compensation of such judges should not be diminished during their continuance in office was repudiated in *O'Malley v. Woodrough*. \(^{524}\) The specific ruling of *Collector v. Day* \(^{525}\) that the salary of a state officer is immune to federal income taxation also has been overruled. \(^{526}\) But the principle underlying that decision—that Congress may not lay...

\(^{519}\) License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).


\(^{521}\) *240 U.S.* at 12.

\(^{522}\) *253 U.S.* 245 (1920).

\(^{523}\) *268 U.S.* 501 (1925).

\(^{524}\) *307 U.S.* 277 (1939).

\(^{525}\) 78 U.S. (11 Wall.) 113 (1871).

\(^{526}\) *Grave v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). *Collector v. Day* was decided in 1871 while the country was still in the throes of Reconstruction. As noted by Chief Justice Stone in a footnote to his opinion in *Helvering v. Gerhardt*, 304 U.S. 405, 414 n.4 (1938), the Court had not determined how far the Civil War Amendments had broadened the federal power at the expense of the States, but the fact that the taxing power had recently been used with destructive effect upon notes issued by the state banks, *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), suggested the possibility of similar attacks upon the existence of the States themselves. Two years later, the Court took the logical step of holding that the federal income tax could not be imposed on income received by a municipal corporation from its investments. *United States v. Railroad Co.*, 84 U.S. (17 Wall.) 322 (1873). A far-reaching extension of private immunity was granted in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), where interest received by a private investor on state or municipal bonds was held to be exempt from federal taxation. (Though relegated to virtual desuetude, *Pollock* was not expressly overruled until *South Carolina v. Baker*, 485 U.S. 505 (1988)). As the apprehension of this era subsided, the doctrine of these cases was pushed into the background. It never received the same wide application as did *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in curbing the power of the States to tax operations or instrumentalities of the Federal Government. Only once since the turn of the century has the national taxing power been further narrowed in the name of dual federalism. In 1931 the Court held that a federal excise tax was inapplicable to the manufacture and sale to a municipal corporation of equipment for its police force. *Indian Motorcycle v. United States*, 283 U.S. 570 (1931). Justices Stone and Brandeis dissented from this decision, and it is doubtful whether it would be followed today. *Cf. Massachusetts v. United States*, 435 U.S. 444 (1978).
a tax which would impair the sovereignty of the States—is still recognized as retaining some vitality.\footnote{At least, if the various opinions in New York v. United States, 326 U.S. 572 (1946), retain force, and they may in view of (a later) New York v. United States, 505 U.S. 144 (1992), a commerce clause case rather than a tax case.}

**Federal Taxation of State Interests.**—In 1903 a succession tax upon a bequest to a municipality for public purposes was upheld on the ground that the tax was payable out of the estate before distribution to the legatee. Looking to form and not to substance, in disregard of the mandate of *Brown v. Maryland*,\footnote{25 U.S. (12 Wheat.) 419, 444 (1827).} a closely divided Court declined to “regard it as a tax upon the municipality, though it might operate incidentally to reduce the bequest by the amount of the tax.”\footnote{Snyder v. Bettman, 190 U.S. 249, 254 (1903).} When South Carolina embarked upon the business of dispensing alcoholic beverages, its agents were held to be subject to the national internal revenue tax, the ground of the holding being that in 1787 such a business was not regarded as one of the ordinary functions of government.\footnote{South Carolina v. United States, 199 U.S. 437 (1905).}

Another decision marking a clear departure from the logic of *Collector v. Day* was *Flint v. Stone Tracy Co.*,\footnote{Ohio v. Helvering, 292 U.S. 360 (1934).} where the Court sustained an act of Congress taxing the privilege of doing business as a corporation, the tax being measured by the income. The argument that the tax imposed an unconstitutional burden on the exercise by a State of its reserved power to create corporate franchises was rejected, partly in consideration of the principle of national supremacy, and partly on the ground that the corporate franchises were private property. This case also qualified *Pollock v. Farmers' Loan & Trust Co.* to the extent of allowing interest on state bonds to be included in measuring the tax on the corporation.

Subsequent cases have sustained an estate tax on the net estate of a decedent, including state bonds,\footnote{Greiner v. Lewellyn, 258 U.S. 384 (1922).} excise taxes on the transportation of merchandise in performance of a contract to sell and deliver it to a county,\footnote{Wheeler Lumber Co. v. United States, 281 U.S. 572 (1930).} on the importation of scientific apparatus by a state university,\footnote{Board of Trustees v. United States, 289 U.S. 48 (1933).} on admissions to athletic contests sponsored by a state institution, the net proceeds of which were used to further its educational program,\footnote{Allen v. Regents, 304 U.S. 439 (1938).} and on admissions to recreational facilities operated on a nonprofit basis by a municipal...
The tax immunity of state functions and instrumentalities, it has been stated that “all agree that not all of the former immunity is gone.”

Twice, the Court has made an effort to express its new point of view in a statement of general principles by which the right to such immunity shall be determined. However, the failure to muster a majority in concurrence with any single opinion in the latter case leaves the question very much in doubt. In Helvering v. Gerhardt, where, without overruling Collector v. Day, it narrowed the immunity of salaries of state officers from federal income taxation, the Court announced “two guiding principles of limitation for holding the tax immunity of State instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the State or in its behalf, excludes from the immunity activities...
thought not to be essential to the preservation of State governments even though the tax be collected from the State treasury.... The other principle, exemplified by those cases where the tax laid upon individuals affects the State only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the State is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the State government; even though the function be thought important enough to demand immunity from a tax upon the State itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons." 545

The second attempt to formulate a general doctrine was made in New York v. United States, 546 where, on review of a judgment affirming the right of the United States to tax the sale of mineral waters taken from property owned and operated by the State of New York, the Court reconsidered the right of Congress to tax business enterprises carried on by the States. Justice Frankfurter, speaking for himself and Justice Rutledge, made the question of discrimination vel non against state activities the test of the validity of such a tax. They found "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." 547 In a concurring opinion in which Justices Reed, Murphy, and Burton joined, Chief Justice Stone rejected the criterion of discrimination. He repeated what he had said in an earlier case to the effect that "the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax ... or the appropriate exercise of the functions of the government affected by it." 548

Justices Douglas and Black dissented in an opinion written by the former on the ground that the decision disregarded the Tenth Amendment, placed "the sovereign States on the same plane as private citizens," and made them "pay the Federal Government for the privilege of exercising powers of sovereignty guaranteed them by the Constitution." 549 In a later case dealing with state immunity the Court sustained the tax on the second ground mentioned in

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545 304 U.S. at 419–20.
547 326 U.S. at 584.
548 326 at 589–90.
549 326 U.S. at 596.
Helvering v. Gerhardt—that the burden of the tax was borne by private persons—and did not consider whether the function was one which the Federal Government might have taxed if the municipality had borne the burden of the exaction. 550

Articulation of the current approach may be found in South Carolina v. Baker. 551 The rules are “essentially the same” for federal immunity from state taxation and for state immunity from federal taxation, except that some state activities may be subject to direct federal taxation, while States may “never” tax the United States directly. Either government may tax private parties doing business with the other government, “even though the financial burden falls on the [other government], as long as the tax does not discriminate against the [other government] or those with which it deals.” 552 Thus, “the issue whether a nondiscriminatory federal tax might nonetheless violate state tax immunity does not even arise unless the Federal Government seeks to collect the tax directly from a State.” 553

Uniformity Requirement.—Whether a tax is to be apportioned among the States according to the census taken pursuant to Article I, § 2, or imposed uniformly throughout the United States depends upon its classification as direct or indirect. 554 The rule of uniformity for indirect taxes is easy to obey. It requires only that the subject matter of a levy be taxed at the same rate wherever found in the United States; or, as it is sometimes phrased, the uniformity required is “geographical,” not “intrinsic.” 555 Even the geographical limitation is a loose one, at least if United States v. Ptasynski 556 is followed. There, the Court upheld an exemption from a crude-oil windfall-profits tax of “Alaskan oil,” defined geographically to include oil produced in Alaska (or elsewhere) north of the Arctic Circle. What is prohibited, the Court said, is favoritism to particular States in the absence of valid bases of classification. Because Congress could have achieved the same result, allowing for severe climactic difficulties, through a classification tailored to the “disproportionate costs and difficulties … associated with extracting oil from this region,” 557 the fact that Congress described the exemption in geographic terms did not condemn the provision.

552 485 U.S. at 523.
553 485 U.S. at 524 n.14.
554 See also Article I, § 9, cl. 4.
555 See also Article I, § 9, cl. 4.
557 462 U.S. at 85.
The clause accordingly places no obstacle in the way of legislative classification for the purpose of taxation, nor in the way of what is called progressive taxation. 558 A taxing statute does not fail of the prescribed uniformity because its operation and incidence may be affected by differences in state laws. 559 A federal estate tax law which permitted deduction for a like tax paid to a State was not rendered invalid by the fact that one State levied no such tax. 560 The term “United States” in this clause refers only to the States of the Union, the District of Columbia, and incorporated territories. Congress is not bound by the rule of uniformity in framing tax measures for unincorporated territories. 561 Indeed, in Binns v. United States, 562 the Court sustained license taxes imposed by Congress but applicable only in Alaska, where the proceeds, although paid into the general fund of the Treasury, did not in fact equal the total cost of maintaining the territorial government.

**PURPOSES OF TAXATION**

**Regulation by Taxation**

The discretion of Congress in selecting the objectives of taxation has also been held at times to be subject to limitations implied from the nature of the Federal System. Apart from matters that Congress is authorized to regulate, the national taxing power, it has been said, “reaches only existing subjects.” 563 Congress may tax any activity actually carried on, such as the business of accepting wagers, 564 regardless of whether it is permitted or prohibited by the laws of the United States 565 or by those of a State. 566 But so-called federal “licenses,” so far as they relate to trade within state limits, merely express, “the purpose of the government not to interfere . . . with the trade nominally licensed, if the required taxes are paid.” Whether the “licensed” trade shall be permitted at all is

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558 Knowlton v. Moore, 178 U.S. 41 (1900).
562 194 U.S. 486 (1904). The Court recognized that Alaska was an incorporated territory but took the position that the situation in substance was the same as if the taxes had been directly imposed by a territorial legislature for the support of the local government.
563 License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).
564 United States v. Kahriger, 345 U.S. 22 (1953). Dissenting, Justice Frankfurter maintained that this was not a bona fide tax, but was essentially an effort to check, if not stamp out, professional gambling, an activity left to the responsibility of the States. Justices Jackson and Douglas noted partial agreement with this conclusion. See also Lewis v. United States, 348 U.S. 419 (1955).
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a question for decision by the State. 567 This, nevertheless, does not signify that Congress may not often regulate to some extent a business within a State in order to tax it more effectively. Under the necessary-and-proper clause, Congress may do this very thing. Not only has the Court sustained regulations concerning the packaging of taxed articles such as tobacco 568 and oleomargarine, 569 ostensibly designed to prevent fraud in the collection of the tax, it has also upheld measures taxing drugs 570 and firearms, 571 which prescribed rigorous restrictions under which such articles could be sold or transferred, and imposed heavy penalties upon persons dealing with them in any other way. These regulations were sustained as conducive to the efficient collection of the tax though they clearly transcended in some respects this ground of justification. 572

Extermination by Taxation

A problem of a different order is presented where the tax itself has the effect of suppressing an activity or where it is coupled with regulations that clearly have no possible relation to the collection of the tax. Where a tax is imposed unconditionally, so that no other purpose appears on the face of the statute, the Court has refused to inquire into the motives of the lawmakers and has sustained the tax despite its prohibitive proportions. 573 “It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.... The principle applies even though the revenue obtained is obviously negligible ... or the revenue purpose of the tax may be secondary.... Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate. As was pointed out in Magnano Co. v. Hamilton, 292 U.S. 40, 47 (1934): ‘From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional

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567 License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).
569 In re Kollock, 165 U.S. 526 (1897).
572 Without casting doubt on the ability of Congress to regulate or punish through its taxing power, the Court has overruled Kahriger, Lewis, Doremus, Sonzinsky, and similar cases on the ground that the statutory scheme compelled self-incrimination through registration. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary v. United States, 395 U.S. 6 (1969).
573 McCray v. United States, 195 U.S. 27 (1904).
power of the lawmakers to realize by legislation directly addressed to their accomplishments.”  

But where the tax is conditional, and may be avoided by compliance with regulations set out in the statute, the validity of the measure is determined by the power of Congress to regulate the subject matter. If the regulations are within the competence of Congress, apart from its power to tax, the exaction is sustained as an appropriate sanction for making them effective; 575 otherwise it is invalid. 576 During the Prohibition Era, Congress levied a heavy tax upon liquor dealers who operated in violation of state law. In United States v. Constantine, 577 the Court held that this tax was unenforceable after the repeal of the Eighteenth Amendment, since the National Government had no power to impose an additional penalty for infractions of state law.

Promotion of Business: Protective Tariff

The earliest examples of taxes levied with a view to promoting desired economic objectives in addition to raising revenue were, of course, import duties. The second statute adopted by the first Congress was a tariff act reciting that “it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandise imported.” 578 After being debated for nearly a century and a half, the constitutionality of protective tariffs was finally settled by the unanimous decision of the Supreme Court in J. W. Hampton & Co. v. United States, 579 where Chief Justice Taft wrote: “The second objection to §315 is that the declared plan of Congress, either expressly or by clear implication, formulates its rule to guide the President and his advisory Tariff Commission as one directed to a tariff system of protection that will avoid damaging competition to the country’s industries by the importation of goods from other countries at too low a rate to equalize foreign and domestic competition in the markets of the United States. It is contended that the only power of Congress in the levying of customs duties is to create revenue, and that

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575 Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 383 (1940). See also Head Money Cases, 112 U.S. 580, 596 (1884).
578 1 Stat. 24 (1789).
579 276 U.S. 394 (1928).
it is unconstitutional to frame the customs duties with any other view than that of revenue raising.”

The Chief Justice then observed that the first Congress in 1789 had enacted a protective tariff. “In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions…. The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history…. Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional. So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subject of taxes cannot invalidate Congressional action.”

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

The grant of power to “provide ... for the general welfare” raises a two-fold question: how may Congress provide for “the general welfare” and what is “the general welfare” that it is authorized to promote? The first half of this question was answered by Thomas Jefferson in his opinion on the Bank as follows: “[T]he laying of taxes is the power, and the general welfare the purpose for which the power is to be exercised. They [Congress] are not to lay taxes ad libitum for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose.” The clause, in short, is not an independent grant of power, but a qualification of the taxing power. Although a broader view has been occasionally asserted, Congress has not acted upon it and the Court has had no occasion to adjudicate the point.

With respect to the meaning of “the general welfare” the pages of The Federalist itself disclose a sharp divergence of views between its two principal authors. Hamilton adopted the literal,
broad meaning of the clause; 583 Madison contended that the powers of taxation and appropriation of the proposed government should be regarded as merely instrumental to its remaining powers, in other words, as little more than a power of self-support. 584 From an early date Congress has acted upon the interpretation espoused by Hamilton. Appropriations for subsidies 585 and for an ever increasing variety of “internal improvements” 586 constructed by the Federal Government, had their beginnings in the administrations of Washington and Jefferson. 587 Since 1914, federal grants-in-aid, sums of money apportioned among the States for particular uses, often conditioned upon the duplication of the sums by the recipient State, and upon observance of stipulated restrictions as to its use, have become commonplace.

The scope of the national spending power was brought before the Supreme Court at least five times prior to 1936, but the Court disposed of four of the suits without construing the “general welfare” clause. In the Pacific Railway Cases 588 and Smith v. Kansas City Title Co., 589 it affirmed the power of Congress to construct internal improvements, and to charter and purchase the capital stock of federal land banks, by reference to its powers over commerce, post roads, and fiscal operations, and to its war powers. Decisions on the merits were withheld in two other cases, Massachusetts v. Mellon and Frothingham v. Mellon, 590 on the ground that neither a State nor an individual citizen is entitled to a remedy in the courts against an alleged unconstitutional appropriation of national funds. In United States v. Gettysburg Electric Railway, 591 however, the Court had invoked “the great power of taxation to be exercised for the common defence and general welfare” 592 to sustain the

584 Id. at No. 41, 268–78.
585 1 Stat. 229 (1792).
586 2 Stat. 357 (1806).
587 In an advisory opinion, which it rendered for President Monroe at his request on the power of Congress to appropriate funds for public improvements, the Court answered that such appropriations might be properly made under the war and postal powers. See Albertsworth, Advisory Functions in the Supreme Court, 23 GEO. L. J. 643, 644–647 (1935). Monroe himself ultimately adopted the broadest view of the spending power, from which, however, he carefully excluded any element of regulatory or police power. See his Views of the President of the United States on the Subject of Internal Improvements, of May 4, 1822, 2 Messages and Papers of the Presidents 713–752 (Richardson ed., 1906).
589 255 U.S. 180 (1921).
590 262 U.S. 447 (1923). See also Alabama Power Co. v. Ickes, 302 U.S. 464 (1938). These cases were limited by Flast v. Cohen, 392 U.S. 83 (1968).
591 160 U.S. 668 (1896).
592 160 U.S. at 681.
right of the Federal Government to acquire land within a State for use as a national park.

Finally, in United States v. Butler, the Court gave its unqualified endorsement to Hamilton's views on the taxing power. Wrote Justice Roberts for the Court: "Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court had noticed the question, but has never found it necessary to decide which is the true construction. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."

By and large, it is for Congress to determine what constitutes the "general welfare." The Court accords great deference to Congress's decision that a spending program advances the general welfare, and has even questioned whether the restriction is judi-

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595 Id. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640, 645 (1937)).
Dispute, such as it is, turns on the conditioning of funds.

**Social Security Act Cases.**—Although holding that the spending power is not limited by the specific grants of power contained in Article I, § 8, the Court found, nevertheless, that it was qualified by the Tenth Amendment, and on this ground ruled in the *Butler* case that Congress could not use moneys raised by taxation to "purchase compliance" with regulations "of matters of State concern with respect to which Congress has no authority to interfere."597 Within little more than a year this decision was reduced to narrow proportions by *Steward Machine Co. v. Davis*,598 which sustained the tax imposed on employers to provide unemployment benefits, and the credit allowed for similar taxes paid to a State. To the argument that the tax and credit in combination were "weapons of coercion, destroying or impairing the autonomy of the States," the Court replied that relief of unemployment was a legitimate object of federal expenditure under the "general welfare" clause, that the Social Security Act represented a legitimate attempt to solve the problem by the cooperation of State and Federal Governments, that the credit allowed for state taxes bore a reasonable relation "to the fiscal need subserved by the tax in its normal operation,"599 since state unemployment compensation payments would relieve the burden for direct relief borne by the national treasury. The Court reserved judgment as to the validity of a tax "if it is laid upon the condition that a State may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power."600

**Conditional Grants-in-Aid.**—It was not until 1947 that the right of Congress to impose conditions upon grants-in-aid over the objection of a State was squarely presented.601 The Court upheld

597 Justice Stone, speaking for himself and two other Justices, dissented on the ground that Congress was entitled when spending the national revenues for the "general welfare" to see to it that the country got its money's worth thereof, and that the condemned provisions were "necessary and proper" to that end. United States v. Butler, 297 U.S. 1, 84–86 (1936).
598 301 U.S. 548 (1937).
599 301 U.S. at 591.
601 In the *Steward Machine Company* case, it was a taxpayer who complained of the invasion of state sovereignty, and the Court put great emphasis on the fact that the State was a willing partner in the plan of cooperation embodied in the Social Security Act. 301 U.S. 548, 589, 590 (1937).
Congress’s power to do so in *Oklahoma v. Civil Service Commission*. 602 The State objected to the enforcement of a provision of the Hatch Act that reduced its allotment of federal highway funds because of its failure to remove from office a member of the State Highway Commission found to have taken an active part in party politics while in office. The Court denied relief on the ground that, “[w]hile the United States is not concerned with, and has no power to regulate local political activities as such of State officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed…. The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the State, it has never been thought that such effect made the federal act invalid.” 603

The general principle is firmly established. “Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.” 604

The Court has set forth several standards purporting to channel Congress’s discretion in attaching grant conditions. 605 To date no statutes have been struck down as violating these standards, although several statutes have been interpreted so as to conform to the guiding principles. First, the conditions, like the spending itself, must advance the general welfare, but the determination of what constitutes the general welfare rests largely if not wholly with Congress. 606 Second, because a grant is “much in the nature of a contract” offer that the States may accept or reject, 607 Congress must set out the conditions unambiguously, so that the

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States may make an informed decision. Third, the Court continues to state that the conditions must be related to the federal interest for which the funds are expended, but it has never found a spending condition deficient under this part of the test. Fourth, the power to condition funds may not be used to induce the States to engage in activities that would themselves be unconstitutional. Fifth, the Court has suggested that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which “pressure turns into compulsion,” but again the Court has never found a congressional condition to be coercive in this sense. Certain federalism restraints on other federal powers seem not to be relevant to spending conditions.

If a State accepts federal funds on conditions and then fails to follow the requirements, the usual remedy is federal administrative action to terminate the funding and to recoup funds the State has already received. While the Court has allowed beneficiaries of conditional grant programs to sue to compel states to comply with the federal conditions, more recently the Court has required that

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610 The relationship in South Dakota v. Dole, 483 U.S. 203, 208–09 (1987), in which Congress conditioned access to certain highway funds on establishing a 21-years-of-age drinking qualification was that the purpose of both funds and condition was safe interstate travel. The federal interest in Oklahoma v. Civil Service Comm’n, 330 U.S. 127, 143 (1947), as we have noted, was assuring proper administration of federal highway funds.


614 South Dakota v. Dole, 483 U.S. 203, 210 (1987) (referring to the Tenth Amendment: “the ‘independent constitutional bar’ limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly”).


any such susceptibility to suit be clearly spelled out so that states will be informed of potential consequences of accepting aid. Finally, it should be noted that Congress has enacted a range of laws forbidding discrimination in federal assistance programs, and some of these laws are enforceable against the states.

**Earmarked Funds.**—The appropriation of the proceeds of a tax to a specific use does not affect the validity of the exaction, if the general welfare is advanced and no other constitutional provision is violated. Thus a processing tax on coconut oil was sustained despite the fact that the tax collected upon oil of Philippine production was segregated and paid into the Philippine Treasury. In *Helvering v. Davis*, the excise tax on employers, the proceeds of which were not earmarked in any way, although intended to provide funds for payments to retired workers, was upheld under the "general welfare" clause, the Tenth Amendment being found to be inapplicable.

**Debts of the United States.**—The power to pay the debts of the United States is broad enough to include claims of citizens arising on obligations of right and justice. The Court sustained an act of Congress which set apart for the use of the Philippine Islands, the revenue from a processing tax on coconut oil of Philippine production, as being in pursuance of a moral obligation to protect and promote the welfare of the people of the Islands. Curiously enough, this power was first invoked to assist the United States to collect a debt due to it. In *United States v. Fisher*, the Supreme Court sustained a statute which gave the Federal Government priority in the distribution of the estates of its insolvent debtors. The debtor in that case was the endorser of a foreign bill of exchange that apparently had been purchased by the United States. Invoking the "necessary and proper" clause, Chief Justice Marshall deduced the power to collect a debt from the power to pay

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618 Here the principal constraint is the Eleventh Amendment. See, e.g., Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Americans with Disabilities Act of 1990 exceeds congressional power to enforce the Fourteenth Amendment, and violates the Eleventh Amendment, by subjecting states to suits brought by state employees in federal courts to collect money damages).


620 *301 U.S. 619* (1937).


623 6 U.S. (2 Cr.) 358 (1805).
its obligations by the following reasoning: “The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.” 624

Clause 2. The Congress shall have Power *** To borrow Money on the credit of the United States.

BORROWING POWER

The original draft of the Constitution reported to the convention by its Committee of Detail empowered Congress “To borrow money and emit bills on the credit of the United States.” 625 When this section was reached in the debates, Gouverneur Morris moved to strike out the clause “and emit bills on the credit of the United States.” Madison suggested that it might be sufficient “to prohibit the making them a tender.” After a spirited exchange of views on the subject of paper money, the convention voted, nine States to two, to delete the words “and emit bills.” 626 Nevertheless, in 1870, the Court relied in part upon this clause in holding that Congress had authority to issue treasury notes and to make them legal tender in satisfaction of antecedent debts. 627

When it borrows money “on the credit of the United States,” Congress creates a binding obligation to pay the debt as stipulated and cannot thereafter vary the terms of its agreement. A law purporting to abrogate a clause in government bonds calling for payment in gold coin was held to contravene this clause, although the creditor was denied a remedy in the absence of a showing of actual damage. 628

Clause 3. The Congress shall have Power *** To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

624 6 U.S. at 396.
626 Id. at 310.
Purposes Served by the Grant

This clause serves a two-fold purpose: it is the direct source of the most important powers that the Federal Government exercises in peacetime, and, except for the due process and equal protection clauses of the Fourteenth Amendment, it is the most important limitation imposed by the Constitution on the exercise of state power. The latter, restrictive operation of the clause was long the more important one from the point of view of the constitutional lawyer. Of the approximately 1400 cases which reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from state legislation. The result was that, generally, the guiding lines in construction of the clause were initially laid down in the context of curbing state power rather than in that of its operation as a source of national power. The consequence of this historical progression was that the word “commerce” came to dominate the clause while the word “regulate” remained in the background. The so-called “constitutional revolution” of the 1930s, however, brought the latter word to its present prominence.

Definition of Terms

Commerce.—The etymology of the word “commerce” carries the primary meaning of traffic, of transporting goods across state lines for sale. This possibly narrow constitutional conception was rejected by Chief Justice Marshall in Gibbons v. Ogden, which remains one of the seminal cases dealing with the Constitution. The case arose because of a monopoly granted by the New York legislature on the operation of steam-propelled vessels on its waters, a monopoly challenged by Gibbons, who transported passengers from New Jersey to New York pursuant to privileges granted by an act of Congress. The New York monopoly was not in conflict with the congressional regulation of commerce, argued the monopolists, because the vessels carried only passengers between the two States and were thus not engaged in traffic, in “commerce” in the constitutional sense.

630 That is, “cum merce (with merchandise).”
632 Act of February 18, 1793, 1 Stat. 305, entitled “An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same.”
“The subject to be regulated is commerce,” the Chief Justice wrote. “The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse.”\footnote{Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).} The term, therefore, included navigation, a conclusion that Marshall also supported by appeal to general understanding, to the prohibition in Article I, § 9, against any preference being given “by any regulation of commerce or revenue, to the ports of one State over those of another,” and to the admitted and demonstrated power of Congress to impose embargoes.\footnote{22 U.S. at 190–94.}

Marshall qualified the word “intercourse” with the word “commercial,” thus retaining the element of monetary transactions.\footnote{22 U.S. at 193.} But, today, “commerce” in the constitutional sense, and hence “interstate commerce,” covers every species of movement of persons and things, whether for profit or not, across state lines,\footnote{As we will see, however, in many later formulations the crossing of state lines is no longer the \textit{sine qua non}; wholly intrastate transactions with substantial effects on interstate commerce may suffice.} every species of communication, every species of transmission of intelligence, whether for commercial purposes or otherwise,\footnote{E.g., United States v. Simpson, 252 U.S. 465 (1920); Caminetti v. United States, 242 U.S. 470 (1917).} every species of commercial negotiation which will involve sooner or later an act of transportation of persons or things, or the flow of services or power, across state lines.\footnote{“Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information.” United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533, 549–550 (1944).}

There was a long period in the Court’s history when a majority of the Justices, seeking to curb the regulatory powers of the Federal Government by various means, held that certain things were not encompassed by the commerce clause because they were either not interstate commerce or bore no sufficient nexus to interstate commerce. Thus, at one time, the Court held that mining or manufacturing, even when the product would move in interstate commerce, was not reachable under the commerce clause;\footnote{Kidd v. Pearson, 128 U.S. 1 (1888); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); United States v. E. C. Knight Co., 156 U.S. 1 (1895); and see Carter v. Carter Coal Co., 298 U.S. 238 (1936).} it held in-
and that exhibitions of baseball between professional teams that travel from State to State were not in commerce,641 and that similarly the commerce clause was not applicable to the making of contracts for the insertion of advertisements in periodicals in another State642 or to the making of contracts for personal services to be rendered in another State.643 Later decisions either have overturned or have undermined all of these holdings. The gathering of news by a press association and its transmission to client newspapers are interstate commerce.644 The activities of a Group Health Association, which serves only its own members, are “trade” and capable of becoming interstate commerce;645 the business of insurance when transacted between an insurer and an insured in different States is interstate commerce.646 But most important of all there was the development of, or more accurately the return to,647 the rationales by which manufacturing,648 mining,649 business transactions,650 and the like, which are antecedent to or subse-
Among the Several States.—Continuing in *Gibbons v. Ogden*, Chief Justice Marshall observed that the phrase “among the several States” was “not one which would probably have been selected to indicate the completely interior traffic of a state.” It must therefore have been selected to demarcate “the exclusively internal commerce of a state.” While, of course, the phrase “may very properly be restricted to that commerce which concerns more states than one,” it is obvious that “[c]ommerce among the states, cannot stop at the exterior boundary line of each state, but may be introduced into the interior.” The Chief Justice then succinctly stated the rule, which, though restricted in some periods, continues to govern the interpretation of the clause. “The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.”

Recognition of an “exclusively internal” commerce of a State, or “intrastate commerce” in today’s terms, was at times regarded as setting out an area of state concern that Congress was precluded from reaching. While these cases seemingly visualized Congress’ power arising only when there was an actual crossing of state boundaries, this view ignored Marshall’s equation of “intrastate commerce” which “affect[s] other states” or “with which it is necessary to interfere” in order to effectuate congressional power with those actions which are “purely” interstate. This equation came back into its own, both with the Court’s stress on the “current of commerce” bringing each element in the current within Congress’ regulatory power, with the emphasis on the interrelationships of industrial production to interstate commerce but especially with the emphasis that even minor transactions have an effect on inter-

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651 22 U.S. (9 Wheat.) 1, 194, 195 (1824).
state commerce and that the cumulative effect of many minor transactions with no separate effect on interstate commerce, when they are viewed as a class, may be sufficient to merit congressional regulation. "Commerce among the states must, of necessity, be commerce with the states. ... The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states.")

Regulate.—"We are now arrived at the inquiry—" continued the Chief Justice, "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution ... If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.")

Of course, the power to regulate commerce is the power to prescribe conditions and rules for the carrying-on of commercial transactions, the keeping-free of channels of commerce, the regulating of prices and terms of sale. Even if the clause granted only this...
power, the scope would be wide, but it extends to include many more purposes than these. “Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.” Thus, in upholding a federal statute prohibiting the shipment in interstate commerce of goods made with child labor, not because the goods were intrinsically harmful but in order to extirpate child labor, the Court said: “It is no objection to the assertion of the power to regulate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.”

The power has been exercised to enforce majority conceptions of morality, to ban racial discrimination in public accommodations, and to protect the public against evils both natural and contrived by people. The power to regulate interstate commerce is, therefore, rightly regarded as the most potent grant of authority in § 8.

Necessary and Proper Clause.—All grants of power to Congress in § 8, as elsewhere, must be read in conjunction with the final clause, cl. 18, of § 8, which authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers.” It will be recalled that Chief Justice Marshall alluded to the power thus enhanced by this clause when he said that the regulatory power did not extend “to those internal concerns [of a state] . . . with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.” There are numerous cases permitting Congress to reach “purely” intrastate activities on the theory, combined with the previously mentioned emphasis on the cumulative effect of minor transactions, that it is necessary to regulate them in order

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660 United States v. Darby, 312 U.S. 100, 114 (1941).
that the regulation of interstate activities might be fully effec-
tuated.\footnote{E.g., Houston & Texas Ry. v. United States, 234 U.S. 342 (1914) (necessary for ICC to regulate rates of an intrastate train in order to effectuate its rate setting for a competing interstate train); Wisconsin R.R. Comm’n v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922) (same); Southern Ry. v. United States, 222 U.S. 20 (1911) (up-

Federalism Limits on Exercise of Commerce Power.—As is recounte
d below, prior to reconsideration of the federal commerce power in the 1930s, the Court in effect followed a doctrine of “dual federalism,” under which Congress’ power to regulate much activity depended on whether it had a “direct” rather than an “indirect” effect on interstate commerce.\footnote{E.g., United States v. E. C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918). Of course, there existed much of this time a par-
allel doctrine under which federal power was not so limited. E.g., Houston & Texas Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).}

When the restrictive interpretation was swept away during and after the New Deal, the question of federalism limits respecting congressional regulation of private activities became moot. However, the States did in a number of in-
stances engage in commercial activities that would be regulated by federal legislation if the enterprise were privately owned; the Court easily sustained application of federal law to these state proprietary activities.\footnote{E.g., United States v. E. C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918). Of course, there existed much of this time a par-
allel doctrine under which federal power was not so limited. E.g., Houston & Texas Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).}

However, as Congress began to extend regulation to state governmental activities, the judicial response was inconsistent and wavering.\footnote{E.g., California v. United States, 320 U.S. 577 (1944); California v. Taylor, 353 U.S. 553 (1957).}

While the Court may shift again to constrain federal power on federalism grounds, at the present time the rule is that Congress lacks authority under the commerce clause to regulate the States as States in some circumstances, when the federal statutory provisions reach only the States and do not bring the States under laws of general applicability.\footnote{For example, federal regulation of the wages and hours of certain state and local governmental employees has alternatively been upheld and invalidated. See Maryland v. Wirtz, 392 U.S. 183 (1968), overruled in National League of Cities v. Usery, 426 U.S. 833 (1976), overruled in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).}

Illegal Commerce

That Congress’ protective power over interstate commerce
reaches all kinds of obstructions and impediments was made clear in United States v. Ferger.\footnote{250 U.S. 199 (1919).} The defendants had been indicted for
issuing a false bill of lading to cover a fictitious shipment in interstate commerce. Before the Court they argued that inasmuch as there could be no commerce in a fraudulent bill of lading, Congress had no power to exercise criminal jurisdiction over them. Said Chief Justice White: “But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce … and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.”

Much of Congress’ criminal legislation is based simply on the crossing of a state line as creating federal jurisdiction.

**Interstate Versus Foreign Commerce**

There are certain dicta urging or suggesting that Congress’ power to regulate interstate commerce restrictively is less than its analogous power over foreign commerce, the argument being that whereas the latter is a branch of the Nation’s unlimited power over foreign relations, the former was conferred upon the National Government primarily in order to protect freedom of commerce from state interference. The four dissenting Justices in the *Lottery Case* endorsed this view in the following words: “The power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken diverso intuitu, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, gen-

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671 250 U.S. at 203.
672 E.g., Hoke v. United States, 227 U.S. 308 (1913) (transportation of women for purposes of prostitution); Gooch v. United States, 297 U.S. 124 (1936) (kidnapping); Brooks v. United States, 267 U.S. 432 (1925) (stolen autos). For example, in Scarborough v. United States, 431 U.S. 563 (1977), the Court upheld a conviction for possession of a firearm by a felon upon a mere showing that the gun had sometime previously traveled in interstate commerce, and Barrett v. United States, 423 U.S. 212 (1976), upheld a conviction for receipt of a firearm on the same showing. The Court does require Congress in these cases to speak plainly in order to reach such activity, inasmuch as historic state police powers are involved. United States v. Bass, 404 U.S. 336 (1971).
erally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case would not be necessary or proper in the other."  

And twelve years later Chief Justice White, speaking for the Court, expressed the same view, as follows: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand."  

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is co-extensive with it." And nearly fifty years later, Justice Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."  

Today it is firmly established doctrine that the power to regulate commerce, whether with foreign nations or among the several States, comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only that the specific limitations imposed upon Congress' powers, as by the due process clause of the Fifth Amendment, are not transgressed. 

**Instruments of Commerce**

The applicability of Congress' power to the agents and instruments of commerce is implied in Marshall's opinion in **Gibbons v. Ogden**, where the waters of the State of New York in their quality as highways of interstate and foreign transportation were held to be governed by the overriding power of Congress. Likewise, the same opinion recognizes that in "the progress of things," new and

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674 Brolan v. United States, 236 U.S. 216, 222 (1915). The most recent dicta to this effect appears in Japan Line v. County of Los Angeles, 441 U.S. 434, 448–451 (1979), a "dormant" commerce clause case involving state taxation with an impact on foreign commerce. In context, the distinction seems unexceptionable, but the language extends beyond context.
675 License Cases, 46 U.S. (5 How.) 504, 578 (1847).
678 22 U.S. (9 Wheat.) 1, 217, 221 (1824).
other instruments of commerce will make their appearance. When the Licensing Act of 1793 was passed, the only craft to which it could apply were sailing vessels, but it and the power by which it was enacted were, Marshall asserted, indifferent to the “principle” by which vessels were moved. Its provisions therefore reached steam vessels as well. A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Waite in the case of the Pensacola Telegraph Co. v. Western Union Telegraph Co., a case closely paralleling Gibbons v. Ogden in other respects also. “The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.”

The Radio Act of 1927 whereby “all forms of interstate and foreign radio transmissions within the United States, its Territories and possessions” were brought under national control, affords another illustration. Because of the doctrine thus stated, the measure met no serious constitutional challenge either on the floors of Congress or in the Courts.

679 U.S. 1 (1878). See also Western Union Telegraph Co. v. Texas, 105 U.S. 460 (1882).


Congressional Regulation of Waterways

_Navigation._—In _Pennsylvania v. Wheeling & Belmont Bridge Co._, the Court granted an injunction requiring that a bridge erected over the Ohio River under a charter from the State of Virginia either be altered so as to admit of free navigation of the river or else be entirely abated. The decision was justified on the basis both of the commerce clause and of a compact between Virginia and Kentucky, whereby both these States had agreed to keep the Ohio River “free and common to the citizens of the United States.” The injunction was promptly rendered inoperative by an act of Congress declaring the bridge to be “a lawful structure” and requiring all vessels navigating the Ohio to be so regulated as not to interfere with it. This act the Court sustained as within Congress’ power under the commerce clause, saying: “So far . . . as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, [it] is not so in the contemplation of law . . . . [Congress] having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and federal, which, if not sufficient, certainly none can be found in our system of government.” In short, it is Congress, and not the Court, which is authorized by the Constitution to regulate commerce.

The law and doctrine of the earlier cases with respect to the fostering and protection of navigation are well summed up in a frequently cited passage from the Court’s opinion in _Gilman v. Philadelphia_. “Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they

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683 54 U.S. (13 How.) 518 (1852).
684 Ch. 111, §6, 10 Stat 112 (1852).
685 Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1856). “It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject.” Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883). See also Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Robertson v. California, 328 U.S. 440 (1946).
686 But see _In re Debs_, 158 U.S. 564 (1895), in which the Court held that in the absence of legislative authorization the Executive had power to seek and federal courts to grant injunctive relief to remove obstructions to interstate commerce and the free flow of the mail.
687 70 U.S. (3 Wall.) 713 (1866).
lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."

Thus, Congress was within its powers in vesting the Secretary of War with power to determine whether a structure of any nature in or over a navigable stream is an obstruction to navigation and to order its abatement if he so finds. Nor is the United States required to compensate the owners of such structures for their loss, since they were always subject to the servitude represented by Congress’ powers over commerce, and the same is true of the property of riparian owners that is damaged. And while it was formerly held that lands adjoining nonnavigable streams were not subject to the above mentioned servitude, this rule has been impaired by recent decisions; and at any rate it would not apply as to a stream rendered navigable by improvements.

In exercising its power to foster and protect navigation, Congress legisizes primarily on things external to the act of navigation. But that act itself and the instruments by which it is accom-

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688 70 U.S. at 724–25.
689 Union Bridge Co. v. United States, 204 U.S. 364 (1907). See also Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910); Wisconsin v. Illinois, 278 U.S. 367 (1929). The United States may seek injunctive or declaratory relief requiring the removal of obstructions to commerce by those negligently responsible for them or it may itself remove the obstructions and proceed against the responsible party for costs. United States v. Republic Steel Corp., 362 U.S. 482 (1960); Wyan- dotte Transportation Co. v. United States, 389 U.S. 191 (1967). Congress’ power in this area is newly demonstrated by legislation aimed at pollution and environmental degradation. In confirming the title of the States to certain waters under the Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. § 1301 et seq., Congress was careful to retain authority over the waters for purposes of commerce, navigation, and the like. United States v. Rands, 389 U.S. 121, 127 (1967).
plished are also subject to Congress’ power if and when they enter into or form a part of “commerce among the several States.” When does this happen? Words quoted above from the Court’s opinion in the Gilman case answered this question to some extent; but the decisive answer to it was returned five years later in the case of The Daniel Ball. 694 Here the question at issue was whether an act of Congress, passed in 1838 and amended in 1852, which required that steam vessels engaged in transporting passengers or merchandise upon the “bays, lakes, rivers, or other navigable waters of the United States,” applied to the case of a vessel that navigated only the waters of the Grand River, a stream lying entirely in the State of Michigan. The Court ruled: “In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; .... So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.” 695

Counsel had suggested that if the vessel was in commerce because it was part of a stream of commerce then all transportation within a State was commerce. Turning to this point, the Court added: “We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when the agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end,

694 77 U.S. (10 Wall.) 557 (1871).
695 77 U.S. at 565.
the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.”

In short, it was admitted, inferentially, that the principle of the decision would apply to land transportation, but the actual demonstration of the fact still awaited some years.

Hydroelectric Power; Flood Control.—As a consequence, in part, of its power to forbid or remove obstructions to navigation in the navigable waters of the United States, Congress has acquired the right to develop hydroelectric power and the ancillary right to sell it to all takers. By a long-standing doctrine of constitutional law, the States possess dominion over the beds of all navigable streams within their borders, but because of the servitude that Congress’ power to regulate commerce imposes upon such streams, the States, without the assent of Congress, practically are unable to utilize their prerogative for power development purposes. Sensing no doubt that controlling power to this end must be attributed to some government in the United States and that “in such matters there can be no divided empire,” the Court held in United States v. Chandler-Dunbar Co., that in constructing works for the improvement of the navigability of a stream, Congress was entitled, as part of a general plan, to authorize the lease or sale of such excess water power as might result from the conservation of the flow of the stream. “If the primary purpose is legitimate,” it said, “we can see no sound objection to leasing any excess of power over the

696 77 U.S. at 566. “The regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway.” Justice Brewer for the Court in Monongahela Navigation Co. v. United States, 148 U.S. 312, 342 (1893).
697 Congress had the right to confer upon the Interstate Commerce Commission the power to regulate interstate ferry rates, N.Y. Central R.R. v. Hudson County, 227 U.S. 248 (1913), and to authorize the Commission to govern the towing of vessels between points in the same State but partly through waters of an adjoining State. Cornell Steamboat Co. v. United States, 321 U.S. 634 (1944). Congress’ power over navigation extends to persons furnishing wharfage, dock, warehouse, and other terminal facilities to a common carrier by water. Hence an order of the United States Maritime Commission banning certain allegedly “unreasonable practices” by terminals in the Port of San Francisco, and prescribing schedules of maximum free time periods and of minimum charges was constitutional. California v. United States, 320 U.S. 577 (1944). The same power also comprises regulation of the registry enrollment, license, and nationality of ships and vessels, the method of recording bills of sale and mortgages thereon, the rights and duties of seamen, the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime. See The Lottawanna, 88 U.S. (21 Wall.) 558, 577 (1875); Providence & N.Y. SS. Co. v. Hill Mfg. Co., 109 U.S. 578, 589 (1883); The Hamilton, 207 U.S. 398 (1907); O’Donnell v. Great Lakes Co., 318 U.S. 36 (1944).
700 229 U.S. 53 (1913).
needs of the Government. The practice is not unusual in respect to similar public works constructed by State governments." 701

Since the Chandler-Dunbar case, the Court has come, in effect, to hold that it will sustain any act of Congress which purports to be for the improvement of navigation whatever other purposes it may also embody, nor does the stream involved have to be one "navigable in its natural state." Such, at least, seems to be the sum of its holdings in Arizona v. California, 702 and United States v. Appalachian Power Co. 703 In the former, the Court, speaking through Justice Brandeis, said that it was not free to inquire into the motives "which induced members of Congress to enact the Boulder Canyon Project Act," adding: "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation . . . the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. . . . And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of congressional power." 704

And in the Appalachian Power case, the Court, abandoning previous holdings laying down the doctrine that to be subject to Congress' power to regulate commerce a stream must be "navigable in fact," said: "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken," provided there must be a "balance between cost and need at a time when the improvement would be useful. . . . Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic. . . . Nor is it necessary for navigability that the use should be continuous. . . . Even absence of use over long periods of years, because of changed conditions, . . . does not affect the navigability of rivers in the constitutional sense." 705

702 283 U.S. 423 (1931).
703 311 U.S. 377 (1940).
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Furthermore, the Court defined the purposes for which Congress may regulate navigation in the broadest terms. “It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation… That authority is as broad as the needs of commerce…. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control.” 706 These views the Court has since reiterated. 707 Nor is it by virtue of Congress’ power over navigation alone that the National Government may develop water power. Its war powers and powers of expenditure in furtherance of the common defense and the general welfare supplement its powers over commerce in this respect. 708

Congressional Regulation of Land Transportation

**Federal Stimulation of Land Transportation.**—The settlement of the interior of the country led Congress to seek to facilitate access by first encouraging the construction of highways. In successive acts, it authorized construction of the Cumberland and the National Road from the Potomac across the Alleghenies to the Ohio, reserving certain public lands and revenues from land sales for construction of public roads to new States granted statehood. 709 Acquisition and settlement of California stimulated interest in railway lines to the west, but it was not until the Civil War that Congress voted aid in the construction of a line from the Missouri River to the Pacific; four years later, it chartered the Union Pacific Company. 710

The litigation growing out of these and subsequent activities settled several propositions. First, Congress may provide highways and railways for interstate transportation; 711 second, it may charter private corporations for that purpose; third, it may vest such corporations with the power of eminent domain in the States; and fourth, it may exempt their franchises from state taxation. 712

**Federal Regulation of Land Transportation.**—Congressional regulation of railroads may be said to have begun in 1866.

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706 311 U.S. at 426.
710 12 Stat. 489 (1862); 13 Stat. 356 (1864); 14 Stat. 79 (1866).
711 The result then as well as now might have followed from Congress’ power of spending, independently of the commerce clause, as well as from its war and postal powers, which were also invoked by the Court in this connection.
By the Garfield Act, Congress authorized all railroad companies operating by steam to interconnect with each other “so as to form continuous lines for the transportation of passengers, freight, troops, governmental supplies, and mails, to their destination.” An act of the same year provided federal chartering and protection from conflicting state regulations to companies formed to construct and operate telegraph lines. Another act regulated the transportation by railroad of livestock so as to preserve the health and safety of the animals.

Congress’ entry into the rate regulation field was preceded by state attempts to curb the abuses of the rail lines in the Middle West, which culminated in the “Granger Movement.” Because the businesses were locally owned, the Court at first upheld state laws as not constituting a burden on interstate commerce; but after the various business panics of the 1870s and 1880s drove numerous small companies into bankruptcy and led to consolidation, there emerged great interstate systems. Thus in 1886, the Court held that a State may not set charges for carriage even within its own boundaries of goods brought from without the State or destined to points outside it; that power was exclusively with Congress. In the following year, Congress passed the original Interstate Commerce Act. A Commission was authorized to pass upon the “reasonableness” of all rates by railroads for the transportation of goods or persons in interstate commerce and to order the discontinuance of all charges found to be “unreasonable.” The Commission’s basic authority was upheld in ICC v. Brimson, in which the Court upheld the validity of the Act as a means “necessary and proper” for the enforcement of the regulatory commerce power and in which it also sustained the Commission’s power to go to court to secure compliance with its orders. Later decisions circumscribed somewhat the ICC’s power.

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713 14 Stat. 66 (1866).
714 14 Stat. 221 (1866).
715 17 Stat. 353 (1873).
718 24 Stat. 379 (1887).
719 154 U.S. 447 (1894).
Expansion of the Commission’s authority came in the Hepburn Act of 1906\(^{721}\) and the Mann-Elkins Act of 1910.\(^{722}\) By the former, the Commission was explicitly empowered, after a full hearing on a complaint, “to determine and prescribe just and reasonable” maximum rates; by the latter, it was authorized to set rates on its own initiative and empowered to suspend any increase in rates by a carrier until it reviewed the change. At the same time, the Commission’s jurisdiction was extended to telegraphs, telephones, and cables.\(^{723}\) By the Motor Carrier Act of 1935,\(^{724}\) the ICC was authorized to regulate the transportation of persons and property by motor vehicle common carriers.

The modern powers of the Commission were largely defined by the Transportation Acts of 1920\(^{725}\) and 1940.\(^{726}\) The jurisdiction of the Commission covers not only the characteristics of the rail, motor, and water carriers in commerce among the States but also the issuance of securities by them and all consolidations of existing companies or lines.\(^{727}\) Further, the Commission was charged with regulating so as to foster and promote the meeting of the transportation needs of the country. Thus, from a regulatory exercise originally begun as a method of restraint there has emerged a policy of encouraging a consistent national transportation policy.\(^{728}\)

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\(^{721}\) 34 Stat. 584 (1906).

\(^{722}\) 36 Stat. 539 (1910).

\(^{723}\) These regulatory powers are now vested, of course, in the Federal Communications Commission.

\(^{724}\) 49 Stat. 543 (1935).

\(^{725}\) 41 Stat. 474 (1920).

\(^{726}\) 54 Stat. 898 (1940), U.S.C. § 1 et seq. The two acts were “intended ... to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers.” United States v. Pennsylvania R.R., 323 U.S. 612, 618–619 (1945). The ICC’s powers include authority to determine the reasonableness of a joint through international rate covering transportation in the United States and abroad and to order the domestic carriers to pay reparations in the amount by which the rate is unreasonable. Canada Packers v. Atchison, T. & S. F. Ry., 385 U.S. 182 (1966), and cases cited.


\(^{728}\) Among the various provisions of the Interstate Commerce Act which have been upheld are: a section penalizing shippers for obtaining transportation at less than published rates, Armour Packing Co. v. United States, 209 U.S. 56 (1908); a section construed as prohibiting the hauling of commodities in which the carrier had at the time of haul a proprietary interest, United States v. Delaware & Hudson Co., 213 U.S. 366 (1909); a section abrogating life passes, Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911); a section authorizing the ICC to regulate the entire bookkeeping system of interstate carriers, including intrastate accounts, ICC v. Goodyear Transit Co., 224 U.S. 194 (1912); a clause affecting the charging of rates different for long and short hauls. Intermountain Rate Cases, 234 U.S. 476 (1914).
Federal Regulation of Intrastate Rates (The Shreveport Doctrine).—Although its statutory jurisdiction did not apply to intrastate rate systems, the Commission early asserted the right to pass on rates, which, though in effect on intrastate lines, gave these lines competitive advantages over interstate lines the rates of which the Commission had set. This power the Supreme Court upheld in a case involving a line operating wholly intrastate in Texas but which paralleled within Texas an interstate line operating between Louisiana and Texas; the Texas rate body had fixed the rates of the intrastate line substantially lower than the rate fixed by the ICC on the interstate line. “Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the States and not the Nation, would be supreme in the national field.”

The same holding was applied in a subsequent case in which the Court upheld the Commission’s action in annulling intrastate passenger rates it found to be unduly low in comparison with the rates the Commission had established for interstate travel, thus tending to thwart, in deference to a local interest, the general purpose of the act to maintain an efficient transportation service for the benefit of the country at large.

Federal Protection of Labor in Interstate Rail Transportation.—Federal entry into the field of protective labor legislation and the protection of organization efforts of workers began in connection with the railroads. The Safety Appliance Act of 1893, applying only to cars and locomotives engaged in moving interstate traffic, was amended in 1903 so as to embrace much of the intrastate rail systems on which there was any connection with interstate commerce. The Court sustained this extension in language much like that it would use in the Shreveport case three years

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later. These laws were followed by the Hours of Service Act of 1907, which prescribed maximum hours of employment for rail workers in interstate or foreign commerce. The Court sustained the regulation as a reasonable means of protecting workers and the public from the hazards which could develop from long, tiring hours of labor.

Most far-reaching of these regulatory measures were the Federal Employers Liability Acts of 1906 and 1908. These laws were intended to modify the common-law rules with regard to the liability of employers for injuries suffered by their employees in the course of their employment and under which employers were generally not liable. Rejecting the argument that regulation of such relationships between employers and employees was a reserved state power, the Court adopted the argument of the United States that Congress was empowered to do anything it might deem appropriate to save interstate commerce from interruption or burdening. Inasmuch as the labor of employees was necessary for the function of commerce, Congress could certainly act to ameliorate conditions that made labor less efficient, less economical, and less reliable. Assurance of compensation for injuries growing out of negligence in the course of employment was such a permissible regulation.

Legislation and litigation dealing with the organizational rights of rail employees are dealt with elsewhere.

Regulation of Other Agents of Carriage and Communications.—In 1914, the Court affirmed the power of Congress to regulate the transportation of oil and gas in pipelines from one State to another and held that this power applied to the transportation even though the oil or gas was the property of the lines. Subse-

735 Baltimore & Ohio R.R. v. ICC, 221 U.S. 521 (1911). The Hours of Service Act of 1907, which prescribed maximum hours of employment for rail workers in interstate or foreign commerce, was held unconstitutional in part in the Employers' Liability Cases, 207 U.S. 463 (1908).
737 The Second Employers' Liability Cases, 223 U.S. 1 (1912). For a longer period, a Court majority reviewed a surprising large number of FELA cases, almost uniformly expanding the scope of recovery under the statute. Cf. Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957). This practice was criticized both within and without the Court, cf. Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); Hart, Foreword: The Time Chart of the Justices, 73 HARV. L. REV. 84, 96–98 (1959), and has been discontinued.
738 See discussion under Railroad Retirement Act and National Labor Relations Act, infra.
 Frequently, the Court struck down state regulation of rates of electric current generated within that State and sold to a distributor in another State as a burden on interstate commerce.\textsuperscript{744} Proceeding on the assumption that the ruling meant the Federal Government had the power, Congress in the Federal Power Act of 1935 conferred on the Federal Power Commission authority to regulate the wholesale distribution of electricity in interstate commerce\textsuperscript{745} and three years later vested the FPC with like authority over natural gas moving in interstate commerce.\textsuperscript{746} Thereafter, the Court sustained the power of the Commission to set the prices at which gas originating in one State and transported into another should be sold to distributors wholesale in the latter State.\textsuperscript{747} “The sale of natural gas originating in the State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress . . . . The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce.”\textsuperscript{748}

Other acts regulating commerce and communication originating in this period have evoked no basic constitutional challenge. These include the Federal Communications Act of 1934, providing for the regulation of interstate and foreign communication by wire and radio,\textsuperscript{749} and the Civil Aeronautics Act of 1938, providing for the regulation of all phases of airborne commerce, foreign and interstate.\textsuperscript{750}


\textsuperscript{742} 49 Stat. 863, 16 U.S.C. §§ 791a–825u.


\textsuperscript{744} FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

\textsuperscript{745} 315 U.S. at 582. Sales to distributors by a wholesaler of natural gas delivered to it from out-of-state sources are subject to FPC jurisdiction. Colorado-Wyoming Co. v. FPC, 324 U.S. 626 (1945). \textit{See also} Illinois Gas Co. v. Public Service Co., 314 U.S. 498 (1942); FPC v. East Ohio Gas Co., 338 U.S. 464 (1950). In Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), the Court ruled that an independent company engaged in one State in production, gathering, and processing of natural gas, which it thereafter sells in the same State to pipelines that transport and sell the gas in other States is subject to FPC jurisdiction. \textit{See also} California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965).


\textsuperscript{747} 52 Stat. 973, as amended. The CAB has now been abolished and its functions are exercised by the Federal Aviation Administration, 49 U.S.C. § 106, as part of the Department of Transportation.
Congressional Regulation of Commerce as Traffic

The Sherman Act: Sugar Trust Case.—Congress’ chief effort to regulate commerce in the primary sense of “traffic” is embodied in the Sherman Antitrust Act of 1890, the opening section of which declares “every contract, combination in the form of trust or otherwise,” or “conspiracy in restraint of trade and commerce among the several States, or with foreign nations” to be “illegal,” while the second section makes it a misdemeanor for anybody to “monopolize or attempt to monopolize any part of such commerce.” The act was passed to curb the growing tendency to form industrial combinations, and the first case to reach the Court under it was the famous Sugar Trust Case, United States v. E. C. Knight Co. Here the Government asked for the cancellation of certain agreements, whereby the American Sugar Refining Company, had “acquired,” it was conceded, “nearly complete control of the manufacture of refined sugar in the United States.”

The question of the validity of the Act was not expressly discussed by the Court but was subordinated to that of its proper construction. The Court, in pursuance of doctrines of constitutional law then dominant with it, turned the Act from its intended purpose and destroyed its effectiveness for several years, as that of the Interstate Commerce Act was being contemporaneously impaired. The following passage early in Chief Justice Fuller’s opinion for the Court sets forth the conception of the federal system that controlled the decision: “It is vital that the independence of the commercial power and of the police power, and the delimation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.”

In short, what was needed, the Court felt, was a hard and fast line between the two spheres of power, and in a series of propositions it endeavored to lay down such a line: (1) production is always local, and under the exclusive domain of the States; (2) commerce among the States does not begin until goods “commence their final movement from their State of origin to that of their des-

\[749\] 156 U.S. 1 (1895).
\[750\] 156 U.S. at 13.
tination;” (3) the sale of a product is merely an incident of its production and, while capable of “bringing the operation of commerce into play,” affects it only incidentally; (4) such restraint as would reach commerce, as above defined, in consequence of combinations to control production “in all its forms,” would be “indirect, however inevitable and whatever its extent,” and as such beyond the purview of the Act. Applying the above reasoning to the case before it, the Court proceeded: “The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function.”

“Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.”

_**Sherman Act Revived.**_—Four years later came the case of _Addyston Pipe and Steel Co. v. United States_, in which the Anti-trust Act was successfully applied as against an industrial com-

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751 156 U.S. at 13–16.
752 156 U.S. at 17. The doctrine of the case boiled down to the proposition that commerce was transportation only, a doctrine Justice Harlan undertook to refute in his notable dissenting opinion. “Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations” Id. at 22. “Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. McCulloch v. Maryland, 4 Wheat. 316, 405,” Id. at 33.
753 175 U.S. 211 (1899).
bination for the first time. The agreements in the case, the parties to which were manufacturing concerns, effected a division of territory among them, and so involved, it was held, a "direct" restraint on the distribution and hence of the transportation of the products of the contracting firms. The holding, however, did not question the doctrine of the earlier case, which in fact continued substantially undisturbed until 1905, when Swift & Co. v. United States, was decided.

The "Current of Commerce" Concept: The Swift Case.—
Defendants in Swift were some thirty firms engaged in Chicago and other cities in the business of buying livestock in their stockyards, in converting it at their packing houses into fresh meat, and in the sale and shipment of such fresh meat to purchasers in other States. The charge against them was that they had entered into a combination to refrain from bidding against each other in the local markets, to fix the prices at which they would sell, to restrict shipments of meat, and to do other forbidden acts. The case was appealed to the Supreme Court on defendants' contention that certain of the acts complained of were not acts of interstate commerce and so did not fall within a valid reading of the Sherman Act. The Court, however, sustained the Government on the ground that the "scheme as a whole" came within the act, and that the local activities alleged were simply part and parcel of this general scheme.

Referring to the purchase of livestock at the stockyards, the Court, speaking by Justice Holmes, said: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring

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754 196 U.S. 375 (1905). The Sherman Act was applied to break up combinations of interstate carriers in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898); and Northern Securities Co. v. United States, 193 U.S. 197 (1904).


course, the current thus existing is a current of commerce among
the States, and the purchase of the cattle is a part and incident of
such commerce." 756 Likewise the sales alleged of fresh meat at the
slaughtering places fell within the general design. Even if they im-
ported a technical passing of title at the slaughtering places, they
also imported that the sales were to persons in other States, and
that shipments to such States were part of the transaction. 757
Thus, sales of the type that in the Sugar Trust case were thrust
to one side as immaterial from the point of view of the law, because
they enabled the manufacturer "to fulfill its function," were here
treated as merged in an interstate commerce stream.

Thus, the concept of commerce as trade, that is, as traffic,
again entered the constitutional law picture, with the result that
conditions directly affecting interstate trade could not be dismissed
on the ground that they affected interstate commerce, in the sense
of interstate transportation, only "indirectly." Lastly, the Court
added these significant words: "But we do not mean to imply that
the rule which marks the point at which State taxation or regula-
tion becomes permissible necessarily is beyond the scope of inter-
ference by Congress in cases where such interference is deemed
necessary for the protection of commerce among the States." 758
That is to say, the line that confines state power from one side does
not always confine national power from the other. Even though the
line accurately divides the subject matter of the complementary
spheres, national power is always entitled to take on the additional
extension that is requisite to guarantee its effective exercise and is
furthermore supreme.

The Danbury Hatters Case.—In this respect, the Swift case
only states what the Shreveport case was later to declare more ex-
plicitly, and the same may be said of an ensuing series of cases in
which combinations of employees engaged in such intrastate activi-
ties as manufacturing, mining, building, construction, and the dis-
tribution of poultry were subjected to the penalties of the Sherman
Act because of the effect or intended effect of their activities on
interstate commerce. 759

756 196 U.S. at 398–99.
757 196 U.S. at 399–401.
758 196 U.S. at 400.
759 Loewe v. Lawlor (The Danbury Hatters Case), 208 U.S. 274 (1908); Duplex
Printing Press Co. v. Deering, 254 U.S. 443 (1921); Coronado Co. v. United Mine
Workers, 268 U.S. 295 (1925); United States v. Bruins, 272 U.S. 549 (1926); Bedford
Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); Local 167 v. United States, 291 U.S.
293 (1934); Allen Bradley Co. v. Union, 325 U.S. 797 (1945); United States v. Em-
ploying Plasterers Ass'n, 347 U.S. 186 (1954); United States v. Green, 350 U.S. 415
Stockyards and Grain Futures Acts.—In 1921 Congress passed the Packers and Stockyards Act\(^\text{760}\) whereby the business of commission men and livestock dealers in the chief stockyards of the country was brought under national supervision, and in the year following it passed the Grain Futures Act\(^\text{761}\) whereby exchanges dealing in grain futures were subjected to control. The decisions of the Court sustaining these measures both built directly upon the *Swift* case.

In *Stafford v. Wallace*,\(^\text{762}\) which involved the former act, Chief Justice Taft, speaking for the Court, said: “The object to be secured by the act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.”\(^\text{763}\) The stockyards, therefore, were “not a place of rest or final destination.” They were “but a throat through which the current flows,” and the sales there were not merely local transactions. “They do not stop the flow;—but, on the contrary” are “indispensable to its continuity.”\(^\text{764}\)

In *Chicago Board of Trade v. Olsen*,\(^\text{765}\) involving the Grain Futures Act, the same course of reasoning was repeated. Speaking of the *Swift* case, Chief Justice Taft remarked: “That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of a great interstate movement, which taken alone are intrastate, to characterize the movement as such.”\(^\text{766}\)

Of special significance, however, is the part of the opinion devoted to showing the relation between future sales and cash sales, and hence the effect of the former upon the interstate grain trade. The test, said the Chief Justice, was furnished by the question of price. “The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article


\(^{761}\)42 Stat. 998 (1922), 7 U.S.C. §§ 1–9, 10a–17.

\(^{762}\)258 U.S. 495 (1922).

\(^{763}\)258 U.S. at 514.


\(^{765}\)262 U.S. 1 (1923).

\(^{766}\)262 U.S. at 35.
directly affect the country-wide commerce in it.” 767 Thus a practice which demonstrably affects prices would also affect interstate trade “directly,” and so, even though local in itself, would fall within the regulatory power of Congress. In the following passage, indeed, Chief Justice Taft whittled down, in both cases, the “direct-indirect” formula to the vanishing point: “Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger to meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent.” 768

It was in reliance on the doctrine of these cases that Congress first set to work to combat the Depression in 1933 and the years immediately following. But in fact, much of its legislation at this time marked a wide advance upon the measures just passed in review. They did not stop with regulating traffic among the States and the instrumentalities thereof; they also essayed to govern production and industrial relations in the field of production. Confronted with this expansive exercise of Congress’ power, the Court again deemed itself called upon to define a limit to the commerce power that would save to the States their historical sphere, and especially their customary monopoly of legislative power in relation to industry and labor management.

Securities and Exchange Commission.—Not all antidepression legislation, however, was of this new approach. The Securities Exchange Act of 1934 769 and the Public Utility Company Act (“Wheeler-Rayburn Act”) of 1935 770 were not. The former created the Securities and Exchange Commission and authorized it to lay down regulations designed to keep dealing in securities honest and aboveboard and closed the channels of interstate commerce and the mails to dealers refusing to register under the act. The latter required the companies governed by it to register with the Securities and Exchange Commission and to inform it concerning their business, organization and financial structure, all on pain of being prohibited use of the facilities of interstate commerce and the mails; while by § 11, the so-called “death sentence” clause, the same act closed after a certain date the channels of interstate com-

767 262 U.S. at 40.
768 262 U.S. at 37, quoting Stafford v. Wallace, 258 U.S. 495, 521 (1922).
communication to certain types of public utility companies whose operations, Congress found, were calculated chiefly to exploit the investing and consuming public. All these provisions have been sustained,\textsuperscript{771} \textit{Gibbons v. Ogden} furnishing the Court its principle reliance.

Congressional Regulation of Production and Industrial Relations: Antidepression Legislation

In the words of Chief Justice Hughes, spoken in a case decided a few days after President Franklin D. Roosevelt’s first inauguration, the problem then confronting the new Administration was clearly set forth. “When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.”\textsuperscript{772}

\textbf{National Industrial Recovery Act.}—The initial effort of Congress to deal with this situation was embodied in the National Industrial Recovery Act of June 16, 1933.\textsuperscript{773} The opening section of the Act asserted the existence of “a national emergency productive of widespread unemployment and disorganization of industry which” burdened “interstate and foreign commerce,” affected “the public welfare,” and undermined “the standards of living of the American people.” To affect the removal of these conditions the President was authorized, upon the application of industrial or trade groups, to approve “codes of fair competition,” or to prescribe the same in cases where such applications were not duly forthcoming. Among other things such codes, of which eventually more than 700 were promulgated, were required to lay down rules of fair dealing with customers and to furnish labor certain guarantees respecting hours, wages and collective bargaining. For the time being, business and industry were to be cartelized on a national scale.

In \textit{A.L.A. Schechter Poultry Corp. v. United States},\textsuperscript{774} one of these codes, the Live Poultry Code, was pronounced unconstitutional. Although it was conceded that practically all poultry handled by the Schechters came from outside the State, and hence via interstate commerce, the Court held, nevertheless, that once the chickens came to rest in the Schechter’s wholesale market, interstate commerce in them ceased. The act, however, also purported

\begin{itemize}
  \item \textsuperscript{771} \textit{Electric Bond Co. v. SEC}, 303 U.S. 419 (1938); \textit{North American Co. v. SEC}, 327 U.S. 686 (1946); \textit{American Power & Light Co. v. SEC}, 329 U.S. 90 (1946).
  \item \textsuperscript{772} \textit{Appalachian Coals, Inc. v. United States}, 288 U.S. 344, 372 (1933).
  \item \textsuperscript{773} 48 Stat. 195.
  \item \textsuperscript{774} 295 U.S. 495 (1935).
\end{itemize}
to govern business activities which “affected” interstate commerce. This, Chief Justice Hughes held, must be taken to mean “directly” affect such commerce: “the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, . . . there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.” In short, the case was governed by the ideology of the Sugar Trust case, which was not mentioned in the Court’s opinion.  

**Agricultural Adjustment Act.**—Congress’ second attempt to combat the Depression comprised the Agricultural Adjustment Act of 1933. As is pointed out elsewhere, the measure was set aside as an attempt to regulate production, a subject held to be “prohibited” to the United States by the Tenth Amendment.  

**Bituminous Coal Conservation Act.**—The third measure to be disallowed was the Guffey-Snyder Bituminous Coal Conservation Act of 1935. The statute created machinery for the regulation of the price of soft coal, both that sold in interstate commerce and that sold “locally,” and other machinery for the regulation of hours of labor and wages in the mines. The clauses of the act dealing with these two different matters were declared by the act itself to be separable so that the invalidity of the one set would not affect the validity of the other, but this strategy was ineffectual. A majority of the Court, speaking by Justice Sutherland, held that the act constituted one connected scheme of regulation, which, inasmuch as it invaded the reserved powers of the States over conditions of

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775 295 U.S. at 548. See also id. at 546.
776 In United States v. Sullivan, 332 U.S. 689 (1948), the Court interpreted the Federal Food, Drug, and Cosmetic Act of 1938 as applying to the sale by a retailer of drugs purchased from his wholesaler within the State nine months after their interstate shipment had been completed. The Court, speaking by Justice Black, cited United States v. Walsh, 331 U.S. 432 (1947); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941). Justice Frankfurter dissented on the basis of FTC v. Bunte Bros., 312 U.S. 349 (1941). It is apparent that the Schechter case has been thoroughly repudiated so far as the distinction between “direct” and “indirect” effects is concerned. Cf. Perez v. United States, 402 U.S. 146 (1971). See also McDermott v. Wisconsin, 228 U.S. 115 (1913), which preceded the Schechter decision by more than two decades.

The NIRA, however, was found to have several other constitutional infirmities besides its disregard, as illustrated by the Live Poultry Code, of the “fundamental” distinction between “direct” and “indirect” effects, namely, the delegation of standardless legislative power, the absence of any administrative procedural safeguards, the absence of judicial review, and the dominant role played by private groups in the general scheme of regulation.

777 48 Stat. 31 (1933).
employment in productive industry, was violative of the Constitution.\footnote{Carter v. Carter Coal Co., 298 U.S. 238 (1936).} Justice Sutherland’s opinion set out from Chief Justice Hughes’ assertion in the Schechter case of the “fundamental” character of the distinction between “direct” and “indirect” effects, that is to say, from the doctrine of the Sugar Trust case. It then proceeded: “Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But … the conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.”\footnote{298 U.S. at 308–09.}

**Railroad Retirement Act.**—Still pursuing the idea of protecting commerce and the labor engaged in it concurrently, Congress, by the Railroad Retirement Act of June 27, 1934,\footnote{48 Stat. 1283 (1934).} ordered the compulsory retirement of superannuated employees of interstate carriers, and provided that they be paid pensions out of a fund comprising compulsory contributions from the carriers and their present and future employees. In *Railroad Retirement Board v. Alton R.R.*,\footnote{295 U.S. 330 (1935).} however, a closely divided Court held this legislation to be in excess of Congress’ power to regulate commerce and contrary to the due process clause of the Fifth Amendment. Said Justice Roberts for the majority: “We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is
neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads’ duty to serve the public in interstate transportation.” 784

Chief Justice Hughes, speaking for the dissenters, contended, on the contrary, that “the morale of the employees [had] an important bearing upon the efficiency of the transportation service.” He added: “The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable.” 785 Under subsequent legislation, an excise is levied on interstate carriers and their employees, while by separate but parallel legislation a fund is created in the Treasury out of which pensions are paid along the lines of the original plan. The constitutionality of this scheme appears to be taken for granted in Railroad Retirement Board v. Duquesne Warehouse Co. 786

**National Labor Relations Act.**—The case in which the Court reduced the distinction between “direct” and “indirect” effects to the vanishing point and thereby placed Congress in the position to regulate productive industry and labor relations in these industries was NLRB v. Jones & Laughlin Steel Corp. 787 Here the statute involved was the National Labor Relations Act of 1935, 788 which declared the right of workers to organize, forbade unlawful employer interference with this right, established procedures by

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784 295 U.S. at 374.
785 295 U.S. at 379, 384.
787 301 U.S. 1 (1937). A major political event had intervened between this decision and those described in the preceding pages. President Roosevelt, angered at the Court’s invalidation of much of his depression program, proposed a “reorganization” of the Court by which he would have been enabled to name one new Justice for each Justice on the Court who was more than 70 years old, in the name of “judicial efficiency.” The plan was defeated in the Senate, in part, perhaps, because in such cases as Jones & Laughlin a Court majority began to demonstrate sufficient “judicial efficiency.” See Leuchtenberg, The Origins of Franklin D. Roosevelt’s ‘Court-Packing’ Plan, 1966 SUP. CT. REV. 347 (P. Kurland ed.); Mason, Harlan Fiske Stone and FDR’s Court Plan, 61 YALE L. J. 791 (1952); 2 M. PUSEY, CHARLES EVANS HUGHES 759–765 (1951).
which workers could choose exclusive bargaining representatives with which employers were required to bargain, and created a board to oversee all these processes.\textsuperscript{789}

The Court, speaking through Chief Justice Hughes, upheld the Act and found the corporation to be subject to the Act. “The close and intimate effect,” he said, “which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local.” Nor will it do to say that such effect is “indirect.” Considering defendant’s “far-flung activities,” the effect of strife between it and its employees “would be immediate and [it] might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with

\textsuperscript{789}The NLRA was enacted not only against the backdrop of depression, although obviously it went far beyond being a mere antidepression measure, but Congress could as well look to its experience in railway labor legislation. In 1898, Congress passed the Erdman Act, 30 Stat. 424, which attempted to influence the unionization of railroad workers and facilitate negotiations with employers through mediation. The statute fell largely into disuse because the railroads refused to mediate. Additionally, in Adair v. United States, 208 U.S. 161 (1908), the Court struck down a section of the law outlawing “yellow-dog contracts,” by which employers exacted promises of workers to quit or not to join unions as a condition of employment. The Court held the section not to be a regulation of commerce, there being no connection between an employee’s membership in a union and the carrying on of interstate commerce.


The Court did uphold in Wilson v. New, 243 U.S. 322 (1917), a congressional settlement of a threatened rail strike through the enactment of an eight-hour day and a time-and-a-half for overtime for all interstate railway employees. The national emergency confronting the Nation was cited by the Court but with the implication that the power existed in more normal times, suggesting that Congress’ powers were not as limited as some judicial decisions had indicated.

Congress’ enactment of the Railway Labor Act in 1926, 44 Stat. 577, as amended, 45 U.S.C. § 151 et seq., was sustained by a Court decision admitting the connection between interstate commerce and union membership as a substantial one. Texas & N.L.R. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548 (1930). A subsequent decision sustained the application of the Act to “back shop” employees of an interstate carrier who engaged in making heavy repairs on locomotives and cars withdrawn from service for long periods, the Court finding that the activities of these employees were related to interstate commerce. Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).
that commerce must be appraised by a judgment that does not ignore actual experience.” 790

While the Act was thus held to be within the constitutional powers of Congress in relation to a productive concern because the interruption of its business by strike “might be catastrophic,” the decision was forthwith held to apply also to two minor concerns, 791 and in a later case the Court stated specifically that the smallness of the volume of commerce affected in any particular case is not a material consideration. 792 Subsequently, the act was declared to be applicable to a local retail auto dealer on the ground that he was an integral part of the manufacturer’s national distribution system, 793 to a labor dispute arising during alteration of a county courthouse because one-half of the cost—$225,000—was attributable to materials shipped from out-of-State, 794 and to a dispute involving a retail distributor of fuel oil, all of whose sales were local, but who obtained the oil from a wholesaler who imported it from another State. 795

Indeed, “[t]his Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.” 796 Thus, the Board has formulated jurisdictional standards which assume the requisite effect on interstate commerce from a prescribed dollar volume of business and these standards have been implicitly approved by the Court. 797

**Fair Labor Standards Act.**—In 1938, Congress enacted the Fair Labor Standards Act. The measure prohibited not only the shipment in interstate commerce of goods manufactured by employees whose wages are less than the prescribed maximum but also the employment of workmen in the production of goods for such commerce at other than the prescribed wages and hours. Interstate commerce was defined by the act to mean “trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.”

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793 Howell Chevrolet Co. v. NLRB, 346 U.S. 482 (1953).
It was further provided that “for the purposes of this act an employee shall be deemed to have been engaged in the production of goods [that is, for interstate commerce] if such employee was employed ... in any process or occupation directly essential to the production thereof in any State.” 798 Sustaining an indictment under the act, a unanimous Court, speaking through Chief Justice Stone, said: “The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows.” 799 In support of the decision the Court invoked Chief Justice Marshall’s reading of the necessary-and-proper clause in *McCulloch v. Maryland* and his reading of the commerce clause in *Gibbons v. Ogden.* 800 Objections purporting to be based on the Tenth Amendment were met from the same point of view: “Our conclusion is unaffected by the Tenth Amendment which provides: ‘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.’ The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new National Government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved powers.” 801

Subsequent decisions of the Court took a very broad view of which employees should be covered by the Act, 802 and in 1949 Con-

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798 52 Stat. 1060, as amended, 63 Stat. 910 (1949). The 1949 amendment substituted the phrase “in any process or occupation directly essential to the production thereof in any State” for the original phrase “in any process or occupation necessary to the production thereof in any State.” In *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 317 (1960), the Court noted that the change “manifests the view of Congress that on occasion courts ... had found activities to be covered, which ... [Congress now] deemed too remote from commerce or too incidental to it.” The 1961 amendments to the Act, 75 Stat. 65, departed from previous practices of extending coverage to employees individually connected to interstate commerce to cover all employees of any “enterprise” engaged in commerce or production of commerce; thus, there was an expansion of employees covered but not, of course, of employers, 29 U.S.C. § 201 et seq. See 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a).

799 United States v. Darby, 312 U.S. 100, 115 (1941).

800 312 U.S. at 115, 114, 118.

801 312 U.S. at 123–24.

802 E.g., *Kirschbaum v. Walling*, 316 U.S. 517 (1942) (operating and maintenance employees of building, part of which was rented to business producing goods for interstate commerce); *Walton v. Southern Package Corp.*, 320 U.S. 540 (1944).
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Congress to some degree narrowed the permissible range of coverage and disapproved some of the Court’s decisions. But in 1961, Congress itself expanded by several million persons the coverage of the Act, introducing the “enterprise” concept by which all employees in a business producing anything in commerce or affecting commerce were brought within the protection of the minimum wage-maximum hours standards. The “enterprise concept” was sustained by the Court in Maryland v. Wirtz. Justice Harlan for a unanimous Court on this issue found the extension entirely proper on the basis of two theories: one, a business’ competitive position in commerce is determined in part by all its significant labor costs, and not just those costs attributable to its employees engaged in production in interstate commerce, and, two, labor peace and thus smooth functioning of interstate commerce was facilitated by the termination of substandard labor conditions affecting all employees and not just those actually engaged in interstate commerce.

Agricultural Marketing Agreement Act.—After its initial frustrations, Congress returned to the task of bolstering agriculture by passing the Agricultural Marketing Agreement Act of June 3, 1937, authorizing the Secretary of Agriculture to fix the minimum prices of certain agricultural products, when the handling of such products occurs “in the current of interstate or foreign commerce or ... directly burdens, obstructs or affects interstate or foreign commerce in such commodity or product thereof.” In United States v. Wrightwood Dairy Co., the Court sustained an order of
the Secretary of Agriculture fixing the minimum prices to be paid to producers of milk in the Chicago “marketing area.” The dairy company demurred to the regulation on the ground it applied to milk produced and sold intrastate. Sustaining the order, the Court said: “Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce . . . and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.... It follows that no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.” 811

In Wickard v. Filburn, 812 a still deeper penetration by Congress into the field of production was sustained. As amended by the act of 1941, the Agricultural Adjustment Act of 1938 813 regulated production even when not intended for commerce but wholly for consumption on the producer’s farm. Sustaining this extension of the act, the Court pointed out that the effect of the statute was to support the market. “It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Homegrown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating...

811 315 U.S. at 118–19.
and obstructing its purpose to stimulate trade therein at increased prices.” 814 And it elsewhere stated: “Questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon interstate commerce. ... The Court’s recognition of the relevance of the economic effects in the application of the Commerce Clause ... has made the mechanical application of legal formulas no longer feasible.” 815

Acts of Congress Prohibiting Commerce

Foreign Commerce: Jefferson’s Embargo.—“Jefferson’s Embargo” of 1807–1808, which cut all trade with Europe, was attacked on the ground that the power to regulate commerce was the power to preserve it, not the power to destroy it. This argument was rejected by Judge Davis of the United States District Court for Massachusetts in the following words: “A national sovereignty is created [by the Constitution]. Not an unlimited sovereignty, but a sovereignty, as to the objects surrendered and specified, limited only by the qualification and restrictions, expressed in the Constitution. Commerce is one of those objects. The care, protection, management and control, of this great national concern, is, in my opinion, vested by the Constitution, in the Congress of the United States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the President and Senate.... Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the acts

815 317 U.S. at 120–24. In United States v. Rock Royal Co-operative, 307 U.S. 533 (1939), the Court sustained an order under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, regulating the price of milk in certain instances. Said Justice Reed for the majority of the Court: “The challenge is to the regulation ‘of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.’ It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond State lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole. Activities conducted within State lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the State of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales.” Id. at 568–69.
under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the National Government, to whom the subject appears to be committed? ... The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has contended, that they are not the proper objects of national regulation; and several acts of Congress have been made respecting them.... [Furthermore] if it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range."

"Congress has power to declare war. It, of course, has power to prepare for war; and the time, the manner, and the measure, in the application of constitutional means, seem to be left to its wisdom and discretion.... Under the Confederation, ... we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects exportations, without any limitations. Some of them exercised this power.... Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures—but this has never been claimed or pretended, since the adoption of the Federal Constitution; and the exercise of such a power by the States, would be manifestly inconsistent with the power, vested by the people in Congress, 'to regulate commerce.' Hence I infer, that the power, reserved to the States by the articles of Confederation, is surrendered to Congress, by the Constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists no where."  

**Foreign Commerce: Protective Tariffs.**—Tariff laws have customarily contained prohibitory provisions, and such provisions have been sustained by the Court under Congress’ revenue powers and under its power to regulate foreign commerce. For the Court in *Board of Trustees v. United States*, 817 in 1933, Chief Justice Hughes said: “The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on

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817 289 U.S. 48 (1933).
foreign commerce with the United States... It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce... It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, cl. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons v. Ogden*, 9 Wheat. 1, 202. 'Under the power to regulate foreign commerce Congress imposes duties on importations, give drawbacks, pass embargo and nonintercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' *Groves v. Slaughter*, 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' 2 *Story on the Constitution*, 1088.

**Foreign Commerce: Banned Articles.**—The forerunners of more recent acts excluding objectionable commodities from interstate commerce are the laws forbidding the importation of like commodities from abroad. This power Congress has exercised since 1842. In that year it forbade the importation of obscene literature or pictures from abroad. 819 Six years, later it passed an act "to prevent the importation of spurious and adulterated drugs" and to provide a system of inspection to make the prohibition effective. 820 Such legislation guarding against the importation of noxiously adulterated foods, drugs, or liquor has been on the statute books ever since. In 1887, the importation by Chinese nationals of smoking opium was prohibited, 821 and subsequent statutes passed in 1909 and 1914 made it unlawful for anyone to import it. 822 In 1897, Congress forbade the importation of any tea "inferior in purity, quality, and fitness for consumption" as compared with a legal standard. 823 The Act was sustained in 1904, in the leading case of *Buttfield v. Stranahan*. 824 In "The Abby Dodge" an act excluding sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida was sustained but construed as not applying to sponges taken from the territorial water of a State. 825

In *Weber v. Freed*, 826 an act prohibiting the importation and interstate transportation of prize-fight films or of pictorial rep-
representation of prize fights was upheld. Chief Justice White grounded his opinion for a unanimous Court on the complete and total control over foreign commerce possessed by Congress, in contrast implicitly to the lesser power over interstate commerce. And in Brolan v. United States, the Court rejected as wholly inappropriate citation of cases dealing with interstate commerce on the question of Congress’ power to prohibit foreign commerce. It has been earlier noted, however, that the purported distinction is one that the Court both previously to and subsequent to these opinions has rejected.

Interstate Commerce: Power to Prohibit Questioned.—The question whether Congress’ power to regulate commerce “among the several States” embraced the power to prohibit it furnished the topic of one of the most protracted debates in the entire history of the Constitution’s interpretation, a debate the final resolution of which in favor of congressional power is an event of first importance for the future of American federalism. The issue was as early as 1841 brought forward by Henry Clay, in an argument before the Court in which he raised the specter of an act of Congress forbidding the interstate slave trade. The debate was concluded ninety-nine years later by the decision in United States v. Darby, in which the Fair Labor Standards Act was sustained.

Interstate Commerce: National Prohibitions and State Police Power.—The earliest such acts were in the nature of quarantine regulations and usually dealt solely with interstate transportation. In 1884, the exportation or shipment in interstate commerce of livestock having any infectious disease was forbidden. In 1903, power was conferred upon the Secretary of Agriculture to establish regulations to prevent the spread of such diseases through foreign or interstate commerce. In 1905, the same official was authorized to lay an absolute embargo or quarantine upon

827 239 U.S. at 329.
828 236 U.S. 216 (1915).
830 312 U.S. 100 (1941).
831 The judicial history of the argument may be examined in the majority and dissenting opinions in Hammer v. Dagenhart, 247 U.S. 251 (1918), a five-to-four decision, in which the majority held Congress not to be empowered to ban from the channels of interstate commerce goods made with child labor, since Congress’ power was to prescribe the rule by which commerce was to be carried on and not to prohibit it, except with regard to those things the character of which—diseased cattle, lottery tickets—was inherently evil. With the majority opinion, compare Justice Stone’s unanimous opinion in United States v. Darby, 312 U.S. 100, 112–124 (1941), overruling Hammer v. Dagenhart. See also Corwin, The Power of Congress to Prohibit Commerce, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 103 (1938).
832 23 Stat. 31.
all shipments of cattle from one State to another when the public necessity might demand it.\textsuperscript{834} A statute passed in 1905 forbade the transportation in foreign and interstate commerce and the mails of certain varieties of moths, plant lice, and other insect pests injurious to plant crops, trees, and other vegetation.\textsuperscript{835} In 1912, a similar exclusion of diseased nursery stock was decreed,\textsuperscript{836} while by the same act and again by an act of 1917,\textsuperscript{837} the Secretary of Agriculture was invested with powers of quarantine on interstate commerce for the protection of plant life from disease similar to those above described for the prevention of the spread of animal disease. While the Supreme Court originally held federal quarantine regulations of this sort to be constitutionally inapplicable to intrastate shipments of livestock, on the ground that federal authority extends only to foreign and interstate commerce,\textsuperscript{838} this view has today been abandoned.

**The Lottery Case.**—The first case to come before the Court in which the issues discussed above were canvassed at all thoroughly was *Champion v. Ames*,\textsuperscript{839} involving the act of 1895 “for the suppression of lotteries.”\textsuperscript{840} An earlier act excluding lottery tickets from the mails had been upheld in the case *In re Rapier*,\textsuperscript{841} on the proposition that Congress clearly had the power to see that the very facilities furnished by it were not put to bad use. But in the case of commerce, the facilities are not ordinarily furnished by the National Government, and the right to engage in foreign and interstate commerce comes from the Constitution itself or is anterior to it.

How difficult the Court found the question produced by the act of 1895, forbidding any person to bring within the United States or to cause to be “carried from one State to another” any lottery ticket, or an equivalent thereof, “for the purpose of disposing of the same,” was shown by the fact that the case was argued three times before the Court and the fact that the Court’s decision finally sustaining the act was a five-to-four decision. The opinion of the Court, on the other hand, prepared by Justice Harlan, marked an almost unqualified triumph at the time for the view that Congress’ power to regulate commerce among the States included the power to prohibit it, especially to supplement and support state legislation

\textsuperscript{834} 33 Stat. 1264.
\textsuperscript{835} 33 Stat. 1269.
\textsuperscript{836} 37 Stat. 315.
\textsuperscript{837} 39 Stat. 1165.
\textsuperscript{839} Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
\textsuperscript{840} 28 Stat. 963.
\textsuperscript{841} 143 U.S. 110 (1892).
enacted under the police power. Early in the opinion, extensive quotation is made from Chief Justice Marshall’s opinion in *Gibbons v. Ogden*,842 with special stress upon the definition there given of the phrase “to regulate.” Justice Johnson’s assertion on the same occasion is also given: “The power of a sovereign State over commerce, ... amounts to nothing more than a power to limit and restrain it at pleasure.” Further along is quoted with evident approval Justice Bradley’s statement in *Brown v. Houston*,843 that “[t]he power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations.”

Following the wake of the *Lottery Case*, Congress repeatedly brought its prohibitory powers over interstate commerce and communications to the support of certain local policies of the States in the exercise of their reserved powers, thereby aiding them in the repression of a variety of acts and deeds objectionable to public morality. The conception of the Federal System on which the Court based its validation of this legislation was stated by it in 1913 in sustaining the Mann “White Slave” Act in the following words: “Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction ... but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material, and moral.”844 At the same time, the Court made it plain that in prohibiting commerce among the States, Congress was equally free to support state legislative policy or to devise a policy of its own. “Congress,” it said, “may exercise this authority in aid of the policy of the State, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the States may induce legislation without reference to the particular policy or law of any given State. Acting within the authority conferred by the Constitution it is for Congress to determine what legislation will attain its purpose. The control of Congress over interstate commerce is not to be limited by State laws.”845

In *Brooks v. United States*,846 the Court sustained the National Motor Vehicle Theft Act847 as a measure protective of owners of automobiles; that is, of interests in “the State of origin.” The statute was designed to repress automobile motor thefts, notwith-
standing that such thefts antedate the interstate transportation of the article stolen. Speaking for the Court, Chief Justice Taft, at the outset, stated the general proposition that “Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin.” Noting “the radical change in transportation” brought about by the automobile, and the rise of “[e]laborately organized conspiracies for the theft of automobiles . . . and their sale or other disposition” in another jurisdiction from the owner’s, the Court concluded that such activity “is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by anyone with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions.” The fact that stolen vehicles were “harmless” and did not spread harm to persons in other States on this occasion was not deemed to present any obstacle to the exercise of the regulatory power of Congress.\footnote{247 U.S. 251 (1918).}

\textbf{The Darby Case}.—In sustaining the Fair Labor Standards Act\footnote{29 U.S.C. §§ 201–219.} in 1941,\footnote{United States v. Darby, 312 U.S. 100 (1941).} the Court expressly overruled \textit{Hammer v. Dagenhart}.\footnote{312 U.S. at 116–17.} “The distinction on which the [latter case] . . . was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned…. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the States of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force…. The conclusion is inescapable that \textit{Hammer v. Dagenhart}, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.”\footnote{321 U.S. at 116–17.}
The Commerce Clause as a Source of National Police Power

The Court has several times expressly noted that Congress’ exercise of power under the commerce clause is akin to the police power exercised by the States.\(^{853}\) It should follow, therefore, that Congress may achieve results unrelated to purely commercial aspects of commerce, and this result in fact has often been accomplished. Paralleling and contributing to this movement is the virtual disappearance of the distinction between interstate and intrastate commerce.

**Is There an Intrastate Barrier to Congress’ Commerce Power.**—Not only has there been legislative advancement and judicial acquiescence in commerce clause jurisprudence, but the melding of the Nation into one economic union has been more than a little responsible for the reach of Congress’ power. “The volume of interstate commerce and the range of commonly accepted objects of government regulation have ... expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power.”\(^ {854}\)

Reviewing the doctrinal developments laid out in the prior pages, it is evident that Congress’ commerce power is fueled by four very interrelated principles of decision, some old, some of recent vintage.

First, the commerce power attaches to the crossing of state lines, and Congress has validly legislated to protect interstate travelers from harm, to prevent such travelers from being deterred in the exercise of interstate traveling, and to prevent them from being burdened. Many of the 1964 public accommodations law applications have been premised on the point that larger establishments do serve interstate travelers and that even small stores, restaurants, and the like may serve interstate travelers, and, therefore, it is permissible to regulate them to prevent or deter discrimination.\(^ {855}\)

Second, it may not be persons who cross state lines but some object that will or has crossed state lines, and the regulation of a purely intrastate activity may be premised on the presence of the

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object. Thus, the public accommodations law reached small establishments that served food and other items that had been purchased from interstate channels. Congress has validly penalized convicted felons, who had no other connection to interstate commerce, for possession or receipt of firearms, which had been previously transported in interstate commerce independently of any activity by the two felons. This reach is not of newly-minted origin. In United States v. Sullivan, the Court sustained a conviction of misbranding, under the Federal Food, Drug and Cosmetic Act. Sullivan, a Columbus, Georgia, druggist had bought a properly labeled 1000–tablet bottle of sulfathiazole from an Atlanta wholesaler. The bottle had been shipped to the Atlanta wholesaler by a Chicago supplier six months earlier. Three months after Sullivan received the bottle, he made two retail sales of 12 tablets each, placing the tablets in boxes not labeled in strict accordance with the law. Upholding the conviction, the Court concluded that there was no question of “the constitutional power of Congress under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce.”

Third, Congress’ power reaches not only transactions or actions that occasion the crossing of state or national boundaries but extends as well to activities that, though local, “affect” commerce, a combination of the commerce power enhanced by the necessary and proper clause. The seminal case, of course, is Wickard v. Filburn, sustaining federal regulation of a crop of wheat grown on a farm and intended solely for home consumption. The premise was that if it were never marketed, it supplied a need otherwise to be satisfied only in the market, and that if prices rose it might be induced onto the market. “Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects

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858 332 U.S. 689 (1948).
859 332 U. S. at 698–99.
commerce among the States or with foreign nations.” Coverage under federal labor and wage-and-hour laws after the 1930s showed the reality of this doctrine.

In upholding federal regulation of strip mining, the Court demonstrated the breadth of the “affects” standard. One case dealt with statutory provisions designed to preserve “prime farmland.” The trial court had determined that the amount of such land disturbed annually amounted to 0.006% of the total prime farmland acreage in the Nation and, thus, that the impact on commerce was “infinitesimal” or “trivial.” Disagreeing, the Court said: “A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.”

Moreover, “[t]he pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce.” In a companion case, the Court reiterated that “[t]he denomination of an activity as a ‘local’ or ‘intrastate’ activity does not resolve the question whether Congress may regulate it under the Commerce Clause. As previously noted, the commerce power ‘extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.’” Judicial review is narrow. Congress’ determination of an “effect” must be deferred to if it is rational, and Congress must have acted reasonably in choosing the means.

Fourth, a still more potent engine of regulation has been the expansion of the class-of-activities standard, which began in the “affecting” cases. In Perez v. United States, the Court sustained the application of a federal “loan-sharking” law to a local culprit.

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864 452 U.S. at 324.
866 452 U.S. at 276, 277. The scope of review is restated in Preseault v. ICC, 494 U.S. 1, 17 (1990). Then-Justice Rehnquist, concurring in the two Hodel cases, objected that the Court was making it appear that no constitutional limits existed under the commerce clause, whereas in fact it was necessary that a regulated activity must have a substantial effect on interstate commerce, not just some effect. He thought it a close case that the statutory provisions here met those tests. 452 U.S. at 307–313.
The Court held that, although individual loan-sharking activities might be intrastate in nature, still it was within Congress’ power to determine that the activity was within a class the activities of which did affect interstate commerce, thus affording Congress the opportunity to regulate the entire class. While the Perez Court and the congressional findings emphasized that loan-sharking was generally part of organized crime operating on a national scale and that loan-sharking was commonly used to finance organized crime’s national operations, subsequent cases do not depend upon a defensible assumption of relatedness in the class.

Thus, the Court applied the federal arson statute to the attempted “torching” of a defendant’s two-unit apartment building. The Court merely pointed to the fact that the rental of real estate “unquestionably” affects interstate commerce and that “the local rental of an apartment unit is merely an element of a much broader commercial market in real estate.” The apparent test of whether aggregation of local activity can be said to affect commerce was made clear next in an antitrust context. Allowing the continuation of an antitrust suit challenging a hospital’s exclusion of a surgeon from practice in the hospital, the Court observed that in order to establish the required jurisdictional nexus with commerce, the appropriate focus is not on the actual effects of the conspiracy but instead is on the possible consequences for the affected market if the conspiracy is successful. The required nexus in this case was sufficient because competitive significance is to be measured by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which the surgeon was being excluded.

For the first time in almost sixty years, the Court invalidated a federal law as exceeding Congress’ authority under the commerce clause. The statute was a provision making it a federal offense to possess a firearm within 1,000 feet of a school.
The Court reviewed the doctrinal development of the commerce clause, especially the effects and aggregation tests, and reaffirmed that it is the Court’s responsibility to decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce when a law is challenged. The Court identified three broad categories of activity that Congress may regulate under its commerce power. “First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce.”

Clearly, said the Court, the criminalized activity did not implicate the first two categories. As for the third, the Court found an insufficient connection. First, a wide variety of regulations of “intrastate economic activity” has been sustained where an activity substantially affects interstate commerce. But the statute being challenged, the Court continued, was a criminal law that had nothing to do with “commerce” or with “any sort of economic enterprise.” Therefore, it could not be sustained under precedents “upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.” The provision did not contain a “jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case. Finally, the Court rejected the arguments of the Government and of the dissent that there existed a sufficient connection between the offense and interstate commerce. At base, the Court’s concern was that accepting the attenuated connection argu-
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ments presented would result in the evisceration of federalism. “Under the theories that the Government presents ... it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”

Whether Lopez bespoke a Court determination to police more closely Congress' exercise of its commerce power, so that it would be a noteworthy case, or whether it was rather a “warning shot” across the bow of Congress, urging more restraint in the exercise of power or more care in the drafting of laws, was not immediately clear. The Court's decision five years later in United States v. Morrison, however, suggests that stricter scrutiny of Congress's commerce power exercises is the chosen path, at least for legislation that falls outside the area of economic regulation. The Court will no longer defer, via rational basis review, to every congressional finding of substantial effects on interstate commerce, but instead will examine the nature of the asserted nexus to commerce, and will also consider whether a holding of constitutionality is consistent with its view of the commerce power as being a limited power that cannot be allowed to displace all exercise of state police powers.

In Morrison the Court applied Lopez principles to invalidate a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Gender-motivated crimes of violence “are not, in any sense of the phrase, economic activity,” the Court explained, and there was allegedly no precedent for upholding commerce-power regulation of intrastate activity that was not economic in nature. The provision, like the invalidated provision of the Gun-Free School Zones Act, contained no jurisdictional element tying the regulated violence to interstate commerce. Unlike the Gun-Free School Zones Act, the VAWA did contain “numerous” congressional findings about the se-

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880 514 U.S. at 564.
881 "Not every epochal case has come in epochal trappings." 514 U.S. at 615 (Justice Souter dissenting) (wondering whether the case is only a misapplication of established standards or is a veering in a new direction).
882 529 U.S. 598 (2000). Once again, the Justices were split 5–4, with Chief Justice Rehnquist’s opinion of the Court being joined by Justices O’Connor, Scalia, Kennedy, and Thomas, and with Justices Souter, Stevens, Ginsburg, and Breyer dissenting.
883 For an expansive interpretation in the area of economic regulation, decided during the same Term as Lopez, see Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).
884 529 U.S. at 613.
The problem with the VAWA findings was that they “relied heavily” on the reasoning rejected in Lopez – the “but-for causal chain from the initial occurrence of crime ... to every attenuated effect upon interstate commerce.” As the Court had explained in Lopez, acceptance of this reasoning would eliminate the distinction between what is truly national and what is truly local, and would allow Congress to regulate virtually any activity, and basically any crime. Accordingly, the Court “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.” Resurrecting the dual federalism dichotomy, the Court could find “no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”

Civil Rights.—It had been generally established some time ago that Congress had power under the commerce clause to prohibit racial discrimination in the use of the channels of commerce. The power under the clause to forbid discrimination within the States was firmly and unanimously sustained by the Court when Congress in 1964 enacted a comprehensive measure outlawing discrimination because of race or color in access to public accommodations with a requisite connection to interstate commerce. Hotels and motels were declared covered, that is, de...
declared to “affect commerce,” if they provided lodging to transient guests; restaurants, cafeterias, and the like, were covered only if they served or offered to serve interstate travelers or if a substantial portion of the food which they served had moved in commerce. The Court sustained the Act as applied to a downtown Atlanta motel which did serve interstate travelers, to an out-of-the-way restaurant in Birmingham that catered to a local clientele but which had spent 46 percent of its previous year’s out-go on meat from a local supplier who had procured it from out-of-state, and to a rurally-located amusement area operating a snack bar and other facilities, which advertised in a manner likely to attract an interstate clientele and that served food a substantial portion of which came from outside the State.

Writing for the Court in Heart of Atlanta Motel and McClung, Justice Clark denied that Congress was disabled from regulating the operations of motels or restaurants because those operations may be, or may appear to be, “local” in character. “[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”

But, it was objected, Congress is regulating on the basis of moral judgments and not to facilitate commercial intercourse. “That Congress [may legislate] ... against moral wrongs ... rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.” The evidence did, in fact, noted the Justice, support Congress’ conclusion that racial discrimination impeded interstate travel by more than 20 million black citizens, which was an impairment Congress could legislate to remove.

891 42 U.S.C. § 2000a (b).
The commerce clause basis for civil rights legislation in respect to private discrimination was important because of the understanding that Congress' power to act under the Fourteenth and Fifteenth Amendments was limited to official discrimination. The Court's subsequent determination that Congress is not necessarily so limited in its power reduces greatly the importance of the commerce clause in this area.

Criminal Law.—Federal criminal jurisdiction based on the commerce power, and frequently combined with the postal power, has historically been an auxiliary criminal jurisdiction. That is, Congress has made federal crimes of acts that constitute state crimes on the basis of some contact, however tangential, with a matter subject to congressional regulation even though the federal interest in the acts may be minimal. Examples of this type of federal criminal statute abound, including the Mann Act designed to outlaw interstate white slavery, the Dyer Act punishing interstate transportation of stolen automobiles, and the Lindbergh Law punishing interstate transportation of kidnapped persons. But, just as in other areas, Congress has passed beyond a proscription of the use of interstate facilities in the commission of a crime, it has in the criminal law area expanded the scope of its jurisdiction. Typical of this expansion is a statute making it a federal offense to "in any way or degree obstruct ... delay ... or affect ... commerce ... by robbery or extortion ...." With the expansion of the scope of the reach of "commerce" the statute potentially could reach crimes involving practically all business concerns, although it appears to be used principally against organized crime.

To date, the most far-reaching measure to be sustained by the Court has been the "loan-sharking" prohibition of the Consumer

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899 The "open housing" provision of the 1968 Civil Rights Act, Title VIII, 82 Stat. 73, 81, 42 U.S.C. § 3601, was based on the commerce clause, but in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court held that antidiscrimination-in-housing legislation could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that although § 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of § 5. United States v. Guest, 383 U.S. 745, 761, 774 (1966) (concurring opinions); Griffin v. Breckenridge, 403 U.S. 88 (1971).
Credit Protection Act. The title affirmatively finds that extortionate credit transactions affect interstate commerce because loan sharks are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Upholding the statute, the Court found that though individual loan-sharking activities may be intrastate in nature, still it is within Congress’ power to determine that it was within a class the activities of which did affect interstate commerce, thus affording Congress power to regulate the entire class.

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

The grant of power to Congress over commerce, unlike that of power to levy customs duties, the power to raise armies, and some others, is unaccompanied by correlative restrictions on state power. This circumstance does not, however, of itself signify that the States were expected to participate in the power thus granted Congress, subject only to the operation of the supremacy clause. As Hamilton pointed out in *The Federalist,* while some of the powers which are vested in the National Government admit of their “concurrent” exercise by the States, others are of their very nature “exclusive,” and hence render the notion of a like power in the States “contradictory and repugnant.” As an example of the latter kind of power, Hamilton mentioned the power of Congress to pass a uniform naturalization law. Was the same principle expected to apply to the power over foreign and interstate commerce?

Unquestionably one of the great advantages anticipated from the grant to Congress of power over commerce was that state interferences with trade, which had become a source of sharp discontent under the Articles of Confederation, would be thereby brought to

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907 Thus, by Article I, § 10, cl. 2, States are denied the power to “lay any Imposts or Duties on Imports or Exports” except by the consent of Congress. The clause applies only to goods imported from or exported to another country, not from or to another State, Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869), which prevents its application to interstate commerce, although Chief Justice Marshall thought to the contrary, Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827), and the contrary has been strongly argued. W. Crosskey, Politics and the Constitution in the History of the United States 295–323 (1953).
908 The Federalist No. 32 (J. Cooke ed. 1961), 199–203. Note that in connection with the discussion that follows, Hamilton avowed that the taxing power of the States, save for imposts or duties on imports or exports, “remains undiminished.” Id. at 201. The States “retain [the taxing] authority in the most absolute and unqualified sense.” Id. at 199.
an end. As Webster stated in his argument for appellant in *Gibbons v. Ogden*: "The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law." 909 In other words, the constitutional grant was itself a regulation of commerce in the interest of uniformity. 910

That, however, the commerce clause, unimplemented by congressional legislation, took from the States any and all power over foreign and interstate commerce was by no means conceded and was, indeed, counterintuitive, considering the extent of state regulation that previously existed before the Constitution. 911 Moreover, legislation by Congress regulative of any particular phase of commerce would raise the question whether the States were entitled to fill the remaining gaps, if not by virtue of a "concurrent" power over interstate and foreign commerce, then by virtue of "that immense mass of legislation" as Marshall termed it, "which embraces everything within the territory of a State, not surrendered to the general government," 912 in a word, the "police power."

The text and drafting record of the commerce clause fails, therefore, without more ado, to settle the question of what power is left to the States to adopt legislation regulating foreign or interstate commerce in greater or lesser measure. To be sure, in cases

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909 22 U.S. (9 Wheat.) 1, 11 (1824). Justice Johnson's assertion, concurring, was to the same effect. Id. at 226. Late in life, James Madison stated that the power had been granted Congress mainly as "a negative and preventive provision against injustice among the States." 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON

910 It was evident from THE FEDERALIST that the principal aim of the commerce clause was the protection of the national market from the oppressive power of individual States acting to stifle or curb commerce. Id. at No. 7, 39–41 (Hamilton); No. 11, 65–73 (Hamilton); No. 22, 135–137 (Hamilton); No. 42, 283–284 (Madison); No. 53, 362–364 (Madison). See H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949). For a comprehensive history of the adoption of the commerce clause, which does not indicate a definitive answer to the question posed, see Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941). Professor Abel discovered only nine references in the Convention records to the commerce clause, all directed to the dangers of interstate rivalry and retaliation. Id. at 470–71 & nn. 169–75.

911 The strongest suggestion of exclusivity found in the Convention debates is a remark by Madison, "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 625 (rev. ed. 1937). However, the statement is recorded during debate on the clause, Art. I, § 10, cl. 3, prohibiting States from laying tonnage duties. That the Convention adopted this clause, when tonnage duties would certainly be one facet of regulating interstate and foreign commerce, casts doubt on the assumption that the commerce power itself was intended to be exclusive.

of flat conflict between an act or acts of Congress regulative of such commerce and a state legislative act or acts, from whatever state power ensuing, the act of Congress is today recognized, and was recognized by Marshall, as enjoying an unquestionable supremacy. But suppose, first, that Congress has passed no act, or second, that its legislation does not clearly cover the ground traversed by previously enacted state legislation. What rules then apply? Since Gibbons v. Ogden, both of these situations have confronted the Court, especially as regards interstate commerce, hundreds of times, and in meeting them the Court has, first, determined that it has power to decide when state power is validly exercised, and, second, it has coined or given currency to numerous formulas, some of which still guide, even when they do not govern, its judgment.

Thus, it has been judicially established that the commerce clause is not only a ‘positive’ grant of power to Congress, but it is also a ‘negative’ constraint upon the States; that is, the doctrine of the ‘dormant’ commerce clause, though what is dormant is the congressional exercise of the power, not the clause itself, under which the Court may police state taxation and regulation of interstate commerce, became well established.

Webster, in Gibbons, argued that a state grant of a monopoly to operate steamships between New York and New Jersey not only contravened federal navigation laws but violated the commerce clause as well, because that clause conferred an exclusive power upon Congress to make the rules for national commerce, although he conceded that the grant to regulate interstate commerce was so broad as to reach much that the States had formerly had jurisdiction over, the courts must be reasonable in interpretation. But because he thought the state law was in conflict with the federal legislation, Chief Justice Marshall was not compelled to pass on Webster’s arguments, although in dicta he indicated his considerable sympathy with them and suggested that the power to regulate

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913 22 U.S. at 210–11.
914 The writings detailing the history are voluminous. See, e.g., F. Frankfurter, The Commerce Clause Under Marshall, Taney, and White (1937); B. Gavit, The Commerce Clause of the United States Constitution (1932) (usefully containing appendices cataloguing every commerce clause decision of the Supreme Court to that time); Sholley, The Negative Implications of the Commerce Clause, 3 U. Chi. L. Rev. 556 (1936). Among the recent writings, see Sedler, The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure, 31 Wayne L. Rev. 885 (1985) (a disputed conceptualization arguing the Court followed a consistent line over the years), and articles cited, id. at 887 n.4.
915 22 U.S. (9 Wheat.) at 13–14, 16.
commerce between the States might be an exclusively federal power. 916

Chief Justice Marshall originated the concept of the “dormant commerce clause” in Willson v. Black Bird Creek Marsh Co., 917 although in dicta. Attacked before the Court was a state law authorizing the building of a dam across a navigable creek, and it was claimed the law was in conflict with the federal power to regulate interstate commerce. Rejecting the challenge, Marshall said that the state act could not be “considered as repugnant to the [federal] power to regulate commerce in its dormant state[.]”

Returning to the subject in Cooley v. Board of Wardens of Port of Philadelphia, 918 the Court, upholding a state law that required ships to engage a local pilot when entering or leaving the port of Philadelphia, enunciated a doctrine of partial federal exclusivity. According to Justice Curtis’ opinion, the state act was valid on the basis of a distinction between those subjects of commerce which “imperatively demand a single uniform rule” operating throughout the country and those which “as imperatively” demand “that diversity which alone can meet the local necessities of navigation,” that is to say, of commerce. As to the former, the Court held Congress’ power to be “exclusive,” as to the latter, it held that the States enjoyed a power of “concurrent legislation.” 919 The Philadelphia pilot-age requirement was of the latter kind.

Thus, the contention that the federal power to regulate interstate commerce was exclusive of state power yielded to a rule of partial exclusivity. Among the welter of such cases, the first actually to strike down a state law solely on commerce clause grounds

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918 53 U.S. (12 How.) 299 (1851). The issue of exclusive federal power and the separate issue of the dormant commerce clause was present in the License Cases, 46 U.S. (5 How.) 504 (1847), and the Passenger Cases, 48 U.S. (7 How.) 283 (1849), but, despite the fact that much ink was shed in multiple opinions discussing the questions, nothing definitive emerged. Chief Justice Taney, in contrast to Marshall, viewed the clause only as a grant of power to Congress, containing no constraint upon the States, and the Court’s role was to void state laws in contravention of federal legislation. 46 U.S. (5 How.) at 573; 48 U.S. (7 How.) at 464.

919 48 U.S. at 317–20. Although Chief Justice Taney had formerly taken the strong position that Congress’ power over commerce was not exclusive, he acquiesced silently in the Cooley opinion. For a modern discussion of Cooley, see Goldstein v. California, 412 U.S. 546, 552–560 (1973), in which, in the context of the copyright clause, the Court, approving Cooley for commerce clause purposes, refused to find the copyright clause either fully or partially exclusive.
was the State Freight Tax Case. The question before the Court was the validity of a nondiscriminatory statute that required every company transporting freight within the State, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. Opining that a tax upon freight, or any other article of commerce, transported from State to State is a regulation of commerce among the States and, further, that the transportation of merchandise or passengers through a State or from State to State was a subject that required uniform regulation, the Court held the tax in issue to be repugnant to the commerce clause.

Whether exclusive or partially exclusive, however, the commerce clause as a restraint upon state exercises of power, absent congressional action, received no sustained justification or explanation; the clause, of course, empowers Congress to regulate commerce among the States, not the courts. Often, as in Cooley, and later cases, the Court stated or implied that the rule was imposed by the commerce clause. In Welton v. Missouri, the Court attempted to suggest a somewhat different justification. Challenged was a state statute that required a “peddler’s” license for merchants selling goods that came from other states, but that required no license if the goods were produced in the State. Declaring that uniformity of commercial regulation is necessary to protect articles of commerce from hostile legislation and that the power asserted

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921 Just a few years earlier, the Court, in an opinion that merged commerce clause and import-export clause analyses, had seemed to suggest that it was a discriminatory tax or law that violates the commerce clause and not simply a tax on interstate commerce. Woodruff v. Parham, 75 U.S. (6 Wall.) 123 (1869).

922 “Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the State.” Leisy v. Hardin, 135 U.S. 100, 108–109 (1890). The commerce clause “remains in the Constitution as a grant of power to Congress ... and as a diminution pro tanto of absolute state sovereignty over the same subject matter.” Carter v. Virginia, 321 U.S. 131, 137 (1944). The commerce clause, the Court has celebrated, “does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given these great silences of the Constitution.” H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534–535 (1949). More recently, the Court has taken to stating that “[t]he Commerce Clause ‘has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.’” Dennis v. Higgins, 498 U.S. 439, 447 (1991) (quoting South-Central Timber Dev., Inc. v. Wunnike, 467 U.S. 82, 87 (1984) (emphasis supplied).
by the State belonged exclusively to Congress, the Court observed that “[t]he fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject . . . is equivalent to a declaration that inter-State commerce shall be free and untrammelled.”

It has been evidently of little importance to the Court to explain. “Whether or not this long recognized distribution of power between the national and state governments is predicated upon the implications of the commerce clause itself . . . or upon the presumed intention of Congress, where Congress has not spoken . . . the result is the same.” Thus, “[f]or a hundred years it has been accepted constitutional doctrine . . . that . . . where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.”

Two other justifications can be found throughout the Court's decisions, but they do not explain why the Court is empowered under a grant of power to Congress to police state regulatory and taxing decisions. For example, in Welton v. Missouri, the statute under review, as observed several times by the Court, was clearly discriminatory as between instate and interstate commerce, but that point was not sharply drawn as the constitutional fault of the law. That the commerce clause had been motivated by the Framers' apprehensions about state protectionism has been frequently noted. A relatively recent theme is that the Framers desired to create a national area of free trade, so that unreasonable burdens on interstate commerce violate the clause in and of themselves.

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927 91 U.S. at 275, 277, 278, 279, 280, 281, 282 (1876).


Nonetheless, the power of the Court is established and is freely exercised. No reservations can be discerned in the opinions for the Court. Individual Justices, to be sure, have urged renunciation of the power and remission to Congress for relief sought by litigants. That has not been the course followed.

The State Proprietary Activity Exception. In a case of first impression, the Court held unaffected by the commerce clause—"the kind of action with which the Commerce Clause is not concerned"—a Maryland bounty scheme by which the State paid scrap processors for each "hulk" automobile destroyed. As first enacted, the bounty plan did not distinguish between in-state and out-of-state processors, but it was subsequently amended to operate in such a manner that out-of-state processors were substantially disadvantaged. The Court held that where a State enters into the market itself as a purchaser, in effect, of a potential article of interstate commerce, it does not, in creating a burden upon that com-

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In McCarroll v. Dixie Lines, 309 U.S. 176, 183 (1940), Justice Black, for himself and Justices Frankfurter and Douglas, dissented, taking precisely this view. See also Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938) (Justice Black dissenting in part); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939) (Justice Black dissenting); Southern Pacific Co. v. Arizona, 325 U.S. 761, 784 (1945) (Justice Black dissenting); id. at 795 (Justice Douglas dissenting). Justices Douglas and Frankfurter subsequently wrote and joined opinions applying the dormant commerce clause. In Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954), the Court rejected the urging that it uphold all not-patently discriminatory taxes and let Congress deal with conflicts. More recently, Justice Scalia has taken the view that, as a matter of original intent, a "dormant" or "negative" commerce power cannot be justified in either taxation or regulation cases, but, yielding to the force of precedent, he will vote to strike down state actions that discriminate against interstate commerce or that are governed by the Court's precedents, without extending any of those precedents. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 94 (1987) (concurring); Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259 (1987) (concurring in part and dissenting in part); Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S. 888, 895 (1988) (concurring in judgment); American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 200 (1990) (concurring); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Justice Scalia concurring) (reiterating view); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Justice Scalia, with Justice Thomas joining) (same). Justice Thomas has written an extensive opinion rejecting both the historical and jurisprudential basis of the dormant commerce clause and expressing a preference for reliance on the imports-exports clause. Camps Newfound/Owatonna, Inc. v. Harrison, 520 U.S. 564, 609 (1997) (dissenting; joined by Justice Scalia entirely and by Chief Justice Rehnquist as to the commerce clause but not the imports-exports clause).}
commerce by restricting its trade to its own citizens or businesses within the State, violate the commerce clause.932

Affirming and extending somewhat this precedent, the Court held that a State operating a cement plant could in times of shortage (and presumably at any time) confine the sale of cement by the plant to residents of the State.933 “The Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. ... There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.”934 It is yet unclear how far this concept of the State as market participant rather than market regulator will be extended.935

Congressional Authorization of Impermissible State Action.—The Supreme Court has heeded the lesson that was administered to it by the Act of Congress of August 31, 1852,936 which pronounced the Wheeling Bridge “a lawful structure,” thereby setting aside the Court’s determination to the contrary earlier the same year.937 The lesson, subsequently observed the Court, is that “[i]t is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce.”938 Similarly, when in the late eighties and the early nineties statewide prohibition laws began making their appearance, Congress again approved state laws the Court had found to violate the dormant commerce clause.

The Court seized upon a previously rejected dictum of Chief Justice Marshall939 and began applying it as a brake on the oper-

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934 447 U.S. at 436–37.
935 See also White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (city may favor its own residents in construction projects paid for with city funds); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (illustrating the deep divisions in the Court respecting the scope of the exception).
938 Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883).
939 In Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827), in which the “original package” doctrine originated in the context of state taxing powers exercised on imports from a foreign country, Marshall in dictum indicated the same rule would apply to imports from sister States. The Court refused to follow the dictum in Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).
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ation of such laws with respect to interstate commerce in intoxicants, which the Court denominated “legitimate articles of commerce.” While holding that a State was entitled to prohibit the manufacture and sale within its limits of intoxicants,940 even for an outside market, manufacture being no part of commerce,941 it contemporaneously laid down the rule, in Bowman v. Chicago & Northwestern Ry. Co.,942 that, so long as Congress remained silent in the matter, a State lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the shipment into it of intoxicants from a sister State. This holding was soon followed by another to the effect that, so long as Congress remained silent, a State had no power to prevent the sale in the original package of liquors introduced from another State.943 The effect of the latter decision was soon overcome by an act of Congress, the so-called Wilson Act, repealing its alleged silence,944 but the Bowman decision still stood, the act in question being interpreted by the Court not to subject liquors from sister States to local authority until their arrival in the hands of the person to whom consigned.945 Not until 1913 was the effect of the decision in the Bowman case fully nullified by the Webb-Kenyon Act,946 which placed intoxicants entering a State from another State under the control of the former for all purposes whatsoever.947

Less than a year after the ruling in United States v. South-Eastern Underwriters Ass'n,948 that insurance transactions across state lines constituted interstate commerce, thereby logically establishing their immunity from discriminatory state taxation, Congress passed the McCarran Act949 authorizing state regulation and taxation of the insurance business. In Prudential Ins. Co. v. Ben-

942 125 U.S. 465 (1888).
943 Leisy v. Hardin, 135 U.S. 100 (1890).
945 Rhodes v. Iowa, 170 U.S. 412 (1898).
947 National Prohibition, under the Eighteenth Amendment, first cast these conflicts into the shadows, and § 2 of the Twenty-first Amendment significantly altered the terms of the dispute. But that section is no authorization for the States to engage in mere economic protectionism separate from concerns about the effect of the traffic in liquor. Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. The Beer Institute, 491 U.S. 324 (1989).
948 322 U.S. 533 (1944).
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328 U.S. at 429–30, 434–35. The Act restored state taxing and regulatory powers over the insurance business to their scope prior to South-Eastern Underwriters. Discriminatory state taxation otherwise cognizable under the commerce clause must, therefore, be challenged under other provisions of the Constitution. See Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981). An equal protection challenge was successful in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), invalidating a discriminatory tax and stating that a favoring of local industries "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Id. at 878. Controversial when rendered, Ward may be a sport in the law. See Northeast Bancorp v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985) (interpreting a provision of the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the State in which the acquired bank is located, as authorizing state laws

Thus, it is now well established that "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." But the
Court requires congressional intent to permit otherwise impermissible state actions to “be unmistakably clear.” The fact that federal statutes and regulations had restricted commerce in timber harvested from national forest lands in Alaska was, therefore, “insufficient indicium” that Congress intended to authorize the State to apply a similar policy for timber harvested from state lands. The rule requiring clear congressional approval for state burdens on commerce was said to be necessary in order to strengthen the likelihood that decisions favoring one section of the country over another are in fact “collective decisions” made by Congress rather than unilateral choices imposed on unrepresented out-of-state interests by individual States. And Congress must be plain as well when the issue is not whether it has exempted a state action from the commerce clause but whether it has taken the less direct form of reduction in the level of scrutiny.

State Taxation and Regulation: The Old Law

Although in previous editions of this volume considerable attention was paid to the development and circuitous paths of the law of the negative commerce clause, the value of this exegesis was doubtlessly quite limited. The Court itself has admitted that its “some three hundred full-dress opinions” as of 1959 have not resulted in “consistent or reconcilable” doctrine but rather in something more resembling a “quagmire.” Although many of the prin-
clips still applicable in constitutional law may be found in the
older cases, in fact the Court has worked a revolution in this area,
though at different times for taxation and for regulation. Thus, in
this section we summarize the “old” law and then deal more fully
with the “modern” law of the negative commerce clause.

**General Considerations.**—The task of drawing the line be-
tween state power and the commercial interest has proved a com-
paratively simple one in the field of foreign commerce, the two
things being in great part territorially distinct. With “commerce
among the States” affairs are very different. Interstate commerce
is conducted in the interior of the country, by persons and corpora-
tions that are ordinarily engaged also in local business; its usual
incidents are acts that, if unconnected with commerce among the
States, would fall within the State’s powers of police and taxation,
while the things it deals in and the instruments by which it is car-
ried on comprise the most ordinary subject matter of state power.
In this field, the Court consequently has been unable to rely upon
sweping solutions. To the contrary, its judgments have often been
fluctuating and tentative, even contradictory, and this is particu-
larly the case with respect to the infringement of interstate com-
merce by the state taxing power.

**Taxation.**—The leading case dealing with the relation of the
States’ taxing power to interstate commerce, the case in which the
Court first struck down a state tax as violative of the commerce
clause, was the *State Freight Tax Case*. Before the Court was
the validity of a Pennsylvania statute that required every company
transporting freight within the State, with certain exceptions, to
pay a tax at specified rates on each ton of freight carried by it. The
Court’s reasoning was forthright. Transportation of freight con-
stitutes commerce. A tax upon freight transported from one
State to another effects a regulation of interstate commerce.
Under the *Cooley* doctrine, whenever the subject of a regulation of
commerce is in its nature of national interest or admits of one uni-
form system or plan of regulation, that subject is within the exclu-

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959 82 U.S. at 275.
960 82 U.S. at 275–76, 279.
sive regulating control of Congress.\textsuperscript{962} Transportation of passengers or merchandise through a State, or from one State to another, is of this nature.\textsuperscript{963} Hence, a state law imposing a tax upon freight, taken up within the State and transported out of it or taken up outside the State and transported into it, violates the commerce clause.\textsuperscript{964}

The principle thus asserted, that a State may not tax interstate commerce, confronted the principle that a State may tax all purely domestic business within its borders and all property “within its jurisdiction.” Inasmuch as most large concerns prosecute both an interstate and a domestic business, while the instrumentalities of interstate commerce and the pecuniary returns from such commerce are ordinarily property within the jurisdiction of some State or other, the task before the Court was to determine where to draw the line between the immunity claimed by interstate business, on the one hand, and the prerogatives claimed by local power on the other. In the \textit{State Tax on Railway Gross Receipts Case},\textsuperscript{965} decided the same day as the \textit{State Freight Tax Case}, the issue was a tax upon gross receipts of all railroads chartered by the State, part of the receipts having been derived from interstate transportation of the same freight that had been held immune from tax in the first case. If the latter tax were regarded as a tax on interstate commerce, it too would fall. But to the Court, the tax on gross receipts of an interstate transportation company was not a tax on commerce. “[I]t is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.”\textsuperscript{966} A gross receipts tax upon a railroad company, which concededly affected commerce, was not a regulation “directly. Very manifestly it is a tax upon the railroad company…. That its ultimate effect may be to increase the cost of transportation must be admitted…. Still it is not a tax upon transportation, or upon commerce….”\textsuperscript{967}

Insofar as there is a distinction between these two cases, the Court drew it in part on the basis of \textit{Cooley}, that some subjects embraced within the meaning of commerce demand uniform, national regulation, while other similar subjects permit of diversity of treatment, until Congress acts, and in part on the basis of a concept of a “direct” tax on interstate commerce, which was impermissible,
and an “indirect” tax, which was permissible until Congress acted. Confusingly, the two concepts were sometimes conflated, sometimes treated separately. In any event, the Court itself was clear that interstate commerce could not be taxed at all, even if the tax was a nondiscriminatory levy applied alike to local commerce. "Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it ... ; or upon persons or property in transit in interstate commerce." However, some taxes imposed only an “indirect” burden and were sustained; property taxes and taxes in lieu of property taxes applied to all businesses, including instrumentalities of interstate commerce, were sustained. A good rule of thumb in these cases is that taxation was sustained if the tax was imposed on some local, rather than an interstate, activity or if the tax was exacted before interstate movement had begun or after it had ended.

An independent basis for invalidation was that the tax was discriminatory, that its impact was intentionally or unintentionally felt by interstate commerce and not by local, perhaps in pursuit of parochial interests. Many of the early cases actually involving discriminatory taxation were decided on the basis of the impermissibility of taxing interstate commerce at all, but the category was soon clearly delineated as a separate ground (and one of the most important today).

Following the Great Depression and under the leadership of Justice, and later Chief Justice, Stone, the Court attempted to move away from the principle that interstate commerce may not be taxed and reliance on the direct-indirect distinction. Instead, a state or local levy would be voided only if in the opinion of the Court it created a risk of multiple taxation for interstate commerce.

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970 The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 400–401 (1913).
972 E.g., Welton v. Missouri, 91 U.S. 275 (1875); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887); Darnell & Son Co. v. City of Memphis, 208 U.S. 113 (1908); Bethlehem Motors Corp. v. Flynt, 256 U.S. 421 (1921).
not felt by local commerce.\textsuperscript{973} It became much more important to the validity of a tax that it be apportioned to an interstate company's activities within the taxing State, so as to reduce the risk of multiple taxation.\textsuperscript{974} But, just as the Court had achieved constancy in the area of regulation, it reverted to the older doctrines in the taxation area and reiterated that interstate commerce may not be taxed at all, even by a properly apportioned levy, and reasserted the direct-indirect distinction.\textsuperscript{975} The stage was set, following a series of cases in which through formalistic reasoning the States were permitted to evade the Court's precedents,\textsuperscript{976} for the formulation of a more realistic doctrine.

\textbf{Regulation}.—Much more diverse were the cases dealing with regulation by the state and local governments. Taxation was one thing, the myriad approaches and purposes of regulations another. Generally speaking, if the state action was perceived by the Court to be a regulation of interstate commerce itself, it was deemed to impose a "direct" burden on interstate commerce and impermissible. If the Court saw it as something other than a regulation of interstate commerce, it was considered only to "affect" interstate commerce or to impose only an "indirect" burden on it in the proper exercise of the police powers of the States.\textsuperscript{977} But the distinction


\textsuperscript{976} Thus, the States carefully phrased tax laws so as to impose on interstate companies not a license tax for doing business in the State, which was not permitted, Railway Express Agency v. Virginia, 347 U.S. 359 (1954), but as a franchise tax on intangible property or the privilege of doing business in a corporate form, which was permissible. Railway Express Agency v. Virginia, 358 U.S. 434 (1959); Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975). Also, the Court increasingly found the tax to be imposed on a local activity in instances it would previously have seen to be an interstate activity. E.g., Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); General Motors Corp. v. Washington, 377 U.S. 436 (1964); Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975).

\textsuperscript{977} Sedler, \textit{The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure}, 31 WAYNE L. REV. 885, 924–925 (1985). In addition to the sources already cited, see the Court's summaries in The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913), and Southern Pacific Co. v. Arizona, 325 U.S. 761, 766–770 (1945). In the latter case, Chief Justice Stone was reconceptualizing the standards under the clause, but the summary represents a faithful recitation of the law.
between “direct” and “indirect” burdens was often perceptible only to the Court. 978

A corporation’s status as a foreign entity did not immunize it from state requirements, conditioning its admission to do a local business, to obtain a local license, and to furnish relevant information as well as to pay a reasonable fee. 979 But no registration was permitted of an out-of-state corporation, the business of which in the host State was purely interstate in character. 980 Neither did the Court permit a State to exclude from the its courts a corporation engaging solely in interstate commerce because of a failure to register and to qualify to do business in that State. 981

Interstate transportation brought forth hundreds of cases. State regulation of trains operating across state lines resulted in divergent rulings. It was early held improper for States to prescribe charges for transportation of persons and freight on the basis that the regulation must be uniform and thus could not be left to the States. 982 The Court deemed “reasonable” and therefore constitutional many state regulations requiring a fair and adequate service for its inhabitants by railway companies conducting interstate service within its borders, as long as there was no unnecessary burden on commerce. 983 A marked tolerance for a class of regulations that arguably furthered public safety was long exhibited by the


983 Generally, the Court drew the line at regulations that provided for adequate service, not any and all service. Thus, one class of cases dealt with requirements that trains stop at designated cities and towns. The regulations were upheld in such cases as Gladson v. Minnesota, 166 U.S. 142 (1897), and Lake Shore & Mich. South. Ry. v. Ohio, 173 U.S. 285 (1899), and invalidated in Illinois Central R. R. v. Illinois, 142 (1896). See Chicago, B. & Q. R.R. v. Wisconsin R.R. Comm’n, 237 U.S. 220, 226 (1915); St. Louis & S. F. Ry. v. Public Service Comm’n, 254 U.S. 535, 536–537 (1921). The cases were extremely fact particularistic.

E.g., Terminal Ass'n v. Trainmen, 318 U.S. 1 (1943) (requiring railroad to provide caboose cars for its employees); Hennington v. Georgia, 163 U.S. 299 (1896) (forbidding freight trains to run on Sundays).

But see Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (voiding as too onerous on interstate transportation law requiring trains to come to almost a complete stop at all grade crossings, when there were 124 highway crossings at grade in 123 miles, doubling the running time).

Four cases over a lengthy period sustained the laws. Chicago, R. I. & Pac. Ry. Co. v. Arkansas, 219 U.S. 453 (1911); St. Louis, Iron Mt. & S. Ry. v. Arkansas, 240 U.S. 518 (1916); Missouri Pacific Co. v. Norwood, 283 U.S. 249 (1931); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R. I. & P. R.R., 382 U.S. 423 (1966). In the latter case, the Court noted the extensive and conflicting record with regard to safety, but it then ruled that with the issue in so much doubt it was peculiarly a legislative choice.


E.g., Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933) (State could deny an interstate firm a necessary certificate of convenience to operate as a common carrier on the basis that the route was overcrowded); Welch Co. v. New Hampshire, 306 U.S. 79 (1939) (maximum hours for drivers of motor vehicles); Eichholz v. Public Service Comm'n, 306 U.S. 268 (1939) (reasonable regulations of traffic). But compare Michigan Comm'n v. Duke, 266 U.S. 570 (1925) (State may not impose common-carrier responsibilities on business operating between States that did not assume them); Buck v. Kuykendall, 267 U.S. 307 (1925) (denial of certificate of convenience under circumstances was a ban on competition).

E.g., Mauer v. Hamilton, 309 U.S. 598 (1940) (ban on operation of any motor vehicle carrying any other vehicle above the head of the operator). By far, the example of the greatest deference is South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938), in which the Court upheld, in a surprising Stone opinion, truck weight and width restrictions prescribed by practically no other State (in terms of the width, no other).

As a general rule, during this time, although the Court did not permit States to regulate a purely interstate activity or prescribe prices for purely interstate transactions,\footnote{991}{E.g., Western Union Tel Co. v. Foster, 247 U.S. 105 (1918); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); State Corp. Comm'n v. Wichita Gas Co., 290 U.S. 561 (1934).} it did sustain a great deal of price and other regulation imposed prior to or subsequent to the travel in interstate commerce of goods produced for such commerce or received from such commerce. For example, decisions late in the period upheld state price-fixing schemes applied to goods intended for interstate commerce.\footnote{992}{Milk Control Board v. Eisenberg Co., 306 U.S. 346 (1939) (milk); Parker v. Brown, 317 U.S. 341 (1943) (raisins).}

However, the States always had an obligation to act nondiscriminatory. Just as in the taxing area, regulation that was parochially oriented, to protect local producers or industries, for instance, was not evaluated under ordinary standards but subjected to practically \textit{per se} invalidation. The mirror image of \textit{Welton v. Missouri},\footnote{993}{91 U.S. 275 (1875).} the tax case, was \textit{Minnesota v. Barber},\footnote{994}{136 U.S. 313 (1890).} in which the Court invalidated a facially neutral law that in its practical effect discriminated against interstate commerce and in favor of local commerce. The law required fresh meat sold in the State to have been inspected by its own inspectors with 24 hours of slaughter. Thus, meat slaughtered in other States was excluded from the Minnesota market. The principle of the case has a long pedigree of application.\footnote{995}{State protectionist regulation on behalf of local milk producers has occasioned judicial censure. Thus, in \textit{Baldwin v. G.A.F. Seelig, Inc.},\footnote{996}{294 U.S. 511 (1935).} the Court had before it a complex state price-fixing scheme for milk, in which the State, in order to keep the price of milk artificially high within the State, required milk dealers buying out-of-state to pay producers, wherever they were, what\footnote{997}{See also Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964). With regard to products originating within the State, the Court had no difficulty with price fixing. Nebbia v. New York, 291 U.S. 502 (1934).} (1937) (upholding state inspection and regulation of tugs operating in navigable waters, in absence of federal law).}
the dealers had to pay within the State, and, thus, in-state producers were protected. And in *H. P. Hood & Sons, Inc. v. Du Mond*, the Court struck down a state refusal to grant an out-of-state milk distributor a license to operate a milk receiving station within the State on the basis that the additional diversion of local milk to the other State would impair the supply for the in-state market. A State may not bar an interstate market to protect local interests.

**State Taxation and Regulation: The Modern Law**

*General Considerations.*—Transition from the old law to the modern standard occurred relatively smoothly in the field of regulation, but in the area of taxation the passage was choppy and often witnessed retreats and advances. In any event, both taxation and regulation now are evaluated under a judicial balancing formula comparing the burden on interstate commerce with the importance of the state interest, save for discriminatory state action that cannot be justified at all.

*Taxation.*—During the 1940s and 1950s, there was engaged within the Court a contest between the view that interstate commerce could not be taxed at all, at least “directly,” and the view that the negative commerce clause protected against the risk of double taxation. In *Northwestern States Portland Cement Co. v. Minnesota*, the Court reasserted the principle expressed earlier in *Western Live Stock*, that the Framers did not intend to immunize interstate commerce from its just share of the state tax burden even though it increased the cost of doing business. *Northwestern States* held that a State could constitutionally impose a
nondiscriminatory, fairly apportioned net income tax on an out-of-state corporation engaged exclusively in interstate commerce in the taxing State. "For the first time outside the context of property taxation, the Court explicitly recognized that an exclusively interstate business could be subjected to the states’ taxing powers." Thus, in *Northwestern States*, foreign corporations, which maintained a sales office and employed sales staff in the taxing State for solicitation of orders for their merchandise that, upon acceptance of the orders at their home office in another jurisdiction, were shipped to customers in the taxing State, were held liable to pay the latter’s income tax on that portion of the net income of their interstate business as was attributable to such solicitation.

Yet, the following years saw inconsistent rulings that turned almost completely upon the use of or failure to use "magic words" by legislative drafters. That is, it was constitutional for the States to tax a corporation’s net income, properly apportioned to the taxing State, as in *Northwestern States*, but no State could levy a tax on a foreign corporation for the privilege of doing business in the State, both taxes alike in all respects. In *Complete Auto Transit, Inc. v. Brady*, the Court overruled the cases embodying the distinction and articulated a standard that has governed the cases since. The tax in *Brady* was imposed on the privilege of doing business as applied to a corporation engaged in interstate transportation services in the taxing State; it was measured by the corporation’s gross receipts from the service. The appropriate concern, the Court wrote, was to pay attention to “economic realities” and to “address the problems with which the commerce clause is concerned.” The standard, a set of four factors that was distilled from precedent but newly applied, was firmly set out. A tax on interstate commerce will be sustained “when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce,

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1005 Spector Motor Service, Inc. v. O’Connor, 340 U.S. 602 (1951). The attenuated nature of the purported distinction was evidenced in Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975), in which the Court sustained a nondiscriminatory, fairly apportioned franchise tax that was measured by the taxpayer’s capital stock, imposed on a pipeline company doing an exclusively interstate business in the taxing State, on the basis that it was a tax imposed on the privilege of conducting business in the corporate form.
and is fairly related to the services provided by the State.”

**Nexus.**—Nexus is a requirement that flows from both the commerce clause and the due process clause of the Fourteenth Amendment. What is required is “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” In its commerce-clause setting, the nexus requirement serves to effectuate the “structural concerns about the effects of state regulation on the national economy.” That is, “the ‘substantial-nexus’ requirement ... limit[s] the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce.”

Often surfacing in cases having to do with the imposition of an obligation by a State on an out-of-state vendor to collect use taxes on goods sold to purchasers in the taxing State, the test is a “physical presence” standard. The Court has sustained the imposition on mail order sellers with retail outlets, solicitors, or property within the taxing State, but it has denied the power to a State when the only connection is that the company communicates with customers in the State by mail or common carrier as part of a general interstate business. The validity of general business taxes on interstate enterprises may also be determined by the nexus stand-

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1009 It had been thought that the tests of nexus under the commerce clause and the due process clause were identical, but, controversially, in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 306-08 (1992), but compare id. at 319 (Justice White concurring in part and dissenting in part), the Court, stating that the two “are closely related,” (citing National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753, 756 (1967)), held that the two constitutional requirements “differ fundamentally” and it found a state tax met the due process test while violating the commerce clause.


1012 504 U.S. at 313.


ard. However, again, only a minimal contact is necessary. Thus, maintenance of one full-time employee within the State (plus occasional visits by non-resident engineers) to make possible the realization and continuance of contractual relations seemed to the Court to make almost frivolous a claim of lack of sufficient nexus. The application of a state business-and-occupation tax on the gross receipts from a large wholesale volume of pipe and drainage products in the State was sustained, even though the company maintained no office, owned no property, and had no employees in the State, its marketing activities being carried out by an in-state independent contractor. Also, the Court upheld a State's application of a use tax to aviation fuel stored temporarily in the State prior to loading on aircraft for consumption in interstate flights.

Given the complexity of modern corporations and their frequent diversification and control of subsidiaries, state treatment of businesses operating within and without their borders requires an appropriate definition of the scope of business operations. Thus, States may impose a tax in accordance with a "unitary business" apportionment formula on concerns carrying on part of their business within the taxing State based upon the company's entire proceeds. But there must be a nexus, or minimal connection, between the interstate activities and the taxing State and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.

Apportionment.—This requirement is of long standing, but its importance has broadened as the scope of the States' taxing powers has enlarged. It is concerned with what formulas the States must use to claim a share of a multistate business' tax base for the

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1017 Tyler Pipe Industries v. Dept. of Revenue, 483 U.S. 232, 249–251 (1987). The Court noted its agreement with the state court holding that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." Id. at 250.


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taxing State, when the business carries on a single integrated enterprise both within and without the State. A State may not exact from interstate commerce more than the State's fair share. Avoidance of multiple taxation, or the risk of multiple taxation, is the test of an apportionment formula. Generally speaking, this factor is both a commerce clause and a due process requisite, and it necessitates a rational relationship between the income attributed to the State and the intrastate values of the enterprise. The Court has declined to impose any particular formula on the States, reasoning that to do so would be to require the Court to engage in "extensive judicial lawmaking," for which it was ill-suited and for which Congress had ample power and ability to legislate.

Rather, "we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent." "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute...."

"The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity." In the latter case, the Court upheld as properly apportioned a state tax on the gross charge of any telephone call originated or terminated in the State and charged to an in-state service address, regardless of where the telephone call was billed or paid. A complex state tax imposed on trucks displays the operation of the test. Thus, a state registration tax met the internal consistency test because every State honored every other States', and a motor fuel tax similarly was sustained.

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1024 488 U.S. at 261, 262 (internal citations omitted).

1025 Id. The tax law provided a credit for any taxpayer who was taxed by another State on the same call. Actual multiple taxation could thus be avoided, the risks of other multiple taxation was small, and it was impracticable to keep track of the taxable transactions.
because it was apportioned to mileage traveled in the State, whereas lump-sum annual taxes, an axle tax and an identification marker fee, being unapportioned flat taxes imposed for the use of the State’s roads, were voided, under the internal consistency test, because if every State imposed them the burden on interstate commerce would be great. 1026

A deference to state taxing authority was evident in a case in which the Court sustained a state sales tax on the price of a bus ticket for travel that originated in the State but terminated in another State. The tax was unapportioned to reflect the intrastate travel and the interstate travel. 1027 The tax in this case was different from the tax upheld in Central Greyhound, the Court held. The previous tax constituted a levy on gross receipts, payable by the seller, whereas the present tax was a sales tax, also assessed on gross receipts, but payable by the buyer. The Oklahoma tax, the Court continued, was internally consistent, since if every State imposed a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one tax. The tax was also externally consistent, the Court held, because it was a tax on the sale of a service that took place in the State, not a tax on the travel. 1028

However, the Court found discriminatory and thus invalid a state intangibles tax on a fraction of the value of corporate stock owned by state residents inversely proportional to the State’s exposure to the state income tax. 1029

**Discrimination.**—The “fundamental principle” governing this factor is simple. “No State may, consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.” 1030 That is, a tax which by its terms or operation imposes

1027 Indeed, there seemed to be a precedent squarely on point, Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948). Struck down in that case was a state statute that failed to apportion its taxation of interstate bus ticket sales to reflect the distance traveled within the State.
1028 Oklahoma Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175 (1995). Indeed, the Court analogized the tax to that in Goldberg v. Sweet, 488 U.S. 252 (1989), a tax on interstate telephone services that originated in or terminated in the State and that were bill to an in-state address.
1029 Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The State had defended on the basis that the tax was a “compensatory” one designed to make interstate commerce bear a burden already borne by intrastate commerce. The Court recognized the legitimacy of the defense, but it found the tax to meet none of the three criteria for classification as a valid compensatory tax. Id. at 333–44. See also South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (tax not justified as compensatory).
greater burdens on out-of-state goods or activities than on competing in-state goods or activities will be struck down as discriminatory under the commerce clause.\footnote{Armco Inc. v. Hardesty}{1031} In Armco Inc. v. Hardesty,\footnote{Armco Inc. v. Hardesty} the Court voided as discriminatory the imposition on an out-of-state wholesaler of a state tax that was levied on manufacturing and wholesaling but that relieved manufacturers subject to the manufacturing tax of liability for paying the wholesaling tax. Even though the former tax was higher than the latter, the Court found the imposition discriminated against the interstate wholesaler.\footnote{Armco Inc. v. Hardesty} A state excise tax on wholesale liquor sales, which exempted sales of specified local products, was held to violate the commerce clause.\footnote{Armco Inc. v. Hardesty} A state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the State, or if produced in another State that granted a similar credit to the State’s ethanol fuel, was found discriminatory in violation of the clause.\footnote{Armco Inc. v. Hardesty} Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in Camps Newfound/Owatonna, Inc. v. Town of Harrison\footnote{Camps Newfound/Owatonna, Inc. v. Town of Harrison} applied its nondiscrimination element of the doctrine to invalidate the State’s charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily non-state residents. The

\footnote{Armco Inc. v. Hardesty}{Maryland v. Louisiana} A state excise tax on wholesale liquor sales, which exempted sales of specified local products, was held to violate the commerce clause. A state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the State, or if produced in another State that granted a similar credit to the State’s ethanol fuel, was found discriminatory in violation of the clause. Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in Camps Newfound/Owatonna, Inc. v. Town of Harrison applied its nondiscrimination element of the doctrine to invalidate the State’s charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily non-state residents. The
claimant here operated a church camp for children, most of whom resided out-of-state. The discriminatory tax would easily have fallen if it had been applied to profit-making firms, and the Court saw no reason to make an exception for nonprofits. The tax scheme was designed to encourage entities to care for local populations and to discourage attention to out-of-state individuals and groups. “For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.”

Benefit Relationship.—Although, in all the modern cases, the Court has stated that a necessary factor to sustain state taxes having an interstate impact is that the levy be fairly related to benefits provided by the taxing State, it has declined to be drawn into any consideration of the amount of the tax or the value of the benefits bestowed. The test rather is whether, as a matter of the first factor, the business has the requisite nexus with the State; if it does, the tax meets the fourth factor simply because the business has enjoyed the opportunities and protections which the State has afforded it.

Regulation.—Adoption of the modern standard of commerce- clause review of state regulation of or having an impact on interstate commerce was achieved in Southern Pacific Co. v. Arizona, although it was presaged in a series of opinions, mostly dissents, by Chief Justice Stone. The Southern Pacific case tested the validity of a state train-length law, justified as a safety measure. Revising a hundred years of doctrine, the Chief Justice wrote that whether a state or local regulation was valid depended upon a “reconciliation of the conflicting claims of state and national power [that] is to be attained only by some appraisal and accommo-

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1037 529 U.S. at 586.
1038 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620–29 (1981). Two state taxes imposing flat rates on truckers, because they did not vary directly with miles traveled or with some other proxy for value obtained from the State, were found to violate this standard in American Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266, 291 (1987), but this oblique holding was tagged onto an elaborate opinion holding the taxes invalid under two other Brady tests, and, thus, the precedential value is questionable.
1039 325 U.S. 761 (1945).
Save in those few cases in which Congress has acted, “this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.”

That the test to be applied was a balancing one, the Chief Justice made clear at length, stating that in order to determine whether the challenged regulation was permissible, “matters for ultimate determination are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.”

The test today continues to be the Stone articulation, although the more frequently quoted encapsulation of it is from *Pike v. Bruce Church, Inc.* “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”

Obviously, the test requires “even-handedness.” *Discrimination* in regulation is another matter altogether. When on its face or in its effect a regulation betrays “economic protectionism,” an intent to benefit in-state economic interests at the expense of out-of-state interests, no balancing is required. “When a state statute clearly discriminates against interstate commerce, it will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. . . . Indeed, when the state statute amounts to simple economic protectionism, a ‘virtually per se rule of invalidity’ has applied.” Thus, an Oklahoma

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1042 325 U.S. at 769.
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law that required coal-fired electric utilities in the State, producing power for sale in the State, to burn a mixture of coal containing at least 10% Oklahoma-mined coal was invalidated at the behest of a State that had previously provided virtually 100% of the coal used by the Oklahoma utilities. Similarly, the Court invalidated a state law that permitted interdiction of export of hydroelectric power from the State to neighboring States, when in the opinion of regulatory authorities the energy was required for use in the State; a State may not prefer its own citizens over out-of-state residents in access to resources within the State.

States may certainly promote local economic interests and favor local consumers, but they may not do so by adversely regulating out-of-state producers or consumers. In Hunt v. Washington State Apple Advertising Comm’n, the Court confronted a state requirement that closed containers of apples offered for sale or shipped into North Carolina carry no grade other than the applicable U.S. grade. Washington State mandated that all apples produced in and shipped in interstate commerce pass a much more rigorous inspection than that mandated by the United States. The inability to display the recognized state grade in North Carolina impeded marketing of Washington apples. The Court obviously suspected the impact was intended, but, rather than strike the state requirement down as purposeful, it held that the regulation had the practical effect of discriminating, and, inasmuch as no defense based on possible consumer protection could be presented, the state

tification aside from economic protectionism. The State barred the importation of out-of-state baitfish, and the Court credited lower-court findings that legitimate ecological concerns existed about the possible presence of parasites and nonnative species in baitfish shipments.


333 U.S. 333 (1977). Other cases in which the State was attempting to promote and enhance local products and businesses include Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (State required producer of high-quality cantaloupes to pack them in the State, rather than in an adjacent State at considerably less expense, in order that the produce be identified with the producing State); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (State banned export of shrimp from State until hulls and heads were removed and processed, in order to favor canning and manufacture within the State).
law was invalidated.\footnote{That discriminatory effects will result in invalidation, as well as purposeful discrimination, is also drawn from Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).} State actions to promote local products and producers, of everything from milk\footnote{E.g., H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949). See also Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) (state effort to combat discrimination by other States against its milk through reciprocity provisions).} to alcohol,\footnote{In West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), the Court held invalidly discriminatory against interstate commerce a state “flow control” law, which required all solid waste within the town to be processed at a designated transfer station before leaving the municipality.} may not be achieved through protectionism.

Even garbage transportation and disposition is covered by the negative commerce clause. A state law that banned the importation of most solid or liquid wastes that originated outside the State was struck down, because the State could not justify it as a health or safety measure, in the form of a quarantine, inasmuch as it did not limit in-state disposal at its landfills; the State was simply attempting to conserve landfill space and lower costs to its residents by keeping out trash from other States.\footnote{City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), reaffirmed and applied in Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), and Fort Gratiot Sanitary Landfill v. Michigan Natural Resources Dept., 504 U.S. 353 (1992).} Further extending the limitation of the clause on waste disposal,\footnote{See also Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) (discriminatory tax).} the Court invalidated as a discrimination against interstate commerce a local “flow control” law, which required all solid waste within the town to be processed at a designated transfer station before leaving the municipality.\footnote{C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).} The town’s reason for the restriction was its decision to have built a solid waste transfer station by a private contractor, rather than with public funds by the town. To make the arrangement appetizing to the contractor, the town guaranteed it a minimum waste flow, for which it could charge a fee significantly higher than market rates. The guarantee was policed by the requirement that all solid waste generated within the town be processed at the contractor’s station and that any person disposing of solid waste in any other location would be penalized.

The Court analogized the constraint as a form of economic protectionism, which bars out-of-state processors from the business of treating the localities solid waste, by hoarding a local resource for
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the benefit of local businesses that perform the service. The town's goal of revenue generation was not a local interest that could justify the discrimination. Moreover, the town had other means to accomplish this goal, such as subsidization of the local facility through general taxes or municipal bonds. The Court did not deal with, indeed, did not notice, the fact that the local law conferred a governmentally-granted monopoly, an exclusive franchise, indistinguishable from a host of local monopolies at the state and local level. 1055

States may not interdict the movement of persons into the State, whatever the motive to protect themselves from economic or similar difficulties. 1056

Drawing the line between discriminatory regulations that are almost per se invalid and regulations that necessitate balancing is not an easy task. Not every claim of protectionism is sustained. Thus, in Minnesota v. Clover Leaf Creamery Co., 1057 there was attacked a state law banning the retail sale of milk products in plastic, nonreturnable containers but permitting sales in other non-returnable, nonrefillable containers, such as paperboard cartons. The Court found no discrimination against interstate commerce, because both in-state and out-of-state interests could not use plastic containers, and it refused to credit a lower, state-court finding that the measure was intended to benefit the local pulpwood industry. In Exxon Corp. v. Governor of Maryland, 1058 the Court upheld a statute that prohibited producers or refiners of petroleum products from operating retail service stations in Maryland. No discrimination was found, first, because there were no local producers or refiners within Maryland and therefore since the State's entire gasoline supply flowed in interstate commerce there was no favoritism, and, second, although the bar on operating fell entirely on out-of-state concerns, there were out-of-state concerns that did not produce or refine gasoline and they were able to continue operating in the State, so that there was some distinction between all in-state

1055 See The Supreme Court, Leading Cases, 1993 Term, 108 Harv. L. Rev. 139, 149–59 (1994). Weight was given to this consideration by Justice O'Connor, 511 U.S. at 401 (concurring) (local law an excessive burden on interstate commerce), and by Justice Souter, id. at 410 (dissenting).
operators and some out-of-state operators as against some other out-of-state operators.

Still a model example of balancing is Chief Justice Stone’s opinion in Southern Pacific Co. v. Arizona. At issue was the validity of Arizona’s law barring the operation within the State of trains of more than 14 passenger cars, no other State had a figure this low, or 70 freight cars, only one other State had a cap this low. First, the Court observed that the law substantially burdened interstate commerce. Enforcement of the law in Arizona, while train lengths went unregulated or were regulated by varying standards in other States, meant that interstate trains of a length lawful in other States had to be broken up before entering the State; inasmuch as it was not practicable to break up trains at the border, that act had to be accomplished at yards quite removed, with the result that the Arizona limitation controlled train lengths as far east as El Paso, Texas, and as far west as Los Angeles. Nearly 95% of the rail traffic in Arizona was interstate. The other alternative was to operate in other States with the lowest cap, Arizona’s, with the result that that State’s law controlled the railroads’ operations over a wide area. If other States began regulating at different lengths, as they would be permitted to do, the burden on the railroads would burgeon. Moreover, the additional number of trains needed to comply with the cap just within Arizona was costly, and delays were occasioned by the need to break up and remake lengthy trains.

Conversely, the Court found that as a safety measure the state cap had “at most slight and dubious advantage, if any, over unregulated train lengths.” That is, while there were safety problems with longer trains, the shorter trains mandated by state law required increases in the numbers of trains and train operations and a consequent increase in accidents generally more severe than

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1059 325 U.S. 761 (1945). Interestingly, Justice Stone had written the opinion for the Court in South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938), in which, in a similar case involving regulation of interstate transportation and proffered safety reasons, he had eschewed balancing and deferred overwhelmingly to the state legislature. Barnwell Bros. involved a state law that prohibited use on state highways of trucks that were over 90 inches wide or that had a gross weight over 20,000 pounds, with from 85% to 90% of the Nation’s trucks exceeding these limits. This deference and refusal to evaluate evidence resurfaced in a case involving an attack on railroad “full-crew” laws. Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. Railroad Co., 393 U.S. 129 (1968).

1060 The concern about the impact of one State’s regulation upon the laws of other States is in part a reflection of the Cooley national uniformity interest and partly a hesitation about the autonomy of other States, E.g., CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88–89 (1987); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 583–584 (1986).

those attributable to longer trains. In short, the evidence did not show that the cap lessened rather than increased the danger of accidents.\textsuperscript{1062}

Conflicting state regulations appeared in \emph{Bibb v. Navajo Freight Lines}.\textsuperscript{1063} There, Illinois required the use of contour mudguards on trucks and trailers operating on the State’s highways, while adjacent Arkansas required the use of straight mudguards and banned contoured ones. At least 45 States authorized straight mudguards. The Court sifted the evidence and found it conflicting on the comparative safety advantages of contoured and straight mudguards. But, admitting that if that were all that was involved the Court would have to sustain the costs and burdens of outfitting with the required mudguards, the Court invalidated the Illinois law, because of the massive burden on interstate commerce occasioned by the necessity of truckers to shift cargoes to differently designed vehicles at the State’s borders.

Arguably, the Court in more recent years has continued to stiffen the scrutiny with which it reviews state regulation of interstate carriers purportedly for safety reasons.\textsuperscript{1064} Difficulty attends any evaluation of the possible developing approach, inasmuch as the Court has spoken with several voices. A close reading, however, indicates that while the Court is most reluctant to invalidate regulations that touch upon safety and that if safety justifications are not illusory it will not second-guess legislative judgment, nonetheless, the Court will not accept, without more, state assertions of safety motivations. “Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.” Rather, the asserted safety purpose must be weighed against the degree of interference with interstate commerce. “This ‘weighing’ . . . requires . . . a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.”\textsuperscript{1065}

Balancing has been used in other than transportation-industry cases. Indeed, the modern restatement of the standard was in such

\textsuperscript{1062} 325 U.S. at 775–79, 781–84.
\textsuperscript{1063} 359 U.S. 520 (1959).
a case.\textsuperscript{1066} There, the State required cantaloupes grown in the State to be packed there, rather than in an adjacent State, so that in-state packers’ names would be associated with a superior product. Promotion of a local industry was legitimate, the Court, said, but it did not justify the substantial expense the company would have to incur to comply. State efforts to protect local markets, concerns, or consumers against outside companies have largely been unsuccessful. Thus, a state law that prohibited ownership of local investment-advisory businesses by out-of-state banks, bank-holding companies, and trust companies was invalidated.\textsuperscript{1067} The Court plainly thought the statute was protectionist, but instead of voiding it for that reason it held that the legitimate interests the State might have did not justify the burdens placed on out-of-state companies and that the State could pursue the accomplishment of legitimate ends through some intermediate form of regulation. In \textit{Edgar v. Mite Corp.},\textsuperscript{1068} an Illinois regulation of take-over attempts of companies that had specified business contacts with the State, as applied to an attempted take-over of a Delaware corporation with its principal place of business in Connecticut, was found to constitute an undue burden, with special emphasis upon the extraterritorial effect of the law and the dangers of disuniformity. These problems were found lacking in the next case, in which the state statute regulated the manner in which purchasers of corporations chartered within the State and with a specified percentage of in-state shareholders could proceed with their take-over efforts. The Court emphasized that the State was regulating only its own corporations, which it was empowered to do, and no matter how many other States adopted such laws there would be no conflict. The burdens on interstate commerce, and the Court was not that clear that the effects of the law were burdensome in the appropriate context, were justified by the State’s interests in regulating its corporations and resident shareholders.\textsuperscript{1069}

In other areas, while the Court repeats balancing language, it has not applied it with any appreciable bite,\textsuperscript{1070} but in most respects the state regulations involved are at most problematic in the context of the concerns of the commerce clause.

\textsuperscript{1067} Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980).
\textsuperscript{1068} 457 U.S. 624 (1982) (plurality opinion).
\textsuperscript{1069} CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).
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Cl. 3—Power to Regulate Commerce

Foreign Commerce and State Powers

State taxation and regulation of commerce from abroad are also subject to negative commerce clause constraints. In the seminal case of Brown v. Maryland, in the course of striking down a state statute requiring “all importers of foreign articles or commodities,” preparatory to selling the goods, to take out a license, Chief Justice Marshall developed a lengthy exegesis explaining why the law was void under both the import-export clause and the commerce clause. According to the Chief Justice, an inseparable part of the right to import was the right to sell, and a tax on the sale of an article is a tax on the article itself. Thus, the taxing power of the States did not extend in any form to imports from abroad so long as they remain “the property of the importer, in his warehouse, in the original form or package” in which they were imported, hence, the famous “original package” doctrine. Only when the importer parts with his importations, mixes them into his general property by breaking up the packages, may the State treat them as taxable property.

Obviously, to the extent that the import-export clause was construed to impose a complete ban on taxation of imports so long as they were in their original packages, there was little occasion to develop a commerce-clause analysis that would have reached only discriminatory taxes or taxes upon goods in transit. In other respects, however, the Court has applied the foreign commerce aspect of the clause more stringently against state taxation.

Thus, in Japan Line, Ltd. v. County of Los Angeles, the Court held that, in addition to satisfying the four requirements that govern the permissibility of state taxation of interstate commerce, “When a State seeks to tax the instrumentalities of for-

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1072 Article I, § 10, cl. 2. This aspect of the doctrine of the case was considerably expanded in Low v. Austin, 80 U.S. (13 Wall.) 29 (1872), and subsequent cases, to bar States from levying nondiscriminatory, ad valorem property taxes upon goods that are no longer in import transit. This line of cases was overruled in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).
1073 See, e.g., Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963); Minnesota v. Blasius, 290 U.S. 1 (1933). After the holding in Michelin Tire, the two clauses are now congruent. The Court has observed that the two clauses are animated by the same policies. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 440–50 n.14 (1979).
1075 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). A state tax failed to pass the nondiscrimination standard in Kraft General Foods, Inc. v. Iowa Dept. of Revenue & Finance, 505 U.S. 71 (1992). Iowa imposed an income tax on a unitary business operating throughout the United States and in several foreign countries. It included in the tax base of corporations the dividends the companies received from subsidiaries operating in foreign countries, but it allowed exclusions from the base of dividends received from domestic subsidiaries. A domestic sub-
eign commerce, two additional considerations ... come into play. The first is the enhanced risk of multiple taxation.... Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential.” 1076 Multiple taxation is to be avoided with respect to interstate commerce by apportionment so that no jurisdiction may tax all the property of a multistate business, and the rule of apportionment is enforced by the Supreme Court with jurisdiction over all the States. However, the Court is unable to enforce such a rule against another country, and the country of the domicile of the business may impose a tax on full value. Uniformity could be frustrated by disputes over multiple taxation, and trade disputes could result.

Applying both these concerns, the Court invalidated a state tax, a nondiscriminatory, *ad valorem* property tax, on foreign-owned instrumentalities, i.e., cargo containers, of international commerce. The containers were used exclusively in international commerce and were based in Japan, which did in fact tax them on full value. Thus, there was the actuality, not only the risk, of multiple taxation. National uniformity was endangered, because, while California taxed the Japanese containers, Japan did not tax American containers, and disputes resulted. 1077

On the other hand, the Court has upheld a state tax on all aviation fuel sold within the State as applied to a foreign airline operating charters to and from the United States. The Court found the *Complete Auto* standards met, and it similarly decided that the two standards specifically raised in foreign commerce cases were not violated. First, there was no danger of double taxation because the tax was imposed upon a discrete transaction, the sale of fuel, that occurred within one jurisdiction only. Second, the one-voice standard was satisfied, inasmuch as the United States had never entered into any compact with a foreign nation precluding such state taxation, having only signed agreements with others, having no force of law, aspiring to eliminate taxation that constituted impediments to air travel. 1078 Also, a state unitary-tax scheme that used a worldwide-combined reporting formula was upheld as ap-

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1076 441 U.S. at 446, 448. *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (sustaining state sales tax as applied to lease of containers delivered within the State and used in foreign commerce).

1077 441 U.S. at 451–57. For income taxes, the test is more lenient, accepting not only the risk but the actuality of some double taxation as something simply inherent in accounting devices. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 187–192 (1983).

Extending Container Corp., the Court in Barclays Bank v. Franchise Tax Bd. of California, upheld the State’s worldwide-combined reporting method of determining the corporate franchise tax owed by unitary multinational corporations, as applied to a foreign corporation. The Court determined that the tax easily satisfied three of the four-part Complete Auto test—nexus, apportionment, and relation to State’s services—and concluded that the non-discrimination principle—perhaps violated by the letter of the law—could be met by the discretion accorded state officials. As for the two additional factors, as outlined in Japan Lines, the Court pronounced itself satisfied. Multiple taxation was not the inevitable result of the tax, and that risk would not be avoided by the use of any reasonable alternative. The tax, it was found, did not impair federal uniformity nor prevent the Federal Government from speaking with one voice in international trade. The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.

The power to regulate foreign commerce was always broader than the States’ power to tax it, an exercise of the “police power” recognized by Chief Justice Marshall in Brown v. Maryland. That this power was constrained by notions of the national interest and preemption principles was evidenced in the cases striking down state efforts to curb and regulate the actions of shippers bringing persons into their ports. On the other hand, quarantine legislation to protect the States’ residents from disease and other hazards was commonly upheld though it regulated international commerce. A state game-season law applied to criminalize the possession of a dead grouse imported from Russia was

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1080 The validity of the formula as applied to domestic corporations with foreign parents or to foreign corporations with foreign parents or foreign subsidiaries, so that some of the income earned abroad would be taxed within the taxing State, is a question of some considerable dispute.
upheld because of the practical necessities of enforcement of domestic law. 1085

Nowadays, state regulation of foreign commerce is likely to be judged by the extra factors set out in Japan Line. 1086 Thus, the application of a state civil rights law to a corporation transporting passengers outside the State to an island in a foreign province was sustained in an opinion emphasizing that, because of the particularistic geographic situation the foreign commerce involved was more conceptual than actual, there was only a remote hazard of conflict between state law and the law of the other country and little if any prospect of burdening foreign commerce.

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

In Gibbons v. Ogden, 1087 the Court, speaking by Chief Justice Marshall, held that New York legislation that excluded from the navigable waters of that State steam vessels enrolled and licensed under an act of Congress to engage in the coasting trade was in conflict with the federal law and hence void. 1088 The result, said the Chief Justice, was required by the supremacy clause, which proclaimed not only that the Constitution itself but statutes enacted pursuant to it and treaties superseded state laws that “interfere with, or are contrary to the laws of Congress .... In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.” 1089

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1088 A modern application of Gibbons v. Ogden is Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), in which the Court, in reliance on the present version of the licensing statute utilized by Chief Justice Marshall, struck down state laws curtailing the operations of federally licensed vessels. In the course of the Douglas opinion, the Court observed that “[a]lthough it is true that the Court’s view in Gibbons of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly re-enacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as Gibbons. We have no doubt that Congress has ratified the statutory interpretation of Gibbons and its progeny.” Id. at 278–79.
1089 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). See also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). Although preemption is basically constitutional in nature, deriving its forcefulness from the supremacy clause, it is much more like statutory decisionmaking, inasmuch as it depends upon an interpretation of an act of Congress in determining whether a state law is ousted. E.g., Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271–72 (1977). See also Swift & Co. v. Wickham, 382 U.S. 111 (1965). "Any such pre-emption or conflict claim is of course
Since the turn of the century, federal legislation, primarily but not exclusively under the commerce clause, has penetrated deeper and deeper into areas once occupied by the regulatory power of the States. One result is that state laws on subjects about which Congress has legislated have been more and more frequently attacked as being incompatible with the acts of Congress and hence invalid under the supremacy clause.

“The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.” As Justice Black once explained in a much quoted exposition of the matter: “There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

Before setting out in their various forms the standards and canons to which the Court formally adheres, one must still recognize the highly subjective nature of their application. As an astute observer long ago observed, “the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into question than by metaphorical sign-language of ‘occupation of the field.’ And it grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way. The basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes.”

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1090 Cases considered under this heading are overwhelmingly about federal legislation based on the commerce clause, but the principles enunciated are identical whatever source of power Congress utilizes. Therefore, cases arising under legislation based on other powers are cited and treated interchangeably.


1092 Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This case arose under the immigration power of cl. 4.
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would seem that this is largely unavoidable. The Court, in order to
determine an unexpressed congressional intent, has undertaken
the task of making the independent judgment of social values that
Congress has failed to make. In making this determination, the
Court's evaluation of the desirability of overlapping regulatory
schemes or overlapping criminal sanctions cannot but be a substan-
tial factor."

Preemption Standards.—Until roughly the New Deal, as rec-
cited above, the Supreme Court applied a doctrine of "dual fed-
eralism," under which the Federal Government and the States
were separate sovereigns, each preeminent in its own fields but
lacking authority in the other's. This conception affected preemp-
tion cases, with the Court taking the view, largely, that any con-
gressional regulation of a subject effectively preempted the field
and ousted the States. Thus, when Congress entered the field
of railroad regulation, the result was invalidation of many pre-
viously enacted state measures. Even here, however, safety meas-
ures tended to survive, and health and safety legislation in other
areas was protected from the effects of federal regulatory actions.

In the 1940s, the Court began to develop modern standards for
determining when preemption occurred, which are still recited and
relied on. All modern cases recite some variation of the basic
standards. "[The] question whether a certain state action is pre-
empted by federal law is one of congressional intent. The purpose
of Congress is the ultimate touchstone. To discern Congress' intent
we examine the explicit statutory language and the structure and
purpose of the statute." Congress' intent to supplant state au-

reasoning process in a case nominally hinging on preemption as it has in past cases
in which the question was whether the state law regulated or burdened interstate
commerce. [The] Court has adopted the same weighing of interests approach in pre-
emption cases that it uses to determine whether a state law unjustifiably burdens
interstate commerce. In a number of situations the Court has invalidated statutes
on the preemption ground when it appeared that the state laws sought to favor local
economic interests at the expense of the interstate market. On the other hand, when
the Court has been satisfied that valid local interests, such as those in safety or
in the reputable operation of local business, outweigh the restrictive effect on inter-
state commerce, the Court has rejected the preemption argument and allowed state
regulation to stand." Note, Preemption as a Preferential Ground: A New Canon of
Construction, 12 STAN. L. REV. 208, 217 (1959) (quoted approvingly as a "thoughtful
student comment" in G. GUNTHER, CONSTITUTIONAL LAW 297 (12th ed. 1991)).


1095 E.g., Hines v. Davidowitz, 312 U.S. 52 (1941); Cloverleaf Butter v. Patter-
son, 315 U.S. 148 (1942); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Cali-

quotation marks and case citations omitted). Recourse to legislative history as one
authority in a particular field may be express in the terms of the statute. Since preemption cases, when the statute contains no express provision, theoretically turn on statutory construction, generalizations about them can carry one only so far. Each case must construe a different federal statute with a distinct legislative history. If the statute and the legislative history are silent or unclear, the Supreme Court has developed over time general criteria which it purports to utilize in determining the preemptive effect of federal legislation.

“Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, ... and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, ... or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

“Pre-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matters permits no other conclusion, or that the Congress has unmistakably so ordained.” However, “[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.”

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In the final conclusion, “the generalities” that may be drawn from the cases do not decide them. Rather, “the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances.”

The Standards Applied.—As might be expected from the caveat just quoted, any overview of the Court’s preemption decisions can only make the field seem muddled, and to some extent it is. But some guidelines may be extracted.

Express Preemption. Of course, it is possible for Congress to write preemptive language that clearly and cleanly prescribes or does not prescribe displacement of state laws in an area. Provisions governing preemption can be relatively interpretation free. For example, a prohibition of state taxes on carriage of air passengers “or on the gross receipts derived therefrom” was held to preempt a state tax on airlines, described by the State as a personal property tax, but based on a percentage of the airline’s gross income; “the manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose

1102 Not only congressional enactments can preempt. Agency regulations, when Congress has expressly or implied empowered these bodies to preempt, are “the supreme law of the land” under the supremacy clause and can displace state law. E.g., Smiley v. Citibank, 517 U.S. 735 (1996); City of New York v. FCC, 486 U.S. 57, 63–64 (1988); Louisiana Public Service Comm’n v. FCC, 476 U.S. 355 (1986); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Fidelity Federal Savings & Loan Ass’n v. de la Cuesta, 458 U.S. 141 (1982). Federal common law, i.e., law promulgated by the courts respecting uniquely federal interests and absent explicit statutory directive by Congress, can also displace state law. See Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (Supreme Court promulgated common-law rule creating government-contractor defense in tort liability suits, despite Congress having considered and failed to enact bills doing precisely this); Westfall v. Erwin, 484 U.S. 292 (1988) (civil liability of federal officials for actions taken in the course of their duty). Finally, ordinances of local governments are subject to preemption under the same standards as state law. Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707 (1985).

1103 Thus, § 408 of the Federal Meat Inspection Act, as amended by the Wholesome Meat Act, 21 U.S. C. § 678, provides that “[n]othing in this chapter may not be imposed by any state ….” See Jones v. Rath Packing Co., 430 U.S. 519, 528–532 (1977). Similarly, much state action is saved by the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), which states that “[n]othing in this chapter shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.” For examples of other express preemptive provisions, see Norfolk & Western Ry. v. American Train Dispatchers’ Ass’n, 499 U.S. 117 (1991); Exxon Corp. v. Hunt, 475 U.S. 355 (1986). And see Department of Treasury v. Fabe, 508 U.S. 491 (1993).
and effect of the provision are to impose a levy upon the gross receipts of airlines.” But, more often than not, express preemptive language may be ambiguous or at least not free from conflicting interpretation. Thus, the Court was divided with respect to whether a provision of the Airline Deregulation Act proscribing the States from having and enforcing laws “relating to rates, routes, or services of any air carrier” applied to displace state consumer-protection laws regulating airline fare advertising. A basic issue is whether preemption or saving language applicable to a “state” applies as well to local governments. In a case involving statutory language preserving “state” authority, the Court created a presumption favoring applicability to local governments: “[a]bsent a clear statement to the contrary, Congress’ reference to the ‘regulatory authority of a State’ should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.”

Perhaps the broadest preemption section ever enacted, § 514 of the Employment Retirement Income Security Act of 1974 (ERISA), is so constructed that the Court has been moved to comment that the provisions “are not a model of legislative drafting.” The section declares that the statute shall “supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan,” but saves to the States the power to enforce “law[s] . . . which regulates insurance, banking, or securities,” except that an employee benefit plan governed by ERISA shall not be “deemed” an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws “purporting to regulate” insurance companies or insurance contracts. Interpretation of the provisions has resulted in contentious and divided Court opinions.

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1106 City of Columbus v. Ours Garage and Wrecker Serv., 122 S. Ct. 2226, 2230 (2002).
1109 Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) (ERISA preempts state common-law claim of wrongful discharge to prevent employee attaining benefits under plan covered by ERISA); FMC Corp. v. Holliday, 498 U.S. 52 (1990) (provision of state motor-vehicle financial-responsibility law barring subrogation and reimbursement from claimant’s tort recovery for benefits received from a self-insured
Illustrative of the judicial difficulty with ambiguous preemption language are the fractured opinions in the Cipollone case, in which the Court had to decide whether sections of the Federal Cigarette Labeling and Advertising Act, enacted in 1965 and 1969, preempted state common-law actions against a cigarette company for the alleged harm visited on a smoker. The 1965 provision barred the requirement of any "statement" relating to smoking health, other than what the federal law imposed, and the 1969 provision barred the imposition of any "requirement or prohibition based on smoking and health" by any "State law." It was, thus, a fair question whether common-law claims, based on design defect, failure to warn, breach of express warranty, fraudulent misrepresentation, health-care plan preempted by ERISA); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (state law requiring employers to provide a one-time severance payment to employees in the event of a plant closing held not preempted by 5–4 vote); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (state law mandating that certain minimum mental-health-care benefits be provided to those insured under general health-insurance policy or employee health-care plan is a law "which regulates insurance" and is not preempted); Shaw v. Delta Air Lines, 463 U.S. 85 (1983) (state law forbidding discrimination in employee benefit plans on the basis of pregnancy not preempted, because of another saving provision in ERISA, and provision requiring employers to pay sick-leave benefits to employees unable to work because of pregnancy not preempted under construction of coverage sections, but both laws "relate to" employee benefit plans); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (state law prohibiting plans from reducing benefits by amount of workers' compensation awards "relates to" employee benefit plan and is preempted); District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992) (law requiring employers to provide health insurance coverage, equivalent to existing coverage, for workers receiving workers' compensation benefits); John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank, 510 U.S. 86 (1993) (ERISA's fiduciary standards, not conflicting state insurance laws, apply to insurance company's handling of general account assets derived from participating group annuity contract); New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (no preemption of statute that required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients covered by Blue Cross/Blue Shield plan); Boggs v. Boggs, 520 U.S. 833 (1997) (decided not on the basis of the express preemption language but instead by implied preemption analysis).

1110 Cipollone v. Liggett Group, 505 U.S. 504 (1992). The decision as a canon of construction promulgated two controversial rules. First, the courts should interpret narrowly provisions that purport to preempt state police-power regulations, and, second, that when a law has express preemption language courts should look only to that language and presume that when the preemptive reach of a law is defined Congress did not intend to go beyond that reach, so that field and conflict preemption will not be found. Id. at 517; and id. at 532-33 (Justice Blackmun concurring and dissenting). Both parts of this canon are departures from established law. Narrow construction when state police powers are involved has hitherto related to implied preemption, not express preemption, and courts generally have applied ordinary-meaning construction to such statutory language; further, courts have not precluded the finding of conflict preemption, though perhaps field preemption, because of the existence of some express preemptive language. See id. at 546-48 (Justice Scalia concurring and dissenting).
sentation, and conspiracy to defraud, were preempted or whether only positive state enactments came within the scope of the clauses. Two groups of Justices concluded that the 1965 section reached only positive state law and did not preempt common-law actions; different alignments of Justices concluded that the 1969 provisions did reach common-law claims, as well as positive enactments, and did preempt some of the claims insofar as they in fact constituted a requirement or prohibition based on smoking health.

Little clarification of the confusing Cipollone decision and opinions resulted in the cases following, although it does seem evident that the attempted distinction limiting courts to the particular language of preemption when Congress has spoken has not prevailed. At issue in Medtronic, Inc. v. Lohr, was the Medical Device Amendments (MDA) of 1976, which prohibited States from adopting or continuing in effect “with respect to a [medical] device” any “requirement” that is “different from, or in addition to” the applicable federal requirement and that relates to the safety or effectiveness of the device. The issue, then, was whether a common-law tort obligation imposed a “requirement” that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as determined by the FDA to be “substantially equivalent” to a device previously on the market, a situation of some import to at least some of the Justices.

Unanimously, the Court determined that a defective design claim was not preempted and that the MDA did not prevent States from providing a damages remedy for violation of common-law duties that paralleled federal requirements. But the Justices split 4–1–4 with respect to preemption of various claims relating to manufacturing and labeling. FDA regulations, which a majority deferred to, limited preemption to situations in which a particular state requirement threatens to interfere with a specific federal interest. Moreover, the common-law standards were not specifically developed to govern medical devices and their generality removed them

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1111 505 U.S. at 518-19 (opinion of the court), 533-34 (Justice Blackmun concurring).
1112 505 U.S. at 520-30 (plurality opinion), 535-43 (Justice Blackmun concurring and dissenting), 548-50 (Justice Scalia concurring and dissenting).
from the category of requirements “with respect to” specific devices. However, five Justices did agree that common-law requirements could be, just as statutory provisions, “requirements” that were preempted, though they did not agree on the application of that view.\footnote{1115}

Following \textit{Cipollone}, the Court observed that while it “need not go beyond” the statutory preemption language, it did need to “identify the domain expressly pre-empted” by the language, so that “our interpretation of that language does not occur in a contextual vacuum.” That is, it must be informed by two presumptions about the nature of preemption: the presumption that Congress does not cavalierly preempt common-law causes of action and the principle that it is Congress’ purpose that is the ultimate touchstone.\footnote{1116}

The Court continued to struggle with application of express preemption language to state common-law tort actions in \textit{Geier v. American Honda Motor Co.}\footnote{1117} The National Traffic and Motor Vehicle Safety Act contained both a preemption clause, prohibiting states from applying “any safety standard” different from an applicable federal standard, and a “saving clause,” providing that “compliance with” a federal safety standard “does not exempt any person from any liability under common law.” The Court determined that the express preemption clause was inapplicable. However, despite the saving clause, the Court ruled that a common law tort action seeking damages for failure to equip a car with an airbag was preempted because its application would frustrate the purpose of a Federal Motor Vehicle Safety Standard that had allowed manufacturers to choose from among a variety of “passive restraint” systems for the applicable model year.\footnote{1118} The Court’s holding makes clear, contrary to the suggestion in \textit{Cipollone}, that existence of ex-
press preemption language does not foreclose operation of conflict (in this case “frustration of purpose”) preemption.

Field Preemption. Where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” the States are ousted from the field. Still a paradigmatic example of field preemption is *Hines v. Davidowitz*, in which the Court held that a new federal law requiring the registration of all aliens in the country precluded enforcement of a pre-existing state law mandating registration of aliens within the State. Adverting to the supremacy of national power in foreign relations and the sensitivity of the relationship between the regulation of aliens and the conduct of foreign affairs, the Court had little difficulty declaring the entire field to have been occupied by federal law. Similarly, in *Pennsylvania v. Nelson*, the Court invalidated as preempted a state law punishing sedition against the National Government. The Court enunciated a three-part test: 1) the pervasiveness of federal regulation; 2) federal occupation of the field as necessitated by the need for national uniformity; and 3) the danger of conflict between state and federal administration.

The *Rice* case itself held that a federal system of regulating the operations of warehouses and the rates they charged completely occupied the field and ousted state regulation. However, it is often a close decision whether a federal law has regulated part of a field, however defined, or the whole area, so that state law cannot even supplement the federal. Illustrative of this point is the

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1119 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The case also is the source of the oft-quoted maxim that when Congress legislates in a field traditionally occupied by the States, courts should “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Id.

1120 312 U.S. 52 (1941).

1121 The Court also said that courts must look to see whether under the circumstances of a particular case, the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” 312 U.S. at 67. That standard is obviously drawn from conflict preemption, for the two standards are frequently intermixed. Nonetheless, not all state regulation is precluded. De Canas v. Bica, 424 U.S. 351 (1976) (upholding a state law penalizing the employment of an illegal alien, the case arising before enactment of the federal law doing the same thing).


1123 350 U.S. at 502–05. Obviously, there is a noticeable blending into conflict preemption.


1125 Compare Campbell v. Hussey, 368 U.S. 297 (1961) (state law requiring tobacco of a certain type to be marked by white tags, ousted by federal regulation that occupied the field and left no room for supplementation), with Florida Lime & Avocado Growers, Inc., 373 U.S. 132 (1963) (state law setting minimum oil content for avocados certified as mature by federal regulation is complementary to federal law,
Court’s holding that the Atomic Energy Act’s preemption of the safety aspects of nuclear power did not invalidate a state law conditioning construction of nuclear power plants on a finding by a state agency that adequate storage and disposal facilities were available to treat nuclear wastes, since “economic” regulation of power generation has traditionally been left to the States - an arrangement maintained by the Act - and since the state law could be justified as an economic rather than a safety regulation.\footnote{A city’s effort to enforce stiff penalties for ship pollution that resulted from boilers approved by the Federal Government was held not preempted, the field of boiler safety, but not boiler pollution, having been occupied by federal regulation.\footnote{Neither does the same reservation of exclusive authority to regulate nuclear safety preempt imposition of punitive damages under state tort law, even if based upon the jury’s conclusion that a nuclear licensee failed to follow adequate safety precautions. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). See also English v. General Electric Co., 496 U.S. 72 (1990) (employee’s state-law claim for intentional infliction of emotional distress for her nuclear-plant employer’s actions retaliating for her whistleblowing is not preempted as relating to nuclear safety).\footnote{Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on ship owners over 100 feet. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).} since federal standard was a minimum one, the field having not been occupied). One should be wary of assuming that a state law that has dual purposes and impacts will not, just for the duality, be held to be preempted. See Gade v. National Solid Wastes Mgmt. Ass’n, 505 U.S. 88 (1992); Perez v. Campbell, 402 U.S. 637 (1971) (under bankruptcy clause).

\footnote{A city’s effort to enforce stiff penalties for ship pollution that resulted from boilers approved by the Federal Government was held not preempted, the field of boiler safety, but not boiler pollution, having been occupied by federal regulation.\footnote{Neither does the same reservation of exclusive authority to regulate nuclear safety preempt imposition of punitive damages under state tort law, even if based upon the jury’s conclusion that a nuclear licensee failed to follow adequate safety precautions. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). See also English v. General Electric Co., 496 U.S. 72 (1990) (employee’s state-law claim for intentional infliction of emotional distress for her nuclear-plant employer’s actions retaliating for her whistleblowing is not preempted as relating to nuclear safety).\footnote{Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on ship owners over 100 feet. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).}}

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on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such a pervasive nature as to leave no room for state or local regulation.\textsuperscript{1130}

Congress may preempt state regulation without itself prescribing a federal standard; it may deregulate a field and thus occupy it by opting for market regulation and precluding state or local regulation.\textsuperscript{1131}

\textit{Conflict Preemption.} Several possible situations will lead to a holding that a state law is preempted as in conflict with federal law. First, it may be that the two laws, federal and state, will actually conflict. Thus, in \textit{Rose v. Arkansas State Police},\textsuperscript{1132} federal law provided for death benefits for state law enforcement officers “in addition to” any other compensation, while the state law required a reduction in state benefits by the amount received from other sources. The Court, in a brief, \textit{per curiam} opinion, had no difficulty finding the state provision preempted.\textsuperscript{1133}

Second, conflict preemption may occur when it is practically impossible to comply with the terms of both laws. Thus, where a federal agency had authorized federal savings and loan associations to include “due-on-sale” clauses in their loan instruments and where the State had largely prevented inclusion of such clauses, while it was literally possible for lenders to comply with both rules, the federal rule being permissive, the state regulation prevented the exercise of the flexibility the federal agency had conferred and was preempted.\textsuperscript{1134} On the other hand, it was possible for an employer to comply both with a state law mandating leave and rein-

\textsuperscript{1130} City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).
\textsuperscript{1131} Congress may preempt state regulation without itself prescribing a federal standard; it may deregulate a field and thus occupy it by opting for market regulation and precluding state or local regulation.
\textsuperscript{1132} Conflict Preemption. Several possible situations will lead to a holding that a state law is preempted as in conflict with federal law. First, it may be that the two laws, federal and state, will actually conflict. Thus, in \textit{Rose v. Arkansas State Police}, federal law provided for death benefits for state law enforcement officers “in addition to” any other compensation, while the state law required a reduction in state benefits by the amount received from other sources. The Court, in a brief, \textit{per curiam} opinion, had no difficulty finding the state provision preempted.
\textsuperscript{1133} Second, conflict preemption may occur when it is practically impossible to comply with the terms of both laws. Thus, where a federal agency had authorized federal savings and loan associations to include “due-on-sale” clauses in their loan instruments and where the State had largely prevented inclusion of such clauses, while it was literally possible for lenders to comply with both rules, the federal rule being permissive, the state regulation prevented the exercise of the flexibility the federal agency had conferred and was preempted.\textsuperscript{1134} On the other hand, it was possible for an employer to comply both with a state law mandating leave and rein-

\textsuperscript{1134} Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141 (1982).
statement to pregnant employees and with a federal law prohibiting employment discrimination on the basis of pregnancy.\footnote{California Federal Savings & Loan Ass’n v. Guerra, 479 U.S. 272 (1987). Compare Cloverleaf Butter v. Patterson, 315 U.S. 148 (1942) (federal law preempts more exacting state standards, even though both could be complied with and state standards were harmonious with purposes of federal law).} Similarly, when faced with both federal and state standards on the ripeness of avocados, the Court discerned that the federal standard was a “minimum” one rather than a “uniform” one and decided that growers could comply with both.\footnote{Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).}

Third, a fruitful source of preemption is found when it is determined that the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.\footnote{The standard is, of course, drawn from Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See also Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) (federal law empowering national banks in small towns to sell insurance preempts state law prohibiting banks from dealing in insurance; despite explicit preemption provision, state law stands as an obstacle to accomplishment of federal purpose).} Thus, the Court voided a state requirement that the average net weight of a package of flour in a lot could not be less than the net weight stated on the package. While applicable federal law permitted variations from stated weight caused by distribution losses, such as through partial dehydration, the State allowed no such deviation. Although it was possible for a producer to satisfy the federal standard while satisfying the tougher state standard, the Court discerned that to do so defeated one purpose of the federal requirement—the facilitating of value comparisons by shoppers. Because different producers in different situations in order to comply with the state standard may have to overpack flour to make up for dehydration loss, consumers would not be comparing packages containing identical amounts of flour solids.\footnote{Jones v. Rath Packing Co., 430 U.S. 519, 532–543 (1977).} In \textit{Felder v. Casey},\footnote{487 U.S. 131 (1988).} a state notice-of-claim statute was found to frustrate the remedial objectives of civil rights laws as applied to actions brought in state court under 42 U. S. C. §1983. A state law recognizing the validity of an unrecorded oral sale of an aircraft was held preempted by the Federal Aviation Act’s provision that unrecorded “instruments” of transfer are invalid, since the congressional purpose evidenced in the legislative history was to make information about an aircraft’s title readily available by requiring that all transfers be documented and recorded.\footnote{Philco Aviation v. Shacket, 462 U.S. 406 (1983).} In \textit{Boggs v. Boggs},\footnote{520 U.S. 833 (1997).} the Court, 5–to–4, applied the “stands as an obstacle” test for conflict even though the statute (ERISA)
contains an express preemption section. The dispute arose in a community-property State, in which heirs of a deceased wife claimed property that involved pension-benefit assets that was left to them by testamentary disposition, as against a surviving second wife. Two ERISA provisions operated to prevent the descent of the property to the heirs, but under community-property rules the property could have been left to the heirs by their deceased mother. The Court did not pause to analyze whether the ERISA preemption provision operated to preclude the descent of the property, either because state law “relate[d] to” a covered pension plan or because state law had an impermissible “connection with” a plan, but it instead decided that the operation of the state law insofar as it conflicted with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. “We can begin, and in this case end, the analysis by simply asking if state law conflicts with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. “We can begin, and in this case end, the analysis by simply asking if state law conflicts with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA 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"Similarly, the Court found it unnecessary to consider field preemption due to its holding that a Massachusetts law barring state agencies from purchasing goods or services from companies doing business with Burma imposed obstacles to the accomplishment of Congress's full objectives under the federal Burma sanctions law. The state law was said to undermine the federal law in several respects that could have implicated field preemption – by limiting the President's effective discretion to control sanctions, and by frustrating the President's ability to engage in effective diplomacy in developing a comprehensive multilateral strategy – but the Court “decline[d] to speak to field preemption as a separate issue." Also, a state law making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by nonmember producers was held to counter a strong federal policy protecting the right of farmers to join or not join such asso-

1042 Id. at 841. The dissent, id. at 854 (Justice Breyer), agreed that conflict analysis was appropriate, but he did not find that the state law achieved any result that ERISA required.


1144 530 U.S. at 374 n.8.
And a state assertion of the right to set minimum stream-flow requirements different from those established by FERC in its licensing capacity was denied as being preempted under the Federal Power Act, despite language requiring deference to state laws “relating to the control, appropriation, use, or distribution of water.”

Contrarily, a comprehensive federal regulation of insecticides and other such chemicals was held not to preempt a town ordinance that required a permit for the spraying of pesticides, there being no conflict between requirements. The application of state antitrust laws to authorize indirect purchasers to recover for all overcharges passed on to them by direct purchasers was held to implicate no preemption concerns, inasmuch as the federal antitrust laws had been interpreted as not permitting indirect purchasers to recover under federal law; state law may be inconsistent with federal law but in no way did it frustrate federal objectives and policies. The effect of federal policy was not strong enough to warrant a holding of preemption when a State authorized condemnation of abandoned railroad property after conclusion of an ICC proceeding permitting abandonment, although the railroad’s opportunity costs in the property had been considered in the decision on abandonment.

Federal Versus State Labor Laws.—One group of cases, which has caused the Court much difficulty over the years, concerns the effect of federal labor laws on state power to govern labor-management relations. Although the Court some time ago

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1146 California v. FERC, 495 U.S. 490 (1990). The savings clause was found inapplicable on the basis of an earlier interpretation of the language in First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946).


reached a settled rule, changes in membership on the Court re-opened the issue and modified the rules.

With the enactment of the National Labor Relations Act and subsequent amendments, Congress declared a national policy in labor-management relations and established the NLRB to carry out that policy. It became the Supreme Court's responsibility to determine what role state law on labor-management relations was to play. At first, the Court applied a test of determination whether the state regulation was in direct conflict with the national regulatory scheme. Thus, in one early case, the Court held that an order by a state board which commanded a union to desist from mass picketing of a factory and from assorted personal threats was not in conflict with the national law that had not been invoked and that did not touch on some of the union conduct in question. A "cease and desist" order of a state board implementing a state provision making it an unfair labor practice for employees to conduct a slowdown or to otherwise interfere with production while on the job was found not to conflict with federal law, while another order of the board was also sustained in its prohibition of the discharge of an employee under a maintenance-of-membership clause inserted in a contract under pressure from the War Labor Board and which violated state law.

On the other hand, a state statute requiring business agents of unions operating in the State to file annual reports and to pay an annual fee of one dollar was voided as in conflict with federal law. And state statutes providing for mediation and outlawing

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1150 Throughout the ups-and-downs of federal labor-law preemption, it remains the rule that the Board remains preeminent and almost exclusive. See, e.g., Wisconsin Dep't of Industry v. Gould, Inc., 475 U.S. 282 (1986) (States may not supplement Board enforcement by debarring from state contracts persons or firms that have violated the NLRA); Golden Gate Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (City may not condition taxicab franchise on settlement of strike by set date, since this intrudes into collective-bargaining process protected by NLRA). On the other hand, the NLRA's protection of associational rights is not so strong as to outweigh the Social Security Act's policy permitting States to determine whether to award unemployment benefits to persons voluntarily unemployed as the result of a labor dispute. New York Tel. Co. v. New York Labor Dep't, 440 U.S. 519 (1979); Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977); Baker v. General Motors Corp., 478 U.S. 621 (1986).


1153 Algoma Plywood Co. v. WERB, 336 U.S. 301 (1949).

1154 Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945). More recently, the Court has held that Hill's premise that the NLRA grants an unqualified right to select union officials has been removed by amendments prohibiting some convicted criminals from holding union office. Partly because the federal disqualification standard was itself dependent upon application of state law, the Court ruled that more stringent state disqualification provisions, also aimed at individuals who had been in-
public utility strikes were similarly voided as being in specific conflict with federal law. A somewhat different approach was noted in several cases in which the Court held that the federal act had so occupied the field in certain areas as to preclude state regulation. The latter approach was predominant through the 1950s as the Court voided state court action in enjoining or awarding damages for peaceful picketing, in awarding of relief by damages or otherwise for conduct which constituted an unfair labor practice under federal law, or in enforcing state antitrust laws so as to affect collective bargaining agreements or to bar a strike as a restraint of trade, even with regard to disputes over which the NLRB declined to assert jurisdiction because of the degree of effect on interstate commerce.

In San Diego Building Trades Council v. Garmon, the Court enunciated the rule, based on its previous decade of adjudication. “When an activity is arguably subject to § 7 or § 8 of the Act, the States … must defer to the exclusive competence of the


1156 Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Local 776, 346 U.S. 485 (1953); Bethlehem Steel Co. v. New York Employment Relations Bd., 330 U.S. 767 (1947). See also Livadas v. Bradshaw, 512 U.S. 107 (1994) (finding preempted because it stood as an obstacle to the achievement of the purposes of NLRA a practice of a state labor commissioner). Of course, where Congress clearly specifies, the Court has had no difficulty. Thus, in the NLRA, Congress provided, 29 U.S.C. § 164(b), that state laws on the subject could override the federal law on union security arrangements and the Court sustained those laws. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). When Congress in the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provided that the federal law on union security was to override contrary state laws, the Court sustained that determination. Railway Employees’ Department v. Hanson, 351 U.S. 225 (1956). The Court has held that state courts may adjudicate questions relating to the permissibility of particular types of union security arrangements under state law even though the issue involves as well an interpretation of federal law., Retail Clerks Int’l Ass’n v. Schermerhorn, 375 U.S. 96 (1963).


1162 Guss v. Utah Labor Board, 353 U.S. 1 (1957). The “no-man’s land” thus created by the difference between the reach of Congress’ commerce power and the NLRB’s finite resources was closed by 73 Stat. 541, 29 U.S.C. § 164(c), which authorized the States to assume jurisdiction over disputes which the Board had indicated through promulgation of jurisdictional standards that it would not treat.

National Labor Relations Board if the danger of state interference with national policy is to be averted."

For much of the period since Garmon, the dispute in the Court concerned the scope of the few exceptions permitted in the Garmon principle. First, when picketing is not wholly peaceful but is attended by intimidation, violence, and obstruction of the roads affording access to the struck establishment, state police powers have been held not disabled to deal with the conduct and narrowly-drawn injunctions directed against violence and mass picketing have been permitted as well as damages to compensate for harm growing out of such activities.

A 1958 case permitted a successful state court suit for reinstatement and damages for lost pay because of a wrongful expulsion, leading to discharge from employment, based on a theory that the union constitution and by-laws constitute a contract between the union and the members the terms of which can be enforced by state courts without the danger of a conflict between state and federal law. The Court subsequently narrowed the interpretation of this ruling by holding in two cases that members who alleged union interference with their existing or prospective employment relations could not sue for damages but must file unfair labor practice charges with the NLRB. Gonzales was said to be limited to "purely internal union matters." Finally, Gonzales, was abandoned in a five-to-four decision in which the Court held that a person who alleged that his union had misinterpreted its constitution and its collective bargaining agreement with the individual's employer in expelling him from the union and causing him to be discharged from his employment because he was late paying his dues had to pursue his federal remedies.

While it was not likely that in Gonzales, a state court resolution of the scope of duty owed the

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1169 373 U.S. at 697 (Borden), and 705 (Perko).

1170 Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971).
member by the union would implicate principles of federal law, Justice Harlan wrote for the Court, state court resolution in this case involved an interpretation of the contract’s union security clause, a matter on which federal regulation is extensive.\textsuperscript{1171}

One other exception has been based, like the violence cases, on the assumption that it concerns areas traditionally left to local law into which Congress would not want to intrude. In \textit{Linn v. Plant Guard Workers},\textsuperscript{1172} the Court permitted a state court adjudication of a defamation action arising out of a labor dispute. And in \textit{Letter Carriers v. Austin},\textsuperscript{1173} the Court held that federal law preempts state defamation laws in the context of labor disputes to the extent that the State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or in reckless disregard of truth or falsity.

However, a state tort action for the intentional infliction of emotional distress occasioned through an alleged campaign of personal abuse and harassment of a member of the union by the union and its officials was held not preempted by federal labor law. Federal law was not directed to the "outrageous conduct" alleged, and NLRB resolution of the dispute would neither touch upon the claim of emotional distress and physical injury nor award the plaintiff any compensation. But state court jurisdiction, in order that there not be interference with the federal scheme, must be premised on tortious conduct either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.\textsuperscript{1174}

A significant retrenchment of \textit{Garmon} occurred in \textit{Sears, Roebuck & Co. v. Carpenters},\textsuperscript{1175} in the context of state court assertion of jurisdiction over trespassory picketing. Objecting to the company’s use of nonunion work in one of its departments, the union picketed the store, using the company’s property, the lot area surrounding the store, instead of the public sidewalks, to walk on. After the union refused to move its pickets to the sidewalk, the company sought and obtained a state court order enjoining the

\textsuperscript{1171} 403 U.S. at 296.  
\textsuperscript{1172} 383 U.S. 53 (1966).  
\textsuperscript{1173} 418 U.S. 264 (1974).  
\textsuperscript{1174} Farmer v. Carpenters, 430 U.S. 290 (1977). Following this case, the Court held that a state court action for misrepresentation and breach of contract, brought by replacement workers promised permanent employment when hired during a strike, was not preempted. The action for breach of contract by replacement workers having no remedies under the NLRA was found to be deeply rooted in local law and of only peripheral concern under the Act. Belknap, Inc. v. Hale, 463 U.S. 491 (1983). See also Int’l Longshoremen’s Ass’n v. Davis, 476 U.S. 380 (1986).  
\textsuperscript{1175} 436 U.S. 180 (1978).
picketing on company property. Depending upon the union motivation for the picketing, it was either arguably prohibited or arguably protected by federal law, the trespassory nature of the picketing being one factor the NLRB would have looked to in determining at least the protected nature of the conduct. The Court held, however, that under the circumstances, neither the arguably prohibited nor the arguably protected rationale of *Garmon* was sufficient to deprive the state court of jurisdiction.

First, as to conduct arguably prohibited by NLRA, the Court seemingly expanded the *Garmon* exception recognizing state court jurisdiction for conduct that touches interests “deeply rooted in local feeling”\(^\text{1176}\) in holding that where there exists “a significant state interest in protecting the citizens from the challenged conduct” and there exists “little risk of interference with the regulatory jurisdiction” of the NLRB, state law is not preempted. Here, there was obviously a significant state interest in protecting the company from trespass; the second, “critical inquiry” was whether the controversy presented to the state court was identical to or different from that which could have been presented to the Board. The Court concluded that the controversy was different. The Board would have been presented with determining the motivation of the picketing and the location of the picketing would have been irrelevant; the motivation was irrelevant to the state court and the situs of the picketing was the sole inquiry. Thus, there was deemed to be no realistic risk of state interference with Board jurisdiction.\(^\text{1177}\)

Second, in determining whether the picketing was protected, the Board would have been concerned with the situs of the picketing, since under federal labor laws the employer has no absolute right to prohibit union activity on his property. Preemption of state court jurisdiction was denied, nonetheless, in this case on two joined bases. One, preemption is not required in those cases in which the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so. In this case, the union could have filed with the Board when the company demanded removal of the pickets, but did not, and the company could not file with the Board at all. Two, even if the matter is not presented to the Board, preemption is called for if there is a risk of erroneous state court adjudication of the protection issue that is unacceptable, so that one must look to the strength of the argument that the activity is protected. While the state court had to make an initial determination


that the trespass was not protected under federal law, the same determination the Board would have made, in the instance of trespassory conduct, the risk of erroneous determination is small, because experience shows that a trespass is far more likely to be unprotected than protected.\textsuperscript{1178}

Introduction of these two balancing tests into the Garmon rationale substantially complicates determining when state courts do not have jurisdiction, and will no doubt occasion much more litigation in state courts than has previously existed.

Another series of cases involves not a Court-created exception to the Garmon rule but the applicability and interpretation of \S\ 301 of the Taft-Hartley Act,\textsuperscript{1179} which authorizes suits in federal, and state,\textsuperscript{1180} courts to enforce collective bargaining agreements. The Court has held that in enacting \S\ 301, Congress authorized actions based on conduct arguably subject to the NLRA, so that the Garmon preemption doctrine does not preclude judicial enforcement of duties and obligations which would otherwise be within the exclusive jurisdiction of the NLRB so long as those duties and obligations are embodied in a collective-bargaining agreement, perhaps as interpreted in an arbitration proceeding.\textsuperscript{1181}

Here, too, the permissible role of state tort actions has been in great dispute. Generally, a state tort action as an alternative to a \S\ 301 arbitration or enforcement action is preempted if it is substantially dependent upon analysis of the terms of a collective-bargaining agreement.\textsuperscript{1182} Thus, a state damage action for the bad-faith handling of an insurance claim under a disability plan that was part of a collective-bargaining agreement was preempted because it involved interpretation of that agreement and because state enforcement would frustrate the policies of \S\ 301 favoring uniform federal-law interpretation of collective-bargaining agreements and favoring arbitration as a predicate to adjudication.\textsuperscript{1183}

\begin{footnotes}
\item[1178] 436 U.S. at 199–207.
\item[1179] 61 Stat. 156 (1947), 29 U.S.C. \S\ 185(a).
\item[1182] See the analysis in Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (state tort action for retaliatory discharge for exercising rights under a state workers' compensation law is not preempted by \S\ 301, there being no required interpretation of a collective-bargaining agreement).
\end{footnotes}
Finally, the Court has indicated that with regard to some situations, Congress has intended to leave the parties to a labor dispute free to engage in "self-help," so that conduct not subject to federal law is nonetheless withdrawn from state control. However, the NLRA is concerned primarily "with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," so States are free to impose minimum labor standards.

**COMMERCE WITH INDIAN TRIBES**

Congress' power to regulate commerce "with the Indian tribes," once almost rendered superfluous by Court decision, has now been resurrected and made largely the basis for informing judicial judgment with respect to controversies concerning the rights and obligations of Native Americans. Although Congress in 1871 forbade the further making of treaties with Indian tribes, cases disputing the application of the old treaties and especially their effects upon attempted state taxation and regulation of on-reservation activities continue to be a staple of the Court's docket. But this clause is one of the two bases now found sufficient to empower Federal Government authority over Native Americans. "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." Forsaking reliance upon

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1185. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (upholding a state requirement that health-care plans, including those resulting from collective bargaining, provide minimum benefits for mental-health care).

1186. United States v. Kagama, 118 U.S. 375 (1886). Rejecting the commerce clause as a basis for congressional enactment of a system of criminal laws for Indians living on reservations, the Court nevertheless sustained the act on the ground that the Federal Government had the obligation and thus the power to protect a weak and dependent people. Cf. United States v. Holiday, 70 U.S. (3 Wall.) 407 (1866); United States v. Sandoval, 231 U.S. 28 (1913). This special fiduciary responsibility can also be created by statute. E.g., United States v. Mitchell, 463 U.S. 206 (1983).


other theories and rationales, the Court has established the preemption doctrine as the analytical framework within which to judge the permissibility of assertions of state jurisdiction over the Indians. However, the “semi-autonomous status” of Indian tribes erects an “independent but related” barrier to the exercise of state authority over commercial activity on an Indian reservation.\textsuperscript{1190} Thus, the question of preemption is not governed by the standards of preemption developed in other areas. “Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts, inform the preemption analysis that governs this inquiry. . . . As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.”\textsuperscript{1191} A corollary is that the preemption doctrine will not be applied strictly to prevent States from aiding Native Americans.\textsuperscript{1192} However, the protective rule is inapplicable to state regulation of liquor transactions, since there has been no tradition of tribal sovereignty with respect to that subject.\textsuperscript{1193}

The scope of state taxing powers—the conflict of “the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations”\textsuperscript{1194}—has been often litigated. Absent cession of jurisdiction or other congressional consent, States possess no power to tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.\textsuperscript{1195} Off-reservation Indian


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\textsuperscript{1192}However, the protective rule is inapplicable to state regulation of liquor transactions, since there has been no tradition of tribal sovereignty with respect to that subject.

\textsuperscript{1193}The protective rule is inapplicable to state regulation of liquor transactions, since there has been no tradition of tribal sovereignty with respect to that subject.

\textsuperscript{1194}White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–143 (1980); Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837–838 (1982). “The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.” Id. at 837, (quoting, White Mountain, 448 U.S. at 143).


\textsuperscript{1196}Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984) (upholding state-court jurisdiction to hear claims of Native Americans against non-Indians involving transactions that occurred in Indian country). However, attempts by States to retrocede jurisdiction favorable to Native Americans may be held to be pre-empted. Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986).

\textsuperscript{1197}Rice v. Rehner, 463 U.S. 713 (1983).

activities require an express federal exemption to deny state taxing power.\textsuperscript{1196} Subjection to taxation of non-Indians doing business with Indians on the reservation involves a close analysis of the federal statutory framework, although the operating premise was for many years to deny state power because of its burdens upon the development of tribal self-sufficiency as promoted through federal law and its interference with the tribes’ ability to exercise their sovereign functions.\textsuperscript{1197}

That operating premise, however, seems to have been eroded. For example, in \textit{Cotton Petroleum Corp. v. New Mexico},\textsuperscript{1198} the Court held that, in spite of the existence of multiple taxation occasioned by a state oil and gas severance tax applied to on-reservation operations by non-Indians, which was already taxed by the tribe,\textsuperscript{1199} the impairment of tribal sovereignty was “too indirect and too insubstantial” to warrant a finding of preemption. The fact that the State provided significant services to the oil and gas lessees justified state taxation and also distinguished earlier cases in which the State had “asserted no legitimate regulatory interest that might justify the tax.”\textsuperscript{1200} Still further erosion, or relaxation, of the principle of construction may be found in a later case, in which the Court, confronted with arguments that the imposition of particular state taxes on Indian property on the reservation was inconsistent with self-determination and self-governance, denominated these as “policy” arguments properly presented to Congress rather than the Court.\textsuperscript{1201}

The impact on tribal sovereignty is also a prime determinant of relative state and tribal regulatory authority.\textsuperscript{1202}


\textsuperscript{1199} \textit{Held} permissible in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

\textsuperscript{1200} 490 U.S. at 185 (distinguishing Bracker and Ramah Navaho School Bd).


\textsuperscript{1202} \textit{E.g.}, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).
Since Worcester v. Georgia,\(^\text{1203}\) it has been recognized that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.\(^\text{1204}\) They are, of course, no longer possessed of the full attributes of sovereignty,\(^\text{1205}\) having relinquished some part of it by their incorporation within the territory of the United States and their acceptance of its protection. By specific treaty provision, they yielded up other sovereign powers, and Congress has removed still others. “The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.”\(^\text{1206}\)

In a case of major import for the settlement of Indian land claims, the Court ruled in County of Oneida v. Oneida Indian Nation,\(^\text{1207}\) that an Indian tribe may obtain damages for wrongful possession of land conveyed in 1795 without the federal approval required by the Nonintercourse Act.\(^\text{1208}\) The Act reflected the accepted principle that extinguishment of the title to land by Native Americans required the consent of the United States and left intact a tribe’s common-law remedies to protect possessory rights. The Court reiterated the accepted rule that enactments are construed liberally in favor of Native Americans and that Congress may abro-


\(^{1208}\) 1 Stat. 379 (1793).
gate Indian treaty rights or extinguish aboriginal land title only if it does so clearly and unambiguously. Consequently, federal approval of land-conveyance treaties containing references to earlier conveyances that had violated the Nonintercourse Act did not constitute ratification of the invalid conveyances.\footnote{470 U.S. at 246–48.} Similarly, the Court refused to apply the general rule for borrowing a state statute of limitations for the federal common-law action, and it rejected the dissent’s view that, given “the extraordinary passage of time,” the doctrine of laches should have been applied to bar the claim.\footnote{470 U.S. at 255, 257 (Justice Stevens).}

While the power of Congress over Indian affairs is broad, it is not limitless.\footnote{470 U.S. at 255, 257 (Justice Stevens).} The Court has promulgated a standard of review that defers to the legislative judgment “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians . . .”\footnote{''The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.'’ United States v. Alcea Bank of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion), (quoted with approval in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977)).} A more searching review is warranted when it is alleged that the Federal Government’s behavior toward the Indians has been in contravention of its obligation and that it has in fact taken property from a tribe which it had heretofore guaranteed to the tribe, without either compensating the tribe or otherwise giving the Indians the full value of the land.\footnote{Morton v. Mancari, 417 U.S. 535, 555 (1974). See also Solem v. Bartlett, 465 U.S. 463, 472 (1984) (there must be “substantial and compelling evidence of congressional intention to diminish Indian lands” before the Court will hold that a statute removed land from a reservation).}

Clause 4. The Congress shall have Power *** To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

\footnote{470 U.S. at 246–48.}
\footnote{470 U.S. at 255, 257 (Justice Stevens).}
\footnote{''The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.'’ United States v. Alcea Bank of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion), (quoted with approval in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977)).}
\footnote{Morton v. Mancari, 417 U.S. 535, 555 (1974). The Court applied the standard to uphold a statutory classification that favored Indians over non-Indians. But in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), the same standard was used to sustain a classification that disfavored, although inadvertently, one group of Indians as against other groups. While Indian tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a “bill of rights” statute covering them. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).}
NATURALIZATION AND CITIZENSHIP

Nature and Scope of Congress’ Power

Naturalization has been defined by the Supreme Court as “the act of adopting a foreigner, and clothing him with the privileges of a native citizen.” In the Dred Scott case, the Court asserted that the power of Congress under this clause applies only to “persons born in a foreign country, under a foreign government.” These dicta are much too narrow to describe the power that Congress has actually exercised on the subject. The competence of Congress in this field merges, in fact, with its indefinite, inherent powers in the field of foreign relations. “As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries.”

Congress’ power over naturalization is an exclusive power; no State has the power to constitute a foreign subject a citizen of the United States. But power to naturalize aliens may be, and was early, devolved by Congress upon state courts of record. And States may confer the right of suffrage upon resident aliens who have declared their intention to become citizens and many did so until recently.

Citizenship by naturalization is a privilege to be given, qualified, or withheld as Congress may determine; an individual may claim it as a right only upon compliance with the terms Congress imposes. This interpretation makes of the naturalization power the only power granted in § 8 of Article I that is unrestrained by constitutional limitations on its exercise. Thus, the first naturalization act enacted by the first Congress restricted naturalization to

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1216 60 U.S. at 417, 419.
1219 The first naturalization act, 1 Stat. 103 (1790), so provided. See 8 U.S.C. § 1421. In Holmgren v. United States, 217 U.S. 509 (1910), it was held that Congress may provide for the punishment of false swearing in the proceedings in state courts.
1220 Spragins v. Houghton, 3 Ill. 377 (1840); Stewart v. Foster, 2 Binn. (Pa.) 110 (1809). See K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES ch. 5 (1918).
1221 United States v. MacIntosh, 283 U.S. 605, 615 (1931); Fong Yue Ting v. United States, 149 U.S. 698, 707–708 (1893). A caveat to this statement is that with regard to persons naturalized in the United States the qualification may only be a condition precedent and not a condition subsequent. Schneider v. Rusk, 377 U.S. 163 (1964), whereas persons born abroad who are made citizens at birth by statute if one or both of their parents are citizens are subject to conditions subsequent. Rogers v. Bellei, 401 U.S. 815 (1971).
“free white persons[&#39;],” which was expanded in 1870 so that persons of “African nativity and . . . descent” were entitled to be naturalized. Orientals were specifically excluded from eligibility in 1882, and the courts enforced these provisions without any indication that constitutional issues were thereby raised. These exclusions are no longer law. Present naturalization statutes continue and expand on provisions designed to bar subversives, dissidents, and radicals generally from citizenship.

Although the usual form of naturalization is through individual application and official response on the basis of general congressional rules, naturalization is not so limited. Citizenship can be conferred by special act of Congress; it can be conferred collectively either through congressional action, such as the naturalization of all residents of an annexed territory or of a territory made a State, or through treaty provision.

Categories of Citizens: Birth and Naturalization

The first sentence of § 1 of the Fourteenth Amendment contemplates two sources of citizenship and two only: birth and naturalization. This contemplation is given statutory expression in § 301 of the Immigration and Nationality Act of 1952, which itemizes those categories of persons who are citizens of the United States at birth; all other persons in order to become citizens must pass through the naturalization process. The first category merely tracks the language of the first sentence of § 1 of the Fourteenth Amendment in declaring that all persons born in the United States

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1222 1 Stat. 103 (1790).
1223 Act of July 14, 1870, § 7, 16 Stat. 254, 256.
1224 Act of May 6, 1882, § 1, 22 Stat. 58.
1226 The Alien and Sedition Act of 1798, 1 Stat. 570, empowered the President to deport any alien he found dangerous to the peace and safety of the Nation. In 1903, Congress provided for denial of naturalization and for deportation for mere belief in certain doctrines, i.e., anarchy. Act of March 3, 1903, 32 Stat. 1214. See United States ex rel. Turner v. Williams, 194 U.S. 279 (1904). The range of forbidden views was broadened in 1918. Act of October 15, 1918, § 1, 40 Stat. 1012. The present law is found in 8 U.S.C. § 1424 and is discussed in The Naturalization of Aliens, infra.
1227 E.g., 77 Stat. 5 (1963) (making Sir Winston Churchill an “honorary citizen of the United States.”).
1228 Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892); Contzen v. United States, 179 U.S. 191 (1900).
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and subject to the jurisdiction thereof are citizens by birth. But there are six other categories of citizens by birth. They are: (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe, (3) a person born outside the United States of citizen parents one of whom has been resident in the United States, (4) a person born outside the United States of one citizen parent who has been continuously resident in the United States for one year prior to the birth and of a parent who is a national but not a citizen, (5) a person born in an outlying possession of the United States of one citizen parent who has been continuously resident in the United States or an outlying possession for one year prior to the birth, (6) a person of unknown parentage found in the United States while under the age of five unless prior to his twenty-first birthday he is shown not to have been born in the United States, and (7) a person born outside the United States of an alien parent and a citizen parent who has been resident in the United States for a period of ten years, provided the person is to lose his citizenship unless he resides continuously in the United States for a period of five years between his fourteenth and twenty-eighth birthdays.

Subsection (7) citizens must satisfy the condition subsequent of five years continuous residence within the United States between the ages of fourteen and twenty-eight, a requirement held to be constitutional, which means in effect that for constitutional purposes, according to the prevailing interpretation, there is a difference between persons born or naturalized in, that is, within, the United States and persons born outside the confines of the United States who are statutorily made citizens. The principal difference is that the former persons may not be involuntarily expatriated whereas the latter may be, subject only to due process protections.

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1234 Compare Schneider v. Rusk, 377 U.S. 163 (1964); Afroyim v. Rusk, 387 U.S. 253 (1967). It will be noted that in practically all cases persons statutorily made citizens at birth will be dual nationals, having the citizenship of the country where they were born. Congress has never required a citizen having dual nationality to elect at some point one and forsake the other but it has enacted several restrictive statutes limiting the actions of dual nationals which have occasioned much litigation. E.g., Savorgnan v. United States, 338 U.S. 491 (1950); Kawakita v. United States, 343 U.S. 717 (1952); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Schneider v. Rusk, 377 U.S. 163 (1964); Rogers v. Bellei, 401 U.S. 815 (1971).
The Naturalization of Aliens

Although, as has been noted, throughout most of our history there were significant racial and ethnic limitations upon eligibility for naturalization, the present law prohibits any such discrimination.

“The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.” However, any person “who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches ... opposition to all organized government,” or “who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches the overthrow by force or violence or other unconstitutional means of the Government of the United States” or who is a member of or affiliated with the Communist Party, or other communist organizations, or other totalitarian organizations is ineligible. These provisions moreover are “applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be, within any of the classes enumerated within this section, notwithstanding that at the time the petition is filed he may not be included within such classes.”

Other limitations on eligibility are also imposed. Eligibility may turn upon the decision of the responsible officials whether the petitioner is of “good moral character.” The immigration and nationality laws themselves include a number of specific congressional determinations that certain persons do not possess “good moral character,” including persons who are “habitual drunkards,” adulterers, polygamists or advocates of polygamy, gamblers, convicted felons, and homosexuals. In order to petition for naturalization, an alien must have been resident for at

1242 § 101(f)(4) and (5), 66 Stat. 172, 8 U.S.C. § 1101(f)(4) and (5).
1243 § 101(f)(7) and (8), 66 Stat. 172, 8 U.S.C. § 1101(f)(7) and (8).
least five years and to have possessed “good moral character” for all of that period.

The process of naturalization culminates in the taking in open court of an oath “(1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by law.”

Any naturalized person who takes this oath with mental reservations or conceals or misrepresents beliefs, affiliations, and conduct, which under the law disqualify one for naturalization, is subject, upon these facts being shown in a proceeding brought for the purpose, to have his certificate of naturalization cancelled. Moreover, if within a year of his naturalization a person joins an organization or becomes in any way affiliated with one which was a disqualification for naturalization if he had been a member at the time, the fact is made prima facie evidence of his bad faith in taking the oath and grounds for instituting proceedings to revoke his admission to citizenship.

Rights of Naturalized Persons

Chief Justice Marshall early stated in dictum that “[a] naturalized citizen ... becomes a member of the society, possessing all the
rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.”

A similar idea was expressed in *Knauer v. United States.*

“Citizenship obtained through naturalization is not a second-class citizenship.... [It] carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government.”

Despite these dicta, it is clear that particularly in the past but currently as well a naturalized citizen has been and is subject to requirements not imposed on native-born citizens. Thus, as we have noted above, a naturalized citizen is subject at any time to have his good faith in taking the oath of allegiance to the United States inquired into and to lose his citizenship if lack of such faith is shown in proper proceedings.

And the naturalized citizen within a year of his naturalization will join a questionable organization at his peril. In *Luria v. United States,* the Court sustained a statute making prima facie evidence of bad faith a naturalized citizen’s assumption of residence in a foreign country within five years after the issuance of a certificate of naturalization. But in *Schneider v. Rusk,* the Court voided a statute that provided that a naturalized citizen should lose his United States citizenship if following naturalization he resided continuously for three years in his former homeland. “We start,” Justice Douglas wrote for the

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1250 *Afroyim v. Rusk,* 387 U.S. 253, 261 (1967) (Justice Black for the Court: “a mature and well-considered dictum ...”), with id. at 275–276 (Justice Harlan dissenting: the dictum, “cannot have been intended to reach the question of citizenship.”).


Court, “from the premise that the rights of citizenship of the native-born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the ‘natural born’ citizen is eligible to be President.”

The failure of the statute, the Court held, was that it impermissibly distinguished between native-born and naturalized citizens, denying the latter the equal protection of the laws. “This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native-born. This is an assumption that is impossible for us to make. . . . A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance.”

The *Schneider* equal protection rationale was abandoned in the next case in which the Court held that the Fourteenth Amendment forbade involuntary expatriation of naturalized persons. But in *Rogers v. Bellei*, the Court refused to extend this holding to persons statutorily naturalized at birth abroad because one of their parents was a citizen and similarly refused to apply *Schneider*. Thus, one who failed to honor a condition subsequent had his citizenship revoked. “Neither are we persuaded that a condition subsequent in this area impresses one with ‘second-class citizenship.’ That cliche is too handy and too easy, and, like most cliches, can be misleading. That the condition subsequent may be beneficial is apparent in the light of the conceded fact that citizenship was fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not ‘second-class.’”

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1255 377 U.S. at 165.

1256 While there is no equal protection clause specifically applicable to the Federal Government, it is established that the due process clause of the Fifth Amendment forbids discrimination in much the same manner as the equal protection clause of the Fourteenth Amendment.


1260 401 U.S. at 835–36.
It is not clear where the progression of cases has left us in this area. Clearly, naturalized citizens are fully entitled to all the rights and privileges of those who are citizens because of their birth here. But it seems equally clear that with regard to retention of citizenship, naturalized citizens are not in the secure position of citizens born here. At least, there is a difference so long as *Afroyim* prevents Congress from making expatriation the consequence of certain acts when done by natural born citizens as well.

On another point, the Court has held that, absent a treaty or statute to the contrary, a child born in the United States who is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, does not thereby lose his American citizenship and that it is not necessary for him to make an election and return to the United States. On still another point, it has been held that naturalization is so far retroactive as to validate an acquisition of land prior to naturalization as to which the alien was under a disability.

Expatriation: Loss of Citizenship

The history of the right of expatriation, voluntarily on the part of the citizen or involuntarily under duress of statute, is shadowy in United States constitutional law. Justice Story, in the course of an opinion, and Chancellor Kent, in his writings, accepted the ancient English doctrine of perpetual and unchangeable allegiance to the government of one's birth, a citizen being precluded from renouncing his allegiance without permission of that government. The pre-Civil War record on the issue is so vague because there was wide disagreement on the basis of national citizenship in the first place, with some contending that national citizenship was derivative from state citizenship, which would place the power of providing for expatriation in the state legislatures, and with others contending for the primacy of national citizenship, which would place the power in Congress. The citizenship basis was settled by the first sentence of § 1 of the Fourteenth Amendment, but expatriation continued to be a muddled topic. An 1868 statute specifically recognized “the right of expatriation” by individuals, but it

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1264 At least, there is a difference so long as *Afroyim* prevents Congress from making expatriation the consequence of certain acts when done by natural born citizens as well.


1268 J. Kent, Commentaries 49–50 (1827).

was directed to affirming the right of foreign nationals to expatriate themselves and to become naturalized United States citizens. An 1865 law provided for the forfeiture of the “rights of citizenship” of draft-dodgers and deserters, but whether the statute meant to deprive such persons of citizenship or of their civil rights is unclear. Beginning in 1940, however, Congress did enact laws designed to strip of their citizenship persons who committed treason, deserted the armed forces in wartime, left the country to evade the draft, or attempted to overthrow the Government by force or violence. In 1907, Congress provided that female citizens who married foreign citizens were to have their citizenship held “in abeyance” while they remained wedded but to be entitled to reclaim it when the marriage was dissolved.

About the simplest form of expatriation, the renunciation of citizenship by a person, there is no constitutional difficulty. “Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.” But while the Court has hitherto insisted on the voluntary character of the renunciation, it has sustained the power of Congress to prescribe conditions and circumstances the voluntary entering into of which constitutes renunciation; the person need not intend to renounce so long as he intended to do what he did in fact do.

The Court first encountered the constitutional issue of forced expatriation in the rather anomalous form of the statute, which placed in limbo the citizenship of any American female who married a foreigner. Sustaining the statute, the Court relied on the

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1268 The Enrollment Act of March 3, 1865, § 21, 13 Stat. 487, 490. The language of the section appears more consistent with a deprivation of civil rights than of citizenship. Note also that § 14 of the Wade-Davis Bill, pocket-vetoed by President Lincoln, specifically provided that any person holding office in the Confederate Government “is hereby declared not to be a citizen of the United States.” 6 J. Richardson, Messages and Papers of the Presidents 223 (1899).

1269 Nationality Act of 1940, 54 Stat. 1169.

1270 Id.

1271 58 Stat. 746 (1944).


1273 34 Stat. 1228 (1907), repealed by 42 Stat. 1021 (1922).


1276 34 Stat. 1228 (1907).
congressional foreign relations power exercised in order to prevent the development of situations that might entangle the United States in embarrassing or hostile relationships with a foreign country. Noting too the fictional merging of identity of husband and wife, the Court thought it well within congressional power to attach certain consequences to these actions, despite the woman's contrary intent and understanding at the time she entered the relationship.  

Beginning in 1958, the Court had a running encounter with the provisions of the 1952 Immigration and Nationality Act, which prescribed expatriation for a lengthy series of actions. In 1958, a five-to-four decision sustained the power to divest a dual national of his United States citizenship because he had voted in an election in the other country of which he was a citizen. But at the same time, another five-to-four decision, in which a majority rationale was lacking, struck down punitive expatriation visited on persons convicted by court-martial of desertion from the armed forces in wartime. In the next case, the Court struck down another puni-

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1278 See generally 8 U.S.C. §§ 1481–1489. Among the acts for which loss of citizenship is prescribed are: (1) obtaining naturalization in a foreign state, (2) taking an oath of allegiance to a foreign state, (3) serving in the armed forces of a foreign state without authorization and with consequent acquisition of foreign nationality, (4) assuming public office under the government of a foreign state for which only nationals of that state are eligible, (5) voting in an election in a foreign state, (6) formally renouncing citizenship before a United States foreign service officer abroad, (7) formally renewing citizenship within the United States in time of war, subject to approval of the Attorney General, (8) being convicted and discharged from the armed services for desertion in wartime, (9) being convicted of treason or of an attempt to overthrow forcibly the Government of the United States, (10) fleeing or remaining outside the United States in wartime or a proclaimed emergency in order to evade military service, and (11) residing abroad if a naturalized citizen, subject to certain exceptions, for three years in the country of his birth or in which he was formerly a national or for five years in any other foreign state. Several of these sections have been declared unconstitutional, as explained in the text.

1279 Perez v. Brownell, 356 U.S. 44 (1958). For the Court, Justice Frankfurter sustained expatriation as a necessary exercise of the congressional power to regulate the foreign relations of the United States to prevent the embarrassment and potential for trouble inherent in our nationals voting in foreign elections. Justice Whitaker dissented because he saw no problem of embarrassment or potential trouble if the foreign state permitted aliens or dual nationals to vote. Chief Justice Warren and Justices Black and Douglas denied that expatriation is within Congress' power to prescribe for an act, like voting, which is not necessarily a sign of intention to relinquish citizenship.

1280 Trop v. Dulles, 356 U.S. 86 (1958). Chief Justice Warren for himself and three Justices held that expatriation for desertion was a cruel and unusual punishment proscribed by the Eighth Amendment. Justice Brennan concurred on the ground of a lack of the requisite relationship between the statute and Congress' war powers. For the four dissenters, Justice Frankfurter argued that Congress had power to impose loss of citizenship for certain activity and that there was a rational nexus between refusal to perform a duty of citizenship and deprivation of citizenship. Justice Frankfurter denied that the penalty was cruel and unusual punish-
tive expatriation visited on persons who, in time of war or emergency, leave or remain outside the country in order to evade military service. 1281 And in the following year, the Court held unconstitutional a section of the law that expatriated a naturalized citizen who returned to his native land and resided there continuously for a period of three years. 1282

The cases up to this point had lacked a common rationale and would have seemed to permit even punitive expatriation under the proper circumstances. But, in Afroyim v. Rusk,1283 a five-to-four majority overruled the 1958 decision permitting expatriation for voting in a foreign election and announced a constitutional rule against all but purely voluntary renunciation of United States citizenship. The majority ruled that the first sentence of § 1 of the Fourteenth Amendment constitutionally vested citizenship in every person “born or naturalized in the United States” and that Congress was powerless to take that citizenship away.1284 The continuing vitality of this decision was called into question by another five-to-four decision in 1971, which technically distinguished Afroyim in upholding a congressionally-prescribed loss of citizenship visited upon a person who was statutorily naturalized “outside” the United States, and held not within the protection of the first sentence of § 1 of the Fourteenth Amendment.1285 Thus, while Afroyim was distinguished, the tenor of the majority opinion was hostile to its holding, and it may be that in a future case it will be overruled.

1281 Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). For the Court Justice Goldberg held that penal expatriation effectuated solely by administrative determination violated due process because of the absence of procedural safeguards. Justices Black and Douglas continued to insist Congress could not deprive a citizen of his nationality at all. Justice Harlan for the dissenters thought the statute a valid exercise of Congress’ war powers but the four dissenters divided two-to-two on the validity of a presumption spelled out in the statute.


1284 Justice Harlan, for himself and Justices Clark, Stewart, and White, argued in dissent that there was no evidence that the drafters of the Fourteenth Amendment had at all the intention ascribed to them by the majority. He would have found in Afroyim’s voluntary act of voting in a foreign election a voluntary renunciation of United States citizenship. 387 U.S. at 268.

1285 Rogers v. Bellei, 401 U.S. 815 (1971). The three remaining Afroyim dissenters plus Chief Justice Burger and Justice Blackmun made up the majority, the three remaining Justices of the Afroyim majority plus Justice Marshall made up the dissenters. The continuing vitality of Afroyim was assumed in Vance v. Terrazas, 444 U.S. 252 (1980), in which a divided Court upheld a congressionally-imposed standard of proof, preponderance of evidence, by which to determine whether one had by his actions renounced his citizenship.
The issue, then, of the constitutionality of congressionally-prescribed expatriation must be taken as unsettled.

ALIENS

The Power of Congress to Exclude Aliens

The power of Congress “to exclude aliens from the United States and to prescribe the terms and conditions on which they come in” is absolute, being an attribute of the United States as a sovereign nation. “That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power…. The United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.”

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Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603, 604 (1889); see also Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904); Bugajewitz v. Adams, 228 U.S. 585 (1913); Hines v. Davidowitz, 312 U.S. 52 (1941); Kleindienst v. Mandel, 408 U.S. 753 (1972). In Galvan v. Press, 347 U.S. 522, 530–531 (1954), Justice Frankfurter for the Court wrote: “[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens…. But the slate is not clean. As to the extent of the power of Congress under review, there is not merely ‘a page of history,’ … but a whole volume…. [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.” Although the issue of racial discrimination was before the Court in Jean v. Nelson, 472 U.S. 846 (1985), in the context of parole for undocumented aliens, the Court avoided it, holding that statutes and regulations precluded INS considerations of race or national origin. Justices Marshall and Brennan, in dissent, argued for reconsideration of the long line of precedents and for constitutional restrictions on the Government. Id. at 858. That there exists some limitation upon exclusion of aliens is one permissible interpretation of Reagan v. Abourezk, 484 U.S. 1 (1987), affg. by an equally divided Court, 785 F.2d 1043 (D.C.Cir. 1986), holding that mere membership in the Communist Party could not be used to exclude an alien on the ground that his activities might be prejudicial to the interests of the United States.

The power of Congress to prescribe the rules for exclusion or expulsion of aliens is a “fundamental sovereign attribute” which is “of a political character and therefore subject only to narrow judicial review.” Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n. 21 (1976); Mathews v. Diaz, 426 U.S. 67, 81–82 (1976); Fiallo v. Bell, 430 U.S. 787, 792 (1977). Although aliens are “an identifiable class of persons,” who aside from the classification at issue “are already subject to disadvantages not shared by the remainder of the community,” Hampton v. Mow Sun Wong, 426 U.S.
Except for the Alien Act of 1798, Congress went almost a century without enacting laws regulating immigration into the United States. The first such statute, in 1875, barred convicts and prostitutes and was followed by a series of exclusions based on health, criminal, moral, economic, and subversion considerations. Another important phase was begun with passage of the Chinese Exclusion Act in 1882, which was not repealed until 1943. In 1924, Congress enacted into law a national origins quota formula which based the proportion of admissible aliens on the nationality breakdown of the 1920 census, which, of course, was heavily weighed in favor of English and northern European ancestry. This national origins quota system was in effect until it was repealed in 1965. The basic law remains the Immigration and Nationality Act of 1952, which, with certain revisions in 1965 and later piecemeal alterations, regulates who may be admitted and under what conditions; the Act, it should be noted, contains a list of 31 excludable classes of aliens.

Numerous cases underscore the sweeping nature of the powers of the Federal Government to exclude aliens and to deport by ad-

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1287 Act of June 25, 1798, 1 Stat. 570. The Act was part of the Alien and Sedition Laws and authorized the expulsion of any alien the President deemed dangerous.


1289 22 Stat. 214 (1882) (excluding idiots, lunatics, convicts, and persons likely to become public charges); 23 Stat. 332 (1885), and 24 Stat. 414 (1887) (regulating importing cheap foreign labor); 26 Stat. 1084 (1891) (persons suffering from certain diseases, those convicted of crimes involving moral turpitude, paupers, and polygamists); 32 Stat. 1213 (1903) (epileptics, insane persons, professional beggars, and anarchists); 34 Stat. 898 (1907) (feeble-minded, children unaccompanied by parents, persons suffering with tuberculosis, and women coming to the United States for prostitution or other immoral purposes).

1290 Act of May 6, 1882, 22 Stat. 58.

1291 Act of December 17, 1943, 57 Stat. 600.


1295 The list of excludable aliens may be found at 8 U.S.C. § 1182. The list has been modified and classified by category in recent amendments.
ART. I—LEGISLATIVE DEPARTMENT

Sec. 8—Powers of Congress

The power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interest of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent. However, when Congress has spelled out the basis for exclusion or deportation, the Court remains free to interpret the statute and review the administration of it and to apply it, often in a manner to mitigate the effects of the law on aliens.

Congress’ power to admit aliens under whatever conditions it lays down is exclusive of state regulation. The States “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.” This principle, however, has not precluded all state regulations dealing with aliens. The power of Congress to legislate with respect to the conduct of alien residents is a concomitant of its power to prescribe the terms and conditions on

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1296 338 U.S. 537 (1950). See also Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), in which the Court majority upheld the Government’s power to exclude on the basis of confidential information he would not disclose, a wartime bride, who was prima facie entitled to enter the United States, was held to be unreviewable by the courts. Nor were regulations on which the order was based invalid as an undue delegation of legislative power. “Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, e.g., as was done here, for the best interest of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent.” However, when Congress has spelled out the basis for exclusion or deportation, the Court remains free to interpret the statute and review the administration of it and to apply it, often in a manner to mitigate the effects of the law on aliens.

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which they may enter the United States, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers. It is not a power to lay down a special code of conduct for alien residents or to govern their private relations.

Yet Congress is empowered to assert a considerable degree of control over aliens after their admission to the country. By the Alien Registration Act of 1940, Congress provided that all aliens in the United States, fourteen years of age and over, should submit to registration and fingerprinting and willful failure to comply was made a criminal offense against the United States. This Act, taken in conjunction with other laws regulating immigration and naturalization, has constituted a comprehensive and uniform system for the regulation of all aliens.

An important benefit of this comprehensive regulation accruing to the alien is that it precludes state regulation that may well be more severe and burdensome. For example, in *Hines v. Davidowitz*, the Court voided a Pennsylvania law requiring the annual registration and fingerprinting of aliens but going beyond the subsequently-enacted federal law to require acquisition of an alien identification card that had to be carried at all times and to be exhibited to any police officer upon demand and to other licensing officers upon applications for such things as drivers' licenses. The Court did not squarely hold the State incapable of having such a law in the absence of federal law but appeared to lean in that direction. Another decision voided a Pennsylvania law limiting those eligible to welfare assistance to citizens and an Arizona law prescribing a fifteen-year durational residency period before an alien could be eligible for welfare assistance. Congress had pro-

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1302 Purporting to enforce this distinction, the Court voided a statute, which, in prohibiting the importation of "any alien woman or girl for the purpose of prostitution," provided that whoever should keep for the purpose of prostitution "any alien woman or girl within three years after she shall have entered the United States" should be deemed guilty of a felony. *Keller v. United States*, 213 U.S. 138 (1909).


1305 312 U.S. 52 (1941).

1306 312 U.S. at 68. *But see De Canas v. Bica*, 424 U.S. 351 (1976), in which the Court upheld a state law prohibiting an employer from hiring aliens not entitled to lawful residence in the United States. The Court wrote that States may enact legislation touching upon aliens coexistent with federal laws, under regular preemption standards, unless the nature of the regulated subject matter precludes the conclusion or unless Congress has unmistakably ordained the impermissibility of state law.

vided, Justice Blackmun wrote for a unanimous Court, that persons who were likely to become public charges could not be admitted to the United States and that any alien who became a public charge within five years of his admission was to be deported unless he could show that the causes of his economic situation arose after his entry. Thus, in effect Congress had declared that lawfully admitted resident aliens who became public charges for causes arising after their entry were entitled to the full and equal benefit of all laws for the security of persons and property and the States were disabled from denying aliens these benefits.

**Deportation**

Unlike the exclusion proceedings, deportation proceedings afford the alien a number of constitutional rights: a right against self-incrimination, protection against unreasonable searches and seizures, guarantees against *ex post facto* laws, bills of attainder, and cruel and unusual punishment, a right to bail, a right to procedural due process, a right to counsel, a right to notice of charges and hearing, as well as a right to cross-examine.

Notwithstanding these guarantees, the Supreme Court has upheld a number of statutory deportation measures as not unconstitutional. The Internal Security Act of 1950, in authorizing the Attorney General to hold in custody, without bail, aliens who are members of the Communist Party of the United States, pending determination as to their deportability, is not unconstitutional. Nor was it unconstitutional to deport under the Alien Registration

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1310 See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950), where the Court noted that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”
1319 Carlson v. Landon, 342 U.S. 524 (1952). In *Reno v. Flores*, 507 U.S. 292 (1993), the Court upheld an INS regulation providing for the ongoing detention of juveniles apprehended on suspicion of being deportable, unless parents, close relatives, or legal guardians were available to accept release, as against a substantive due process attack.
Act of 1940\footnote{1320} a legally resident alien because of membership in the Communist Party, although such membership ended before the enactment of the Act. Such application of the Act did not make it \textit{ex post facto}, being but an exercise of the power of the United States to terminate its hospitality \textit{ad libitum}.\footnote{1321} And a statutory provision\footnote{1322} making it a felony for an alien against whom a specified order of deportation is outstanding “to willfully fail or refuse to make timely application for travel or other documents necessary to his departure” was not on its face void for “vagueness.”\footnote{1323} An alien unlawfully in the country “has no constitutional right to assert selective enforcement as a defense against his deportation.”\footnote{1324}

\section*{Bankruptcy}

\subsection*{Persons Who May Be Released From Debt}

In an early case on circuit, Justice Livingston suggested that inasmuch as the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders it might “well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject.”\footnote{1325} Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice to the extent of including bankers, brokers, factors and underwriters as well as traders.\footnote{1326} Asserting that the narrow scope of the English statutes was a mere matter of policy, which by no means entered into the nature of such laws, Justice Story defined bankruptcy legislation in the sense of the Constitution as a law making provisions for cases of persons failing to pay their debts.\footnote{1327}

This interpretation has been ratified by the Supreme Court. In \textit{Hanover National Bank v. Moyses},\footnote{1328} it held valid the Bankruptcy Act of 1898, which provided that persons other than traders might become bankrupts and that this might be done on voluntary petition. The Court has given tacit approval to the extension of the

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\footnotesize{\textcopyright} Amer. Inst. of Legal Studies, Inc. 2004.
bankruptcy laws to cover practically all classes of persons and corporations,$^{1329}$ including even municipal corporations$^{1330}$ and wage-earning individuals. The Bankruptcy Act has, in fact been amended to provide a wage-earners' extension plan to deal with the unique problems of debtors who derive their livelihood primarily from salaries or commissions. In furthering the implementation of this plan, the Supreme Court has held that a wage earner may make use of it, notwithstanding the fact he has been previously discharged in bankruptcy within the last six years.$^{1331}$

**Liberalization of Relief Granted and Expansion of the Rights of the Trustee**

As the coverage of the bankruptcy laws has been expanded, the scope of the relief afforded to debtors has been correspondingly enlarged. The act of 1800, like its English antecedents, was designed primarily for the benefit of creditors. Beginning with the act of 1841, which opened the door to voluntary petitions, rehabilitation of the debtor has become an object of increasing concern to Congress. An adjudication in bankruptcy is no longer requisite to the exercise of bankruptcy jurisdiction. In 1867, the debtor for the first time was permitted, either before or after adjudication of bankruptcy, to propose terms of composition that would become binding upon acceptance by a designated majority of his creditors and confirmation by a bankruptcy court. This measure was held constitutional,$^{1332}$ as were later acts, which provided for the reorganization of corporations that are insolvent or unable to meet their debts as they mature,$^{1333}$ and for the composition and extension of debts in proceedings for the relief of individual farmer debtors.$^{1334}$

Nor is the power of Congress limited to adjustment of the rights of creditors. The Supreme Court has also ruled that the rights of a purchaser at a judicial sale of the debtor's property are within reach of the bankruptcy power, and may be modified by a reasonable extension of the period for redemption from such sale.$^{1335}$ Moreover, the Court expanded the bankruptcy court's power over the property of the estate by affording the trustee af-

firmative relief on counterclaim against a creditor filing a claim against the estate.\footnote{Katchen v. Landy, 382 U.S. 323 (1966).}

Underlying most Court decisions and statutes in this area is the desire to achieve equity and fairness in the distribution of the bankrupt’s funds.\footnote{United States v. Speers,\footnote{Bank of Marin v. England, 385 U.S. 99, 103 (1966).} codified by an amendment to the Bankruptcy Act,\footnote{Act of July 5, 1966, 80 Stat. 269, 11 U.S.C. § 501, repealed.} furthered this objective by strengthening the position of the trustee as regards the priority of a federal tax lien unrecorded at the time of bankruptcy.\footnote{382 U.S., 271–72.} The Supreme Court has held, in other cases dealing with the priority of various creditors’ claims, that claims arising from the tort of the receiver is an “actual and necessary” cost of administration,\footnote{Reading Co. v. Brown, 391 U.S. 471 (1968).} that benefits under a nonparticipating annuity plan are not wages and are therefore not given priority,\footnote{Joint Industrial Bd. v. United States, 391 U.S. 224 (1968).} and that when taxes are allowed against a bankrupt’s estate, penalties due because of the trustee’s failure to pay the taxes incurred while operating a bankrupt business are also allowable.\footnote{Nicholas v. United States, 384 U.S. 678 (1966).} The Court’s attitude with regard to these and other developments is perhaps best summarized in the opinion in \textit{Continental Bank v. Rock Island Ry.},\footnote{294 U.S. 648 (1935).} where Justice Sutherland wrote, on behalf of a unanimous court: “[T]hese acts, far-reaching though they may be, have not gone beyond the limit of Congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.”\footnote{294 U.S. at 671.}

\section*{Constitutional Limitations on the Bankruptcy Power}

In the exercise of its bankruptcy powers, Congress must not transgress the Fifth and Tenth Amendments. The Bankruptcy Act provides that oral testimony cannot be used in violation of the bankrupt’s right against self-incrimination.\footnote{Louisville Bank v. Radford, 295 U.S. 555, 589, 602 (1935).} Congress may not take from a creditor specific property previously acquired from a debtor, nor circumscribe the creditor’s right to such an unreasonable extent as to deny him due process of law;\footnote{11 U.S.C. § 344.} this principle, however, is subject to the Supreme Court’s finding that a bankruptcy court has summary jurisdiction for ordering the surrender
of voidable preferences when the trustee successfully counterclaims to a claim filed by the creditor receiving such preferences. 1348

Since Congress may not supersede the power of a State to determine how a corporation shall be formed, supervised, and dissolved, a corporation, which has been dissolved by a decree of a state court, may not file a petition for reorganization under the Bankruptcy Act. 1349 But Congress may impair the obligation of a contract and may extend the provisions of the bankruptcy laws to contracts already entered into at the time of their passage. 1350 Although it may not subject the fiscal affairs of a political subdivision of a State to the control of a federal bankruptcy court, 1351 Congress may empower such courts to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness where the State has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of such petitioners. 1352 Congress may recognize the laws of the State relating to dower, exemption, the validity of mortgages, priorities of payment and similar matters, even though such recognition leads to different results from State to State; 1353 for although bankruptcy legislation must be uniform, the uniformity required is geographic, not personal.

The power of Congress to vest the adjudication of bankruptcy claims in entities not having the constitutional status of Article III federal courts is unsettled. At least, it may not give to non-Article III courts the authority to hear state law claims made subject to federal jurisdiction only because of their relevance to a bankruptcy proceeding. 1354

Constitutional Status of State Insolvency Laws: Preemption

Prior to 1898, Congress exercised the power to establish “uniform laws on the subject of bankruptcy” only intermittently. The first national bankruptcy law was not enacted until 1800 and was repealed in 1803; the second was passed in 1841 and was repealed two years later; a third was enacted in 1867 and repealed in

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1350 In re Klein, 42 U.S. (1 How.) 277 (1843); Hanover National Bank v. Moyses, 186 U.S. 181 (1902).
ART. I—LEGISLATIVE DEPARTMENT

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1878. Thus, during the first eighty-nine years under the Constitution, a national bankruptcy law was in existence only sixteen years altogether. Consequently, the most important issue of interpretation that arose during that period concerned the effect of the clause on state law.

The Supreme Court ruled at an early date that in the absence of congressional action the States may enact insolvency laws, since it is not the mere existence of the power but rather its exercise that is incompatible with the exercise of the same power by the States. Later cases settled further that the enactment of a national bankruptcy law does not invalidate state laws in conflict therewith but serves only to relegate them to a state of suspended animation with the result that upon repeal of the national statute they again come into operation without re-enactment.

A State is, of course, without power to enforce any law governing bankruptcies which impairs the obligation of contracts, extends to persons or property outside its jurisdiction, or conflicts with the national bankruptcy laws. Giving effect to the policy of the federal statute, the Court has held that a state statute regulating this distribution of property of an insolvent was suspended by that law, and that a state court was without power to proceed with pending foreclosure proceedings after a farmer-debtor had filed a petition in federal bankruptcy court for a composition or extension of time to pay his debts. A state court injunction ordering a defendant to clean up a waste-disposal site was held to be a “liability on a claim” subject to discharge under the bankruptcy law, after the State had appointed a receiver to take charge of the defendant’s property and comply with the injunc-

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1357 Tua v. Carriere, 117 U.S. 201 (1886); Butler v. Goreley, 146 U.S. 303, 314 (1892).
1360 In re Watts and Sachs, 190 U.S. 1, 27 (1903); International Shoe Co. v. Pinkus, 278 U.S. 261, 264 (1929).
A state law governing fraudulent transfers was found to be compatible with the federal law. 1364

Substantial disagreement has marked the actions of the Justices in one area, however, resulting in three five-to-four decisions first upholding and then voiding state laws providing that a discharge in bankruptcy was not to relieve a judgment arising out of an automobile accident upon pain of suffering suspension of his driver’s license. 1365 The state statutes were all similar enactments of the Uniform Motor Vehicle Safety Responsibility Act, which authorizes the suspension of the license of any driver who fails to satisfy a judgment against himself growing out of a traffic accident; a section of the law specifically provides that a discharge in bankruptcy will not relieve the debtor of the obligation to pay and the consequence of license suspension for failure to pay. In the first two decisions, the Court majorities decided that the object of the state law was not to see that such judgments were paid but was rather a device to protect the public against irresponsible driving. 1366 The last case rejected this view and held that the Act’s sole emphasis was one of providing leverage for the collection of damages from drivers and as such was in fact intended to and did frustrate the purpose of the federal bankruptcy law, the giving of a fresh start unhampered by debt. 1367

If a State desires to participate in the assets of a bankruptcy, it must submit to the appropriate requirements of the bankruptcy court with respect to the filing of claims by a designated date. It cannot assert a claim for taxes by filing a demand at a later date. 1368


1364 Stellwagon v. Clum, 245 U.S. 605, 615 (1918).


1367 Perez v. Campbell, 402 U.S. 637, 644–648, 651–654 (1971). The dissenters, Justice Blackmun for himself and Chief Justice Burger and Justices Harlan and Stewart, argued, in line with the Reitz and Kesler majorities, that the provision at issue was merely an attempt to assure driving competence and care on the part of its citizens and had only tangential effect upon bankruptcy.

Sec. 8—Powers of Congress

Clauses 5 and 6. The Congress shall have Power *** To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.

*** To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.

FISCAL AND MONETARY POWERS OF CONGRESS

Coinage, Weights, and Measures

The power “to coin money” and “regulate the value thereof” has been broadly construed to authorize regulation of every phase of the subject of currency. Congress may charter banks and endow them with the right to issue circulating notes, \(^{1369}\) and it may restrain the circulation of notes not issued under its own authority. \(^{1370}\) To this end it may impose a prohibitive tax upon the circulation of the notes of state banks \(^{1371}\) or of municipal corporations. \(^{1372}\) It may require the surrender of gold coin and of gold certificates in exchange for other currency not redeemable in gold. A plaintiff who sought payment for the gold coin and certificates thus surrendered in an amount measured by the higher market value of gold was denied recovery on the ground that he had not proved that he would suffer any actual loss by being compelled to accept an equivalent amount of other currency. \(^{1373}\) Inasmuch as “every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power,” \(^{1374}\) the Supreme Court sustained the power of Congress to make Treasury notes legal tender in satisfaction of antecedent debts, \(^{1375}\) and, many years later, to abrogate the clauses in private contracts calling for payment in gold coin, even though such contracts were executed before the legislation was passed. \(^{1376}\) The power to coin money also imports authority to maintain such coinage as a medium of ex-

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\(^{1369}\) McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

\(^{1370}\) Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

\(^{1371}\) 75 U.S. at 548.

\(^{1372}\) National Bank v. United States, 101 U.S. 1 (1880).


\(^{1375}\) Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

change at home, and to forbid its diversion to other uses by defacement, melting or exportation.\textsuperscript{1377}

**Punishment of Counterfeiting**

In its affirmative aspect, this clause has been given a narrow interpretation; it has been held not to cover the circulation of counterfeit coin or the possession of equipment susceptible of use for making counterfeit coin.\textsuperscript{1378} At the same time, the Supreme Court has rebuffed attempts to read into this provision a limitation upon either the power of the States or upon the powers of Congress under the preceding clause. It has ruled that a State may punish the issuance of forged coins.\textsuperscript{1379} On the ground that the power of Congress to coin money imports “the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation,”\textsuperscript{1380} it has sustained federal statutes penalizing the importation or circulation of counterfeit coin,\textsuperscript{1381} or the willing and conscious possession of dies in the likeness of those used for making coins of the United States.\textsuperscript{1382} In short, the above clause is entirely superfluous. Congress would have had the power it purports to confer under the necessary and proper clause; and the same is the case with the other enumerated crimes it is authorized to punish. The enumeration was unnecessary and is not exclusive.\textsuperscript{1383}

**Borrowing Power Versus Fiscal Power**

Usually the aggregate of the fiscal and monetary powers of the National Government—to lay and collect taxes, to borrow money and to coin money and regulate the value thereof—have reinforced each other, and, cemented by the necessary and proper clause, have provided a secure foundation for acts of Congress chartering banks and other financial institutions,\textsuperscript{1384} or making its treasury notes legal tender in the payment of antecedent debts.\textsuperscript{1385} But in 1935, the opposite situation arose—one in which the power to regulate the value of money collided with the obligation incurred in the exercise of the power to borrow money. By a vote of eight-to-one

\begin{itemize}
\item \textsuperscript{1377} Ling Su Fan v. United States, 218 U.S. 302 (1910).
\item \textsuperscript{1378} United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850).
\item \textsuperscript{1379} Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).
\item \textsuperscript{1380} United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850).
\item \textsuperscript{1381} Id.
\item \textsuperscript{1382} Baender v. Barnett, 255 U.S. 224 (1921).
\item \textsuperscript{1383} Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 536 (1871).
\item \textsuperscript{1385} Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 540–547 (1871).
\end{itemize}
the Supreme Court held that the obligation assumed by the exercise of the latter was paramount, and could not be repudiated to effectuate the monetary policies of Congress. In a concurring opinion, Justice Stone declined to join with the majority in suggesting that "the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds." However, with a view to inducing purchase of savings bonds, the sale of which is essential to successful management of the national debt, Congress is competent to authorize issuance of regulations creating a right of survivorship in such bonds registered in co-ownership form, and such regulations preempt provisions of state law prohibiting married couples from utilizing the survivorship privilege whenever bonds are paid out of community property.

Clause 7. The Congress shall have Power *** To establish Post Offices and post roads.

POSTAL POWER

"Establish"

The great question raised in the early days with reference to the postal clause concerned the meaning to be given to the word "establish"—did it confer upon Congress the power to construct post offices and post roads, or only the power to designate from existing places and routes those that should serve as post offices and post roads? As late as 1855, Justice McLean stated that this power "has generally been considered as exhausted in the designation of roads on which the mails are to be transported," and concluded that neither under the commerce power nor the power to establish post roads could Congress construct a bridge over a navigable water. A decade earlier, however, the Court, without passing upon the validity of the original construction of the Cumberland Road, held that being "charged ... with the transportation of the

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1387 294 U.S. at 361.
mails," Congress could enter a valid compact with the State of Pennsylvania regarding the use and upkeep of the portion of the road lying in the State.\textsuperscript{1390} The debate on the question was terminated in 1876 by the decision in \textit{Kohl v. United States},\textsuperscript{1391} sustaining a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post office and courthouse.

**Power To Protect the Mails**

The postal powers of Congress embrace all measures necessary to insure the safe and speedy transit and prompt delivery of the mails.\textsuperscript{1392} And not only are the mails under the protection of the National Government, they are in contemplation of law its property. This principle was recognized by the Supreme Court in 1845 in holding that wagons carrying United States mail were not subject to a state toll tax imposed for use of the Cumberland Road pursuant to a compact with the United States.\textsuperscript{1393} Half a century later it was availed of as one of the grounds on which the national executive was conceded the right to enter the national courts and demand an injunction against the authors of any wide-spread disorder interfering with interstate commerce and the transmission of the mails.\textsuperscript{1394}

Prompted by the efforts of Northern anti-slavery elements to disseminate their propaganda in the Southern States through the mails, President Jackson, in his annual message to Congress in 1835, suggested "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection." In the Senate, John C. Calhoun resisted this recommendation, taking the position that it belonged to the States and not to Congress to determine what is and what is not calculated to disturb their security. He expressed the fear that if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation.\textsuperscript{1395} On this point his reasoning would appear to be vindicated.

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\textsuperscript{1390} Searight v. Stokes, 44 U.S. (3 How.) 151, 166 (1845).
\textsuperscript{1391} 91 U.S. 367 (1876).
\textsuperscript{1392} Ex parte Jackson, 96 U.S. 727, 732 (1878). See United States Postal Serv. v. Council of Greenburgh Civic Assn’s, 453 U.S. 114 (1981), in which the Court sustained the constitutionality of a law making it unlawful for persons to use, without payment of a fee (postage), a letterbox which has been designated an "authorized depository" of the mail by the Postal Service.
\textsuperscript{1393} Searight v. Stokes, 44 U.S. (3 How.) 151, 169 (1845).
\textsuperscript{1394} In re Debs, 158 U.S. 564, 599 (1895).
\textsuperscript{1395} Cong. Globe, 24th Cong., 1st Sess., 3, 10, 298 (1835).
by such decisions as those denying the right of the States to prevent the importation of alcoholic beverages from other States. 1396

**Power To Prevent Harmful Use of the Postal Facilities**

In 1872, Congress passed the first of a series of acts to exclude from the mails publications designed to defraud the public or corrupt its morals. In the pioneer case of *Ex parte Jackson*, 1397 the Court sustained the exclusion of circulars relating to lotteries on the general ground that “the right to designate what shall be carried necessarily involves the right to determine what shall be excluded.” 1398 The leading fraud order case, decided in 1904, held to the same effect. 1399 Pointing out that it is “an indispensable adjunct to a civil government,” to supply postal facilities, the Court restated its premise that the “legislative body in thus establishing a postal service may annex such conditions . . . as it chooses.” 1400

Later cases first qualified these sweeping assertions and then overturned them, holding Government operation of the mails to be subject to constitutional limitations. In upholding requirements that publishers of newspapers and periodicals seeking second-class mailing privileges file complete information regarding ownership, indebtedness, and circulation and that all paid advertisements in the publications be marked as such, the Court emphasized that these provisions were reasonably designed to safeguard the second-class privilege from exploitation by mere advertising publications. 1401 Chief Justice White warned that the Court by no means intended to imply that it endorsed the Government’s “broad contentions concerning . . . the classification of the mails, or by the way of condition . . . .” 1402 Again, when the Court sustained an order of the Postmaster General excluding from the second-class privilege a newspaper he had found to have published material in contravention of the Espionage Act of 1917, the claim of absolute power in Congress to withhold the privilege was sedulously avoided. 1403

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1396 Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890).
1397 96 U.S. 727 (1878).
1398 96 U.S. at 732.
1400 194 U.S. at 506.
1402 229 U.S. at 316.
A unanimous Court transformed these reservations into a holding in *Lamont v. Postmaster General*, in which it struck down a statute authorizing the Post Office to detain mail it determined to be “communist political propaganda” and to forward it to the addressee only if he notified the Post Office he wanted to see it. Noting that Congress was not bound to operate a postal service, the Court observed that while it did, it was bound to observe constitutional guarantees. The statute violated the First Amendment because it inhibited the right of persons to receive any information which they wished to receive.

On the other hand, a statute authorizing persons to place their names on a list in order to reject receipt of obscene or sexually suggestive materials is constitutional, because no sender has a right to foist his material on any unwilling receiver. But, as in other areas, postal censorship systems must contain procedural guarantees sufficient to ensure prompt resolution of disputes about the character of allegedly objectionable material consistently with the First Amendment.

**Exclusive Power as an Adjunct to Other Powers**

In the cases just reviewed, it was attempted to close the mails to communication which were deemed to be harmful. A much broader power of exclusion was asserted in the Public Utility Holding Company Act of 1935. To induce compliance with the regulatory requirements of that act, Congress denied the privilege of using the mails for any purpose to holding companies that failed to obey that law, irrespective of the character of the material to be carried. Viewing the matter realistically, the Supreme Court treat-
ed this provision as a penalty. While it held this statute constitutional because the regulations whose infractions were thus penalized were themselves valid, it declared that “Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province...”

State Regulations Affecting the Mails

In determining the extent to which state laws may impinge upon persons or corporations whose services are utilized by Congress in executing its postal powers, the task of the Supreme Court has been to determine whether particular measures are consistent with the general policies indicated by Congress. Broadly speaking, the Court has approved regulations having a trivial or remote relation to the operation of the postal service, while disallowing those constituting a serious impediment to it. Thus, a state statute, which granted to one company an exclusive right to operate a telegraph business in the State, was found to be incompatible with a federal law, which, in granting to any telegraph company the right to construct its lines upon post roads, was interpreted as a prohibition of state monopolies in a field Congress was entitled to regulate in the exercise of its combined power over commerce and post roads.

An Illinois statute which, as construed by the state courts, required an interstate mail train to make a detour of seven miles in order to stop at a designated station, also was held to be an unconstitutional interference with the power of Congress under this clause. But a Minnesota statute requiring intrastate trains to stop at county seats was found to be unobjectionable.

Local laws classifying postal workers with railroad employees for the purpose of determining a railroad's liability for personal injuries, or subjecting a union of railway mail clerks to a general law forbidding any “labor organization” to deny any person membership because of his race, color or creed, have been held not to conflict with national legislation or policy in this field. Despite the interference pro tanto with the performance of a federal function, a State may arrest a postal employee charged with murder while he is engaged in carrying out his official duties, but it

1410 Electric Bond Co. v. SEC, 303 U.S. 419 (1938).
1411 303 U.S. at 442.
1417 United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869).
cannot punish a person for operating a mail truck over its highways without procuring a driver's license from state authorities.  

Clause 8. The Congress shall have Power *** To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

COPYRIGHTS AND PATENTS

Scope of the Power

This clause is the foundation upon which the national patent and copyright laws rest, although it uses neither of those terms. So far as patents are concerned, modern legislation harks back to the Statute of Monopolies of 1624, whereby Parliament endowed inventors with the sole right to their inventions for fourteen years. Copyright law, in turn, traces back to the English Statute of 1710, which secured to authors of books the sole right of publishing them for designated periods. Congress was not vested by this clause, however, with anything akin to the royal prerogative in the creation and bestowal of monopolistic privileges. Its power is limited with regard both to subject matter and to the purpose and duration of the rights granted. Only the writings and discoveries of authors and inventors may be protected, and then only to the end of promoting science and the useful arts. The concept of originality is central to copyright, and it is a constitutional requirement Congress may not exceed. While Congress may grant exclusive rights only for a limited period, it may extend the term upon the

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1418 Johnson v. Maryland, 254 U.S. 51 (1920).
1423 Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991) (publisher of telephone directory, consisting of white pages and yellow pages, not entitled to copyright in white pages, which are only compilations). “To qualify for copyright protection, a work must be original to the author…. Originality, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses some minimal degree of creativity…. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.” Id. at 345. First clearly articulated in The Trade Mark Cases, 100 U.S. 82, 94 (1879), and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–60 (1884), the requirement is expressed in nearly every copyright opinion, but its forceful iteration in Feist was noteworthy, because originality is a statutory requirement as well, 17 U.S.C. § 102(a), and it was unnecessary to discuss the concept in constitutional terms.
expiration of the period originally specified, and in so doing may protect the rights of purchasers and assignees.\footnote{Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815); Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 548 (1852); Bloomer v. Millinger, 68 U.S. (1 Wall.) 340, 350 (1864); Eunson v. Dodge, 85 U.S. (18 Wall.) 414, 416 (1873).} The copyright and patent laws do not have, of their own force, any extraterritorial operation.\footnote{Brown v. Duchesne, 60 U.S. (19 How.) 183, 195 (1857). It is, however, the ultimate objective of many nations, including the United States, to develop a system of patent issuance and enforcement which transcends national boundaries; it has been recommended, therefore, that United States policy should be to harmonize its patent system with that of foreign countries so long as such measures do not diminish the quality of the United States patent standards. President's Commission on the Patent System, To Promote the Progress of Useful Arts, Report to the Senate Judiciary Committee, S. Doc. No. 5, 90th Cong., 1st sess. (1967), recommendation XXXV. Effectuation of this goal was begun with the United States agreement to the Berne Convention (the Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886), and Congress' conditional implementation of the Convention through legislation. The Berne Convention Implementation Act of 1988, P. L. 100–568, 102 Stat. 2853, 17 U.S.C. § 101 and notes.} 

### Patentable Discoveries

The protection traditionally afforded by acts of Congress under this clause has been limited to new and useful inventions,\footnote{Seymour v. Osborne, 78 U.S. (11 Wall.) 516, 549 (1871). Cf. Collar Company v. Van Dusen, 90 U.S. (23 Wall.) 590, 563 (1875); Reckendorfer v. Faber, 92 U.S. 347, 356 (1876).} and while a patentable invention is a mental achievement,\footnote{Smith v. Nichols, 89 U.S. (21 Wall.) 112, 118 (1875).} for an idea to be patentable it must have first taken physical form.\footnote{Rubber-Tip Pencil Co. v. Howard, 87 U.S. (20 Wall.) 498, 507 (1874); Clark Thread Co. v. Willimantic Linen Co., 140 U.S. 481, 489 (1891).} Despite the fact that the Constitution uses the term “discovery” rather than “invention,” a patent may not be issued for the discovery of a hitherto unknown phenomenon of nature. “If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end.”\footnote{Funk Bros. Seed Co. v. Kalo Co., 333 U.S. 127, 130 (1948). Cf. Dow Co. v. Halliburton Co., 324 U.S. 320 (1945); Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 89 (1941).} As for the mental processes which have been traditionally required, the Court has held in the past that an invention must display “more ingenuity . . . than the work of a mechanic skilled in the art;”\footnote{Sinclair Co. v. Interchemical Corp., 325 U.S. 327, 330 (1945); Marconi Wireless Co. v. United States, 320 U.S. 1 (1944).} and while combination patents have been at times sustained,\footnote{Keystone Mfg. Co. v. Adams, 151 U.S. 139 (1894); Diamond Rubber Co. v. Consol. Tire Co., 220 U.S. 428 (1911).} the accumulation of old devices is patentable “only when the whole in some way exceeds the sum of its parts.”\footnote{A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950). An interesting concurring opinion was filed by Justice Douglas for himself and Justice}
Black: “It is not enough,” says Justice Douglas, “that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance.” Id. at 154–155. He then quotes the following from an opinion of Justice Bradley’s given 70 years ago:

“...It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacturers. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith. (Atlantic Works v. Brady, 107 U.S. 192, 200 (1882)).”

The opinion concludes: “The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge. A few that have reached this Court show the pressure to extend monopoly to the simplest of devices: [listing instances].” Id. at 156-58.


Sec. 8—Powers of Congress

Cl. 8—Copyrights and Patents

case said: “Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must ‘promote the Progress of ... useful Arts.’ This is the standard expressed in the Constitution and it may not be ignored.” 

Congressional requirements on patentability, then, are conditions and tests that must fall within the constitutional standard. Underlying the constitutional tests and congressional conditions for patentability is the balancing of two interests—the interest of the public in being protected against monopolies and in having ready access to and use of new items versus the interest of the country, as a whole, in encouraging invention by rewarding creative persons for their innovations. By declaring a constitutional standard of patentability, however, the Court, rather than Congress, will be doing the ultimate weighing. As for the clarity of the patentability standard, the three-fold test of utility, novelty and advancement seems to have been made less clear by the Supreme Court’s recent rejuvenation of “invention” as a standard of patentability.

Procedure in Issuing Patents

The standard of patentability is a constitutional standard, and the question of the validity of a patent is a question of law. Congress may authorize the issuance of a patent for an invention by a special, as well as by general, law, provided the question as to whether the patentees device is in truth an invention is left open to investigation under the general law. The function of the Commissioner of Patents in issuing letters patent is deemed to be quasi-judicial in character. Hence an act granting a right of appeal from the Commission to the Court of Appeals for the District of Columbia is not unconstitutional as conferring executive power upon

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1440 Anderson’s-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969). “The question of invention must turn on whether the combination supplied the key requirement.” Id. at 60. But the Court also appeared to apply the test of nonobviousness in the same decision: “We conclude that the combination was reasonably obvious to one with ordinary skill in the art.” Id. See also McClain v. Ortmayer, 141 U.S. 419, 427 (1891), where, speaking of the use of “invention” as a standard of patentability the Court said: “The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not.”

1441 A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Mahn v. Harwood, 112 U.S. 354, 358 (1884). In Markman v. Westview Instruments, Inc., 517 U.S. 348 (1996), the Court held that the interpretation of terms in a patent claim is a matter of law reserved entirely for the court. The Seventh Amendment does not require that such issues be tried to a jury.

a judicial body. The primary responsibility, however, for weeding out unpatentable devices rests in the Patent Office. The present system of “de novo” hearings before the Court of Appeals allows the applicant to present new evidence which the Patent Office has not heard, thus making somewhat amorphous the central responsibility.

**Nature and Scope of the Right Secured**

The leading case bearing on the nature of the rights which Congress is authorized to secure is that of Wheaton v. Peters. Wheaton charged Peters with having infringed his copyright on the twelve volumes of “Wheaton’s Reports,” wherein are reported the decisions of the United States Supreme Court for the years from 1816 to 1827 inclusive. Peters’ defense turned on the proposition that inasmuch as Wheaton had not complied with all of the requirements of the act of Congress, his alleged copyright was void. Wheaton, while denying this assertion of fact, further contended that the statute was only intended to secure him in his pre-existent rights at common law. These at least, he claimed, the Court should protect. A divided Court held in favor of Peters on the legal question. It denied, in the first place, that there was any principle of the common law that protected an author in the sole right to continue to publish a work once published. It denied, in the second place, that there is any principle of law, common or otherwise, which pervades the Union except such as are embodied in the Constitution and the acts of Congress. Nor, in the third place, it held, did the word “securing” in the Constitution recognize the alleged common law principle Wheaton invoked. The exclusive right which Congress is authorized to secure to authors and inventors owes its existence solely to the acts of Congress securing it, from which it follows that the rights granted by a patent or copyright are subject to such qualifications and limitations as Congress, in its unhampered consultation of the public interest, sees fit to impose.

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1446 Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 660 (1834); Holmes v. Hurst, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.
1447 Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 662 (1834); Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815). A major limitation of copyright law is that “fair use” of a copyrighted work is not an infringement. Fair use can involve such things as citation for the use of criticism and reproduction for classroom purposes, but it may not
The Court’s “reluctance to expand [copyright] protection without explicit legislative guidance” controlled its decision in *Sony Corp. v. Universal City Studios*, in which it held that the manufacture and sale of video tape (or cassette) recorders for home use do not constitute “contributory” infringement of the copyright in television programs. Copyright protection, the Court reiterated, is “wholly statutory,” and courts should be “circumspect” in extending protections to new technology. The Court refused to hold that contributory infringement could occur simply through the supplying of the devices with which someone else could infringe, especially in view of the fact that VCRs are capable of substantial noninfringing “fair use,” e.g., time shifting of television viewing.

In giving to authors the exclusive right to dramatize any of their works, Congress did not exceed its powers under this clause. Even as applied to pantomine dramatization by means of silent motion pictures, the act was sustained against the objection that it extended the copyright to ideas rather than to the words in which they were clothed. But the copyright of the description of an art in a book was held not to lay a foundation for an exclusive claim to the art itself. The latter can be protected, if at all, only by letters patent. Since copyright is a species of property distinct from the ownership of the equipment used in making copies of the matter copyrighted, the sale of a copperplate under execution did not pass any right to print and publish the map which the copperplate was designed to produce. A patent right may, however, be subjected, by bill in equity, to payment of a judgment debt of the patentee.

### Power of Congress Over Patents and Copyrights

Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the Government...
without just compensation.\textsuperscript{1453} Congress may, however, modify rights under an existing patent, provided vested property rights are not thereby impaired,\textsuperscript{1454} but it does not follow that it may authorize an inventor to recall rights that he has granted to others or re-invest in him rights of property that he had previously conveyed for a valuable and fair consideration.\textsuperscript{1455} Furthermore, the rights the present statutes confer are subject to the antitrust laws, though it can hardly be said that the cases in which the Court has endeavored to draw the line between the rights claimable by patentees and the kind of monopolistic privileges which are forbidden by those acts exhibit entire consistency in their holdings.\textsuperscript{1456}

\textbf{State Power Affecting Patents and Copyrights}

Displacement of state police or taxing powers by federal patent or copyright has been a source of considerable dispute. Ordinarily, rights secured to inventors must be enjoyed in subordination to the general authority of the States over all property within their limits. A state statute requiring the condemnation of illuminating oils inflammable at less than 130 degrees Fahrenheit was held not to interfere with any right secured by the patent laws, although the oil for which the patent was issued could not be made to comply with state specifications.\textsuperscript{1457} In the absence of federal legislation, a State may prescribe reasonable regulations for the transfer of patent rights, so as to protect its citizens from fraud. Hence, a requirement of state law that the words “given for a patent right” appear on the face of notes given in payment for such right is not unconstitutional.\textsuperscript{1458} Royalties received from patents or copyrights are subject to a nondiscriminatory state income tax, a holding to the contrary being overruled.\textsuperscript{1459}


\textsuperscript{1454} McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843).

\textsuperscript{1455} Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 553 (1852).


\textsuperscript{1457} Patterson v. Kentucky, 97 U.S. 501 (1879).

\textsuperscript{1458} Allen v. Riley, 203 U.S. 347 (1906); John Woods & Sons v. Carl, 203 U.S. 358 (1906); Ozan Lumber Co. v. Union County Bank, 207 U.S. 251 (1907).

\textsuperscript{1459} Fox Film Corp. v. Doyal, 286 U.S. 123 (1932), overruling Long v. Rockwood, 277 U.S. 142 (1928).
State power to protect things not patented or copyrighted under federal law has been buffeted under changing Court doctrinal views. In two major cases, the Court held that a State could not utilize unfair competition laws to prevent or punish the copying of products not entitled to a patent. Emphasizing the necessity for a uniform national policy and adverting to the monopolistic effects of the state protection, the Court inferred that because Congress had not extended the patent laws to the material at issue, federal policy was to promote free access when the materials were thus in the public domain. But, in *Goldstein v. California*, the Court distinguished the two prior cases and held that the determination whether a state “tape piracy” statute conflicted with the federal copyright statute depended upon the existence of a specific congressional intent to forbid state protection of the “writing” involved. Its consideration of the statute and of its legislative history convinced the Court that Congress in protecting certain “writings” and in not protecting others bespoke no intention that federally unprotected materials should enjoy no state protection, only that Congress “has left the area unattended.” Similar analysis was used to sustain the application of a state trade secret law to protect a chemical process, that was patentable but not patented, from utilization by a commercial rival, which had obtained the process from former employees of the company, all of whom had signed agreements not to reveal the process. The Court determined that protection of the process by state law was not incompatible with the federal patent policy of encouraging invention and public use of patented inventions, inasmuch as the trade secret law serves other interests not similarly served by the patent law and where it protects matter clearly patentable it is not likely to deter applications for patents.

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1461 412 U.S. 546 (1973). Informing the decisions were different judicial attitudes with respect to the preclusion of the States from acting in fields covered by the patent and copyright clauses, whether Congress had or had not acted. The latter case recognized permissible state interests, id. at 552–560, whereas the former intimated that congressional power was exclusive. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 228–31 (1964).
1462 In the 1976 revision of the copyright law, Congress broadly preempted, with narrow exceptions, all state laws bearing on material subject to copyright. 17 U.S.C. § 301. The legislative history makes clear Congress’ intention to overturn Goldstein and “to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law.” H. Rep. No. 94–1476, 94th Congress, 2d sess. (1976), 130. The statute preserves state tape piracy and similar laws as to sound recordings fixed before February 15, 1972, until February 15, 2047.
Returning to the Sears and Compco emphasis, the Court unanimously, in Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,\textsuperscript{1464} reasserted that "efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions."\textsuperscript{1465} At the same time, however, the Court attempted to harmonize Goldstein, Kewanee, and other decisions: there is room for state regulation of the use of unpatented designs if those regulations are "necessary to promote goals outside the contemplation of the federal patent scheme."\textsuperscript{1466} What States are forbidden to do is to "offer patent-like protection to intellectual creations which would otherwise remain unprotected as a matter of federal law."\textsuperscript{1467} A state law "aimed directly at preventing the exploitation of the [unpatented] design" is invalid as impinging on an area of pervasive federal regulation.\textsuperscript{1468}

**Trade-Marks and Advertisements**

In the famous Trade-Mark Cases,\textsuperscript{1469} decided in 1879, the Supreme Court held void acts of Congress, which, in apparent reliance upon this clause, extended the protection of the law to trademarks registered in the Patent Office. "The ordinary trade mark," said Justice Miller for the Court, "has no necessary relation to invention or discovery," nor is it to be classified "under the head of writings of authors." It does not "depend upon novelty, invention, discovery, or any work of the brain."\textsuperscript{1470} Not many years later the Court, again speaking through Justice Miller, ruled that a photograph may be constitutionally copyrighted,\textsuperscript{1471} while still more recently a circus poster was held to be entitled to the same protection. In answer to the objection of the circuit court that a lithograph which "has no other use than that of a mere advertisement ... (would not be within) the meaning of the Constitution," Justice Holmes summoned forth the shades of Velasquez, Whistler, Rembrandt, Ruskin, Degas, and others in support of the proposition that it is not for the courts to attempt to judge the worth of pic-

\textsuperscript{1464} 489 U.S. 141 (1989).  
\textsuperscript{1465} 489 U.S. at 156.  
\textsuperscript{1466} 489 U.S. at 166. As examples of state regulation that might be permissible, the Court referred to unfair competition, trademark, trade dress, and trade secrets laws. Perhaps by way of distinguishing Sears and Compco, both of which invalidated use of unfair competition laws, the Court suggested that prevention of "consumer confusion" is a permissible state goal that can be served in some instances by application of such laws. Id. at 154.  
\textsuperscript{1467} 489 U.S. at 156 (emphasis supplied).  
\textsuperscript{1468} 489 U.S. at 158.  
\textsuperscript{1469} 100 U.S. 82 (1879).  
\textsuperscript{1470} 100 U.S. at 94.  
\textsuperscript{1471} Burrow-Giles Lithograph Co. v. Saroney, 111 U.S. 53 (1884).
Clause 9. The Congress shall have Power *** To constitute Tribunals inferior to the supreme Court; (see Article III).

IN GENERAL


Clause 10. The Congress shall have Power *** To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

PIRACIES, FELONIES, AND OFFENSES AGAINST THE LAW OF NATIONS

Origin of the Clause

“When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law.... The faithful observance of this law is essential to national character....” These words of the Chancellor Kent expressed the view of the binding character of international law that was generally accepted at the time the Constitution was adopted. During the Revolutionary War, Congress took cognizance of all matters arising under the law of nations and professed obedience to that law. Under the Articles of Confederation, it was given exclusive power to appoint courts for the trial of piracies and felonies committed on the high seas, but no provision was made for dealing with offenses against the law of nations. The draft of the Constitution submitted to the Convention of 1787 by its Committee of Detail empowered Congress “to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations.” In the debate on the

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1473 1 J. Kent, Commentaries on American Law 1 (1826).
1474 19 Journals of the Continental Congress 315, 361 (1912); 20 id. at 762; 21 id. at 1136–37, 1158.
1475 Article IX.
floor of the Convention, the discussion turned on the question as to whether the terms, "felonies" and the "law of nations," were sufficiently precise to be generally understood. The view that these terms were often so vague and indefinite as to require definition eventually prevailed and Congress was authorized to define as well as punish piracies, felonies, and offenses against the law of nations. 1477

**Definition of Offenses**

The fact that the Constitutional Convention considered it necessary to give Congress authority to define offenses against the law of nations does not mean that in every case Congress must undertake to codify that law or mark its precise boundaries before prescribing punishments for infractions thereof. An act punishing "the crime of piracy, as defined by the law of nations" was held to be an appropriate exercise of the constitutional authority to "define and punish" the offense, since it adopted by reference the sufficiently precise definition of International Law. 1478 Similarly, in *Ex parte Quirin*, 1479 the Court found that by the reference in the Fifteenth Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions . . .," Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." 1480 Where, conversely, Congress defines with particularity a crime which is "an offense against the law of nations," the law is valid, even if it contains no recital disclosing that it was enacted pursuant to this clause. Thus, the duty which the law of nations casts upon every government to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, was found to furnish a sufficient justification for the punishment of the counterfeiting within the United States, of notes, bonds, and other securities of foreign governments. 1481

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1477 Id. at 316.
1479 317 U.S. 1, 27 (1942).
1480 317 U.S. at 28.
Extraterritorial Reach of the Power

Since this clause contains the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States, a lower federal court held in 1932 that the general grant of admiralty and maritime jurisdiction by Article III, § 2, could not be construed as extending either the legislative or judicial power of the United States to cover offenses committed on vessels outside the United States but not on the high seas. Reversing that decision, the Supreme Court held that this provision “cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the National Government. It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the States and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters.”

Within the meaning of this section, an offense is committed on the high seas even where the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country.

Clauses 11, 12, 13, and 14. The Congress shall have power

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

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ART. I—LEGISLATIVE DEPARTMENT

Sec. 8—Powers of Congress

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

To provide and maintain a Navy.

To make Rules for the Government and Regulation of the land and naval Forces.

THE WAR POWER

Source and Scope

Three Theories.—Three different views regarding the source of the war power found expression in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. Writing in The Federalist, Hamilton elaborated the theory that the war power is an aggregate of the particular powers granted by Article I, § 8. Not many years later, in 1795, the argument was advanced that the war power of the National Government is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution. Chief Justice Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it. In McCulloch v. Maryland, he listed the power “to declare and conduct a war” as one of the “enumerated powers” from which the authority to charter the Bank of the United States was deduced. During the era of the Civil War, the two latter theories were both given countenance by the Supreme Court. Speaking for four Justices in Ex parte Milligan, Chief Justice Chase described the power to declare war as “necessarily” extending “to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns.”

An Inherent Power.—Thereafter, we find the phrase, “the war power,” being used by both Chief Justice White and Chief

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1485 The Federalist, No. 23 (J. Cooke ed. 1937), 146–51.
1486 Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795).
1488 17 U.S. at 407. (Emphasis supplied.)
1489 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (dissenting opinion); see also Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871); and United States v. MacIntosh, 283 U.S. 605, 622 (1931).
ART. I—LEGISLATIVE DEPARTMENT

Sec. 8—Powers of Congress CIs. 11, 12, 13, and 14—War; Military Establishment

Justice Hughes, the former declaring the power to be “complete and undivided.” Not until 1936, however, did the Court explain the logical basis for imputing such an inherent power to the Federal Government. In United States v. Curtiss-Wright Corp., the reasons for this conclusion were stated by Justice Sutherland as follows: “As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality.”

A Complexus of Granted Powers.—In Lichter v. United States, on the other hand, the Court speaks of the “war powers” of Congress. Upholding the Renegotiation Act, it declared that: “In view of this power ‘To raise and support Armies, … and the power granted in the same Article of the Constitution ‘to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers’, … the only question remaining is whether the Renegotiation Act was a law ‘necessary and proper for carrying into Execution’ the war powers of Congress and especially its power to support armies.” In a footnote, it listed the Preamble, the necessary and proper clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander-in-Chief of the Army and Navy, as being “among the many other provisions implementing

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1493 Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398 (1934).
1495 299 U.S. 304 (1936).
1496 299 U.S. at 316, 318. On the controversy respecting Curtiss-Wright, see The Curtiss-Wright Case, infra.
1497 334 U.S. 742 (1948).
1498 334 U.S. at 757–58.
the Congress and the President with powers to meet the varied demands of war...." 1499

Declaration of War

In the early draft of the Constitution presented to the Convention by its Committee of Detail, Congress was empowered “to make war.” 1500 Although there were solitary suggestions that the power should better be vested in the President alone, 1501 in the Senate alone, 1502 or in the President and the Senate, 1503 the sentiment of the Convention, as best we can determine from the limited notes of the proceedings, was that the potentially momentous consequences of initiating armed hostilities should be called up only by the concurrence of the President and both Houses of Congress. 1504 In contrast to the English system, the Framers did not want the wealth and blood of the Nation committed by the decision of a single individual; 1505 in contrast to the Articles of Confederation, they did not wish to forego entirely the advantages of executive efficiency nor to entrust the matter solely to a branch so close to popular passions. 1506

The result of these conflicting considerations was that the Convention amended the clause so as to give Congress the power to

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1499 334 U.S. at 755 n.3.
1501 Mr. Butler favored “vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.” Id. at 318.
1502 Mr. Pinkney thought the House was too numerous for such deliberations but that the Senate would be more capable of a proper resolution and more acquainted with foreign affairs. Additionally, with the States equally represented in the Senate, the interests of all would be safeguarded. Id.
1503 Hamilton’s plan provided that the President was “to make war or peace, with the advice of the senate...”. Id. at 300.
1504 2 id., 318–319. In THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 465, Hamilton notes: “The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.” (Emphasis in original). And see id. at No. 26, 164–171. Cf. C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES ch. V (1921).
1506 The Articles of Confederation vested powers with regard to foreign relations in the Congress.
Sec. 8—Powers of Congress  Cls. 11, 12, 13, and 14—War; Military Establishment

“declare war.” Although this change could be read to give Congress the mere formal function of recognizing a state of hostilities, in the context of the Convention proceedings it appears more likely the change was intended to insure that the President was empowered to repel sudden attacks without awaiting congressional action and to make clear that the conduct of war was vested exclusively in the President.

An early controversy revolved about the issue of the President’s powers and the necessity of congressional action when hostilities are initiated against us rather than the Nation instituting armed conflict. The Bey of Tripoli, in the course of attempting to extort payment for not molesting United States shipping, declared war upon the United States, and a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Jefferson sent a squadron of frigates to the Mediterranean to protect our ships but limited its mission to defense in the narrowest sense of the term. Attacked by a Tripolitan cruiser, one of the frigates subdued it, disarmed it, and, pursuant to instructions, released it. Jefferson in a message to Congress announced his actions as in compliance with constitutional limitations on his authority in the absence of a declaration of war.

Hamilton espoused a different interpretation, contending that the Constitution vested in Congress the power to initiate war but that when another nation made war upon the United States we were already in a state of war and no declaration by Congress was needed. Congress thereafter enacted a statute authorizing the President to instruct the commanders of armed vessels of the United States to seize all vessels and goods of the Bey of Tripoli “and also to cause to be done all such other acts of precaution or hostility as the state of war will justify . . .” But no formal declaration of

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1508 Jointly introducing the amendment to substitute “declare” for “make,” Madison and Gerry noted the change would “leave[e] to the Executive the power to repel sudden attacks.” Id. at 318.
1509 Connecticut originally voted against the amendment to substitute “declare” for “make” but “on the remark by Mr. King that ‘make’ war might be understood to ‘conduct’ it which was an Executive function, Mr. Ellsworth gave up his opposition, and the vote of Connecticut was changed…” Id. at 318. The contemporary and subsequent judicial interpretation was to the understanding set out in the text. Cf. Talbot v. Seeman, 5 U.S. (1 Cr.), 1, 28 (1801) (Chief Justice Marshall: “The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry.”); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).
1510 MESSAGES AND PAPERS OF THE PRESIDENTS 326, 327 (J. Richardson ed., 1896).
1511 7 WORKS OF ALEXANDER HAMILTON 746–747 (J. Hamilton ed., 1851).
1512 2 Stat. 129, 130 (1802) (emphasis supplied).
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war was passed, Congress apparently accepting Hamilton’s view.  

Sixty years later, the Supreme Court sustained the blockade of the Southern ports instituted by Lincoln in April 1861 at a time when Congress was not in session. Congress had subsequently ratified Lincoln’s action, so that it was unnecessary for the Court to consider the constitutional basis of the President’s action in the absence of congressional authorization, but the Court nonetheless approved, five-to-four, the blockade order as an exercise of Presidential power alone, on the ground that a state of war was a fact. “The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.” The minority challenged this doctrine on the ground that while the President could unquestionably adopt such measures as the laws permitted for the enforcement of order against insurgency, Congress alone could stamp an insurrection with the character of war and thereby authorize the legal consequences ensuing from a state of war.  

The view of the majority was proclaimed by a unanimous Court a few years later when it became necessary to ascertain the exact dates on which the war began and ended. The Court, the Chief Justice said, must “refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second.”  

These cases settled the issue whether a state of war could exist without formal declaration by Congress. When hostile action is taken against the Nation, or against its citizens or commerce, the appropriate response by order of the President may be resort to force. But the issue so much a source of controversy in the era of the Cold War and so divisive politically in the context of United States involvement in the Vietnam War has been whether the

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1513 Of course, Congress need not declare war in the all-out sense; it may provide for a limited war which, it may be, the 1802 statute recognized. Cf. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).
1515 12 Stat. 326 (1861).
1517 67 U.S. at 682.
1518 The Protector, 79 U.S. (12 Wall.) 700, 702 (1872).
President is empowered to commit troops abroad to further national interests in the absence of a declaration of war or specific congressional authorization short of such a declaration.\(^{1519}\) The Supreme Court studiously refused to consider the issue in any of the forms in which it was presented,\(^{1520}\) and the lower courts generally refused, on "political question" grounds, to adjudicate the matter.\(^{1521}\) In the absence of judicial elucidation, the Congress and the President have been required to accommodate themselves in the controversy to accept from each other less than each has been willing to accept but more than either has been willing to grant.\(^{1522}\)

**THE POWER TO RAISE AND MAINTAIN ARMED FORCES**

**Purpose of Specific Grants**

The clauses of the Constitution, which give Congress authority to raise and support armies, and so forth, were not inserted to


\(^{1520}\) In Atlee v. Richardson, 411 U.S. 911 (1973), aff'd 347 F. Supp. 689 (E.D.Pa., 1982), the Court summarily affirmed a three-judge court's dismissal of a suit challenging the constitutionality of United States activities in Vietnam on political question grounds. The action constituted approval on the merits of the dismissal, but it did not necessarily approve the lower court's grounds. See also Massachusetts v. Laird, 400 U.S. 886 (1970); Holtzman v. Schlesinger, 414 U.S. 1304, 1316, 1321 (1973) (actions of individual justices on motions for stays). The Court simply denied certiorari in all cases on its discretionary docket.


\(^{1522}\) For further discussion, see section on President's commander-in-chief powers.
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endow the national government rather than the States with the power to do these things but to designate the department of the Federal Government which would exercise the powers. As we have noted above, the English king was endowed with the power not only to initiate war but the power to raise and maintain armies and navies. 

Aware historically that these powers had been utilized to the detriment of the liberties and well-being of Englishmen and aware that in the English Declaration of Rights of 1688 it was insisted that standing armies could not be maintained without the consent of Parliament, the Framers vested these basic powers in Congress.

**Time Limit on Appropriations for the Army**

Prompted by the fear of standing armies to which Story alluded, the framers inserted the limitation that “no appropriation of money to that use shall be for a longer term than two years.” In 1904, the question arose whether this provision would be violated if the Government contracted to pay a royalty for use of a patent in constructing guns and other equipment where the payments are likely to continue for more than two years. Solicitor-General Hoyt ruled that such a contract would be lawful; that the appropriations limited by the Constitution “are those only which are to raise and support armies in the strict sense of the word ‘support,’ and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense.”

Relying on this earlier opinion, Attorney General Clark ruled in 1948 that there was “no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended.”

**Conscription**

The constitutions adopted during the Revolutionary War by at least nine of the States sanctioned compulsory military service. Towards the end of the War of 1812, conscription of men for the army was proposed by James Monroe, then Secretary of War, but opposition developed and peace came before the bill could be en-
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acted. 1528 In 1863, a compulsory draft law was adopted and put into operation without being challenged in the federal courts. 1529 Not so the Selective Service Act of 1917. 1530 This measure was attacked on the grounds that it tended to deprive the States of the right to “a well-regulated militia,” that the only power of Congress to exact compulsory service was the power to provide for calling forth the militia for the three purposes specified in the Constitution, which did not comprehend service abroad, and finally that the compulsory draft imposed involuntary servitude in violation of the Thirteenth Amendment. The Supreme Court rejected all of these contentions. It held that the powers of the States with respect to the militia were exercised in subordination to the paramount power of the National Government to raise and support armies, and that the power of Congress to mobilize an army was distinct from its authority to provide for calling the militia and was not qualified or in any wise limited thereby. 1531

Before the United States entered the first World War, the Court had anticipated the objection that compulsory military service would violate the Thirteenth Amendment and had answered it in the following words: “It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.” 1532 Accordingly, in the Selective Draft Law Cases, 1533 it dismissed the objection under that amendment as a contention that was “refuted by its mere statement.” 1534

Although the Supreme Court has so far formally declined to pass on the question of the “peacetime” draft, 1535 its opinions leave no doubt of the constitutional validity of the act. In United States v. O’Brien, 1536 upholding a statute prohibiting the destruction of
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selective service registrants’ certificate of registration, the Court, speaking through Chief Justice Warren, thought “[t]he power of Congress to classify and conscript manpower for military service is ‘beyond question.’” In noting Congress’ “broad constitutional power” to raise and regulate armies and navies, the Court has specifically observed that the conscription act was passed “pursuant to” the grant of authority to Congress in clauses 12–14. 

Care of the Armed Forces

Scope of the congressional and executive authority to prescribe the rules for the governance of the military is broad and subject to great deference by the judiciary. The Court recognizes “that the military is, by necessity, a specialized society separate from civilian society,” that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian,” and that “Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed than it is when prescribing rules for [civilian society].” Denying that Congress or military authorities are free to disregard the Constitution when acting in this area, the Court nonetheless operates with “a healthy deference to legislative and executive judgments” with respect to military affairs, so that, while constitutional guarantees apply, “the different character of the military community and of the military mission requires a different application of those protections.”

In reliance upon this deference to congressional judgment with respect to the roles of the sexes in combat and the necessities of military mobilization, coupled with express congressional consideration of the precise questions, the Court sustained as constitutional the legislative judgment to provide only for registration of males

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1543 453 U.S. at 66. “[P]erhaps in no other area has the Court accorded Congress greater deference.” Id. at 64–65. See also Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
for possible future conscription.\footnote{Rostker v. Goldberg, 453 U.S. 57 (1981). \textit{Compare} Frontiero v. Richardson, 411 U.S. 677 (1973), \textit{with} Schlesinger v. Ballard, 419 U.S. 498 (1975).} Emphasizing the unique, separate status of the military, the necessity to indoctrinate men in obedience and discipline, the tradition of military neutrality in political affairs, and the need to protect troop morale, the Court upheld the validity of military post regulations, backed by congressional enactments, banning speeches and demonstrations of a partisan political nature and the distribution of literature without prior approval of post headquarters, with the commander authorized to keep out only those materials that would clearly endanger the loyalty, discipline, or morale of troops on the base.\footnote{Greer v. Spock, 424 U.S. 828 (1976), limiting Flower v. United States, 407 U.S. 197 (1972).} On the same basis, the Court rejected challenges on constitutional and statutory grounds to military regulations requiring servicemen to obtain approval from their commanders before circulating petitions on base, in the context of circulations of petitions for presentation to Congress.\footnote{Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980). The statutory challenge was based on 10 U.S.C. § 1034, which protects a serviceman’s right to communicate with a Member of Congress, but which the Court interpreted narrowly.} And the statements of a military officer urging disobedience to certain orders could be punished under provisions that would have been of questionable validity in a civilian context.\footnote{Parker v. Levy, 417 U.S. 733 (1974).} Reciting the considerations previously detailed, the Court has refused to allow enlisted men and officers to sue to challenge or set aside military decisions and actions.\footnote{Chappell v. Wallace, 462 U.S. 296 (1983) (enlisted men charging racial discrimination by their superiors in duty assignments and performance evaluations could not bring constitutional tort suits); United States v. Stanley, 483 U.S. 669 (1987) (officer who had been an unwitting, unconsenting subject of an Army experiment to test the effects of LSD on human subjects could not bring a constitutional tort for damages). These considerations are also the basis of the Court’s construction of the Federal Tort Claims Act so that it does not reach injuries arising out of or in the course of military activity. Feres v. United States, 340 U.S. 135 (1950). In United States v. Johnson, 481 U.S. 681 (1987), four Justices urged reconsideration of \textit{Feres}, but that has not occurred.}

Congress has a plenary and exclusive power to determine the age at which a soldier or seaman shall be received, the compensation he shall be allowed, and the service to which he shall be assigned. This power may be exerted to supersede parents’ control of minor sons who are needed for military service. Where the statute requiring the consent of parents for enlistment of a minor son did not permit such consent to be qualified, their attempt to impose a condition that the son carry war risk insurance for the benefit of
his mother was not binding on the Government. Since the possession of government insurance payable to the person of his choice is calculated to enhance the morale of the serviceman, Congress may permit him to designate any beneficiary he desires, irrespective of state law, and may exempt the proceeds from the claims of creditors. Likewise, Congress may bar a State from taxing the tangible, personal property of a soldier, assigned for duty therein, but domiciled elsewhere. To safeguard the health and welfare of the armed forces, Congress may authorize the suppression of bordellos in the vicinity of the places where forces are stationed.

**Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents**

Under its power to make rules for the government and regulation of the armed forces, Congress has set up a system of criminal law binding on all servicemen, with its own substantive laws, its own courts and procedures, and its own appeals procedure. The drafters of these congressional enactments conceived of a military justice system with application to all servicemen wherever they are, to reservists while on inactive duty training, and to certain civilians in special relationships to the military. In recent years, all these conceptions have been restricted.

**Servicemen.**—Although there had been extensive disagreement about the practice of court-martial trial of servicemen for nonmilitary offenses, the matter never was raised in substantial degree until the Cold War period when the United States found

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1549 United States v. Williams, 302 U.S. 46 (1937). See also In re Grimley, 137 U.S. 147, 153 (1890); In re Morrissey, 137 U.S. 157 (1890).


1552 McKinley v. United States, 249 U.S. 397 (1919).


it essential to maintain both at home and abroad a large standing army in which great numbers of servicemen were draftees. In *O'Callahan v. Parker*, the Court held that court-martial jurisdiction was lacking to try servicemen charged with a crime that was not “service connected.” The Court attempted to assay no definition of “service connection,” but among the factors it noted were that the crime in question was committed against a civilian in peacetime in the United States off-base while the serviceman was lawfully off duty. *O'Callahan* was overruled in *Solorio v. United States*, the Court holding that “the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged.” Chief Justice Rehnquist’s opinion for the Court insisted that *O'Callahan* had been based on erroneous readings of English and American history, and that “the service connection approach . . . has proved confusing and difficult for military courts to apply.”

With regard to trials before courts-martial, it is not clear what provisions of the Bill of Rights and other constitutional guarantees do apply. The Fifth Amendment expressly excepts “[c]ases arising in the land and naval forces” from its grand jury provision, and there is an implication that these cases are also excepted from the Sixth Amendment. The double jeopardy provision of the Fifth Amendment appears to be applicable. The Court of Military Appeals now holds that servicemen are entitled to all constitutional rights except those expressly or by implication inapplicable to the military. The Uniform Code of Military Justice, supplemented by the *Manual for Courts-Martial*, affirmatively grants due process rights roughly comparable to civilian procedures, so that many

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1558 483 U.S. at 450–51.
1559 483 U.S. at 448. Although the Court of Military Appeals had affirmed Solorio’s military-court conviction on the basis that the service-connection test had been met, the Court elected to reconsider and overrule *O'Callahan* altogether.
1560 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123, 138–139 (1866); Ex parte Quirin, 317 U.S. 1, 40 (1942). The matter was raised but left unresolved in Middendorf v. Henry, 425 U.S. 25 (1976).
such issues are unlikely to arise absolutely necessitating constitutional analysis. However, the Code leaves intact much of the criticized traditional structure of courts-martial, including the pervasive possibilities of command influence, and the Court of Military Appeals is limited on the scope of its review, thus creating areas in which constitutional challenges are likely.

Upholding Articles 133 and 134 of the Uniform Code of Military Justice, the Court stressed the special status of military society. This difference has resulted in a military Code regulating aspects of the conduct of members of the military that in the civilian sphere would go unregulated, but on the other hand the penalties imposed range from the severe to well below the threshold of that possible in civilian life. Because of these factors, the Court, while agreeing that constitutional limitations applied to military justice, was of the view that the standards of constitutional guarantees were significantly different in the military than in civilian life. Thus, the vagueness challenge to the Articles was held to be governed by the standard applied to criminal statutes regulating economic affairs, the most lenient of vagueness standards. Neither did application of the Articles to conduct essentially composed of speech necessitate a voiding of the conviction, inasmuch as the speech was unprotected, and, even while it might reach protected speech the officer here was unable to raise that issue.

Military courts are not Article III courts but agencies established pursuant to Article I. It was established in the last century that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review. Until August 1, 1984, the Supreme Court had no jurisdiction to review by writ of certiorari the proceedings of a military commission, but Congress has now conferred appellate jurisdiction of decisions of the Court of Military Appeals. Prior to this time, civil court review of court-martial decisions was possible through writs of habeas corpus and certiorari.
through habeas corpus jurisdiction, an avenue that continues to exist, but the Court severely limited the scope of such review, restricting it to the issue whether the court-martial has jurisdiction over the person tried and the offense charged. However, at least seven Justices appeared to reject the traditional view and adopt the position that civil courts on habeas corpus could review claims of denials of due process rights to which the military had not given full and fair consideration. Since Burns, the Court has thrown little light on the range of issues cognizable by a federal court in such litigation and the lower federal courts have divided several ways.

**Civilians and Dependents.**—In recent years, the Court rejected the view of the drafters of the Code of Military Justice with regard to the persons Congress may constitutionally reach under its clause 14 powers. Thus, it held that an honorably discharged former soldier, charged with having committed murder during military service in Korea, could not be tried by court-martial but must be charged in federal court, if at all. After first leaning the other way, the Court on rehearing found lacking court-martial jurisdiction, at least in peacetime, to try civilian dependents of service personnel for capital crimes committed outside the United States. Subsequently, the Court extended its ruling to civilian dependents overseas charged with noncapital crimes and to ci-
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villian employees of the military charged with either capital or non-capital crimes.\footnote{Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).}

WAR LEGISLATION

War Powers in Peacetime

To some indeterminate extent, the power to wage war embraces the power to prepare for it and the power to deal with the problems of adjustment following its cessation. Justice Story emphasized that “[i]t is important also to consider, that the surest means of avoiding war is to be prepared for it in peace. . . . How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? . . . It will be in vain to oppose constitutional barriers to the impulse of self-preservation.”\footnote{3 J. Story, Commentaries on the Constitution of the United States 1180 (1833).}

Authoritative judicial recognition of the power is found in \textit{Ashwander v. Tennessee Valley Authority},\footnote{297 U.S. 288 (1936).} in which the power of the Federal Government to construct and operate a dam and power plant, pursuant to the National Defense Act of June 3, 1916,\footnote{39 Stat. 166 (1916).} was sustained. The Court noted that the assurance of an abundant supply of electrical energy and of nitrates, which would be produced at the site, “constitute national defense assets” and the project was justifiable under the war powers.\footnote{297 U.S. at 327–328.}

Perhaps the most significant example of legislation adopted pursuant to the war powers when no actual “shooting war” was in progress, with the object of strengthening national defense, was the Atomic Energy Act of 1946, establishing a body to oversee and further the research into and development of atomic energy for both military and civil purposes.\footnote{60 Stat. 755 (1946), 42 U.S.C. § 1801 et seq.} Congress has also authorized a vast amount of highway construction, pursuant to its conception of their “primary importance to the national defense,”\footnote{108(a), 70 Stat. 374, 378 (1956), 23 U.S.C. § 101(b), naming the Interstate System the “National System of Interstate and Defense Highways.”} and the first extensive program of federal financial assistance in the field of education was the National Defense Education Act.\footnote{72 Stat. 1580 (1958), as amended, codified to various sections of Titles 20 and 42.}

\footnote{1582 3 J. Story, Commentaries on the Constitution of the United States 1180 (1833).}
\footnote{1583 297 U.S. 288 (1936).}
\footnote{1584 39 Stat. 166 (1916).}
\footnote{1585 297 U.S. at 327–328.}
\footnote{1586 60 Stat. 755 (1946), 42 U.S.C. § 1801 et seq.}
\footnote{1588 72 Stat. 1580 (1958), as amended, codified to various sections of Titles 20 and 42.}
War II years, though nominally peacetime, constituted the era of the Cold War and the occasions for several armed conflicts, notably in Korea and Indochina, in which the Congress enacted much legislation designed to strengthen national security, including an apparently permanent draft, authorization of extensive space exploration, authorization for wage and price controls, and continued extension of the Renegotiation Act to recapture excess profits on defense contracts. Additionally, the period saw extensive regulation of matter affecting individual rights, such as loyalty-security programs, passport controls, and limitations on members of the Communist Party and associated organizations, all of which are dealt with in other sections.

A particular province of such legislation is that designed to effect a transition from war to peace. The war power “is not limited to victories in the field.... It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.” This principle was given a much broader application after the First World War in Hamilton v. Kentucky Distilleries Co., where the War Time Prohibition Act adopted after the signing of the Armistice was upheld as an appropriate measure for increasing war efficiency. The Court was unable to conclude that the war emergency had passed with the cessation of hostilities. But in 1924, it held that a rent control law for the District of Columbia, which
had been previously upheld, had ceased to operate because the emergency which justified it had come to an end. A similar issue was presented after World War II, and the Court held that the authority of Congress to regulate rents by virtue of the war power did not end with the presidential proclamation terminating hostilities on December 31, 1946. However, the Court cautioned that "[w]e recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision." In the same year, the Court sustained by only a five-to-four vote the Government's contention that the power which Congress had conferred upon the President to deport enemy aliens in times of a declared war was not exhausted when the shooting stopped. "It is not for us to question," said Justice Frankfurter for the Court, "a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come."

Delegation of Legislative Power in Wartime

The Court has insisted that in times of war as in times of peace "the respective branches of the Government keep within the power assigned to each," thus raising the issue of permissible delegation, inasmuch as during a war Congress has been prone to delegate many more powers to the President than at other times. But the number of cases actually discussing the matter is few. Two theories have been advanced at times when the del-

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1600 Block v. Hirsh, 256 U.S. 135 (1921).
1603 333 U.S. at 143–44.
1605 335 U.S. at 170.
1607 For an extensive consideration of this subject in the context of the President's redelegation of it, see N. GRUNDSTEIN, PRESIDENTIAL DELEGATION OF AUTHORITY IN WARTIME (1961).
1608 In the Selective Draft Law Cases, 245 U.S. 366, 389 (1918), the objection was dismissed without discussion. The issue was decided by reference to peacetime precedents in Yakus v. United States, 321 U.S. 414, 424 (1944).
The delegation doctrine carried more force than it has in recent years. First, it is suggested that inasmuch as the war power is inherent in the Federal Government, and one shared by the legislative and executive branches, Congress does not really delegate legislative power when it authorizes the President to exercise the war power in a prescribed manner, a view which entirely overlooks the fact that the Constitution expressly vests the war power as a legislative power in Congress. Second, it is suggested that Congress’ power to delegate in wartime is limited as in other situations but that the existence of a state of war is a factor weighing in favor of the validity of the delegation.

The first theory was fully stated by Justice Bradley in *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73 (1875) upholding a levy imposed by the Secretary of the Treasury pursuant to an act of Congress. To the argument that the levy was a tax the fixing of which Congress could not delegate, Justice Bradley noted that the power exercised “does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government…. ” 88 U.S. at 96–97.

Both theories found expression in different passages of Chief Justice Stone’s opinion in *Hirabayashi v. United States*, 320 U.S. 81 (1943) upholding executive imposition of a curfew on Japanese-Americans pursuant to legislative delegation. On the one hand, he spoke to Congress and the Executive, “acting in cooperation,” to impose the curfew, 320 U.S. at 91–92, 104 while on the other hand, he noted that a delegation in which Congress has determined the policy and the rule of conduct, leaving to the Executive the carrying-out of the policy, is permissible delegation. 320 U.S. at 104.

A similar ambiguity is found in *Lichter v. United States*, 334 U.S. 742 (1948), upholding the Renegotiation Act, but taken as a whole the Court there espoused the second theory. “The power [of delegation] is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to method to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition…. Thus, while the constitutional structure and controls of our Government are our guides

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1609 88 U.S. (21 Wall.) 73 (1875).
1611 320 U.S. 81 (1943).
1612 320 U.S. at 91–92, 104.
1613 320 U.S. at 104.
1614 334 U.S. 742 (1948).
equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind.” The Court then examined the exigencies of war and concluded that the delegation was valid.

CONSTITUTIONAL RIGHTS IN WARTIME

Constitution and the Advance of the Flag

Theater of Military Operations.—Military law to the exclusion of constitutional limitations otherwise applicable is the rule in the areas in which military operations are taking place. This view was assumed by all members of the Court in Ex parte Milligan, in which the trial by a military commission of a civilian charged with disloyalty in a part of the country remote from the theater of military operations was held invalid. Although unanimous in the result, the Court divided five-to-four on the ground of decision. The point of disagreement was over which department of the Government had authority to say with finality what regions lie within the theater of military operations. The majority claimed this function for the courts and asserted that an area in which the civil courts were open and functioning does not; the minority argued that the question was for Congress’ determination. The entire Court rejected the Government’s contention that the President’s determination was conclusive in the absence of restraining legislation.

Similarly, in Duncan v. Kahanamoku, the Court declared that the authority granted by Congress to the territorial governor of Hawaii to declare martial law under certain circumstances, which he exercised in the aftermath of the attack on Pearl Harbor, did not warrant the supplanting of civil courts with military tribunals and the trial of civilians for civilian crimes in these military tribunals at a time when no obstacle stood in the way of the operation of the civil courts, except, of course, the governor’s order.

Enemy Country.—It has seemed reasonably clear that the Constitution does not follow the advancing troops into conquered territory. Persons in such territory have been held entirely beyond the reach of constitutional limitations and subject to the laws of war as interpreted and applied by the Congress and the Presi-

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1615 334 U.S. at 778–79, 782.
1616 334 U.S. at 778–83.
1617 71 U.S. (4 Wall.) 2 (1866).
1618 71 U.S. at 127.
1619 71 U.S. at 132, 138.
1620 71 U.S. at 121, 139-42.
1621 327 U.S. 304 (1946).
dent. “What is the law which governs an army invading an enemy’s country?” the Court asked in *Dow v. Johnson*. “It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy’s country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty.”

These conclusions follow not only from the usual necessities of war but as well from the Court’s doctrine that the Constitution is not automatically applicable in all territories acquired by the United States, the question turning upon whether Congress has made the area “incorporated” or “unincorporated” territory. But in *Reid v. Covert*, Justice Black in a plurality opinion of the Court asserted that wherever the United States acts it must do so only “in accordance with all the limitations imposed by the Constitution…. [C]onstitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as at home.” The case, however, involved the trial of a United States citizen abroad and the language quoted was not subscribed to by a majority of the Court; thus, it must be regarded as a questionable rejection of the previous line of cases.

**Enemy Property.**—In *Brown v. United States*, Chief Justice Marshall dealt definitively with the legal position of enemy property during wartime. He held that the mere declaration of war by Congress does not effect a confiscation of enemy property situated within the territorial jurisdiction of the United States, but the right of Congress by further action to subject such property to confiscation was asserted in the most positive terms. As an exercise of the war power, such confiscation was held not subject to the restrictions of the Fifth and Sixth Amendments. Since such confiscation is unrelated to the personal guilt of the owner, it is immaterial

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1623 100 U.S. 158, 170 (1880).
1625 354 U.S. 1 (1957).
1626 354 U.S. at 6, 7.
1627 For a comprehensive treatment, preceding *Reid v. Covert*, of the matter in the context of the post-War war crimes trials, see Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).
whether the property belongs to an alien, a neutral, or even to a
citizen. The whole doctrine of confiscation is built upon the founda-
tion that it is an instrument of coercion, which, by depriving an
enemy of property within the reach of his power, whether within
his territory or outside it, impairs his ability to resist the confis-
cating government while at the same time it furnishes to that gov-
ernment means for carrying on the war.1629

**Prizes of War.**—The power of Congress with respect to prizes
is plenary; no one can have any interest in prizes captured except
by permission of Congress.1630 Nevertheless, since international
law is a part of our law, the Court will administer it so long as it
has not been modified by treaty or by legislative or executive ac-
ton. Thus, during the Civil War, the Court found that the Confis-
cation Act of 1861, and the Supplementary Act of 1863, which, in
authorizing the condemnation of vessels, made provision for the
protection of interests of loyal citizens, merely created a municipal
forfeiture and did not override or displace the law of prize. It de-
cided, therefore, that when a vessel was liable to condemnation
under either law, the Government was at liberty to proceed under
the most stringent rules of international law, with the result that
the citizen would be deprived of the benefit of the protective provi-
sions of the statute.1631 Similarly, when Cuban ports were block-
aded during the Spanish-American War, the Court held, over the
vigorous dissent of three of its members, that the rule of inter-
national law exempting unarmed fishing vessels from capture was
applicable in the absence of any treaty provision, or other public
act of the Government in relation to the subject.1632

**The Constitution at Home in Wartime**

**Personal Liberty.**—"The Constitution of the United States is
a law for rulers and people, equally in war and in peace, and covers
with the shield of its protection all classes of men, at all times, and
under all circumstances. No doctrine, involving more pernicious
consequences, was ever invented by the wit of man than that any
of its provisions can be suspended during any of the great exigen-
cies of government. Such a doctrine leads directly to anarchy or
despotism, but the theory of necessity on which it is based is false;

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1629 Miller v. United States, 78 U.S. (11 Wall.) 268 (1871); Steehr v. Wallace, 255
U.S. 239 (1921); Central Trust Co. v. Garvan, 254 U.S. 554 (1921); United States
v. Chemical Foundation, 272 U.S. 1 (1926); Silesian-American Corp. v. Clark, 332
U.S. 469 (1947); Cities Service Co. v. McGrath, 342 U.S. 330 (1952); Handelsbureau

1630 The Siren, 80 U.S. (13 Wall.) 389 (1871).

1631 The Hampton, 72 U.S. (5 Wall.) 372, 376 (1867).

1632 The Paquete Habana, 175 U.S. 677, 700, 711 (1900).
for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.\footnote{1633}{Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120–121 (1866).}

\textit{Ex parte Milligan}, from which these words are quoted, is justly deemed one of the great cases undergirding civil liberty in this country in times of war or other great crisis, holding that except in areas in which armed hostilities have made enforcement of civil law impossible constitutional rights may not be suspended and civilians subjected to the vagaries of military justice. Yet, the words were uttered after the cessation of hostilities, and the Justices themselves recognized that with the end of the shooting there arose the greater likelihood that constitutional rights could be and would be observed and that the Court would require the observance.\footnote{1634}{This pattern recurs with each critical period.}

That the power of Congress to punish seditious utterances in wartime is limited by the First Amendment was assumed by the Court in a series of cases,\footnote{1635}{Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Sugarman v. United States, 249 U.S. 182 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919).} in which it nonetheless affirmed conviction for violations of the Espionage Act of 1917.\footnote{1636}{The Court also upheld a state law making it an offense for persons to advocate that citizens of the State should refuse to assist in prosecuting war against enemies of the United States.}\footnote{1637}{Justice Holmes matter-of-factly stated the essence of the pattern that we have mentioned. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."}\footnote{1638}{By far, the most dramatic restraint of personal liberty imposed during World War II was the detention and relocation of the Japanese residents of the Western States, including those who were native-born citizens of the United States. When various phases of this program were challenged, the Court held that in order to prevent espionage and sabotage, the authorities could restrict the movement of...}
these persons by a curfew order, but a citizen of Japanese ancestry whose loyalty was conceded could not be detained in a relocation camp.  

A mixed pattern emerges from an examination of the Cold War period. Legislation designed to regulate and punish the organizational activities of the Communist Party and its adherents was at first upheld and then in a series of cases was practically viti-ated. Against a contention that Congress’ war powers had been utilized to achieve the result, the Court struck down for the second time in history a congressional statute as an infringement of the First Amendment. It voided a law making it illegal for any member of a “communist-action organization” to work in a defense facility. The majority reasoned that the law overbroadly required a person to choose between his First Amendment-protected right of association and his right to hold a job, without attempting to distinguish between those persons who constituted a threat and those who did not.

On the other hand, in New York Times Co. v. United States, a majority of the Court agreed that in appropriate circumstances the First Amendment would not preclude a prior restraint of publication of information that might result in a sufficient degree of harm to the national interest, although a different majority concurred in denying the Government’s request for an injunction in that case.

**Enemy Aliens**.—The Alien Enemy Act of 1798 authorized the President to deport any alien or to license him to reside within the
Sec. 8—Powers of Congress  

United States at any place to be designated by the President.\(^{1649}\) Though critical of the measure, many persons conceded its constitutionality on the theory that Congress’ power to declare war carried with it the power to treat the citizens of a foreign power against which war has been declared as enemies entitled to summary justice.\(^{1650}\) A similar statute was enacted during World War I\(^{1651}\) and was held valid in *Ludecke v. Watkins*.\(^{1652}\)

During World War II, the Court unanimously upheld the power of the President to order to trial before a military tribunal German saboteurs captured within this Country.\(^{1653}\) Enemy combatants, said Chief Justice Stone, who without uniforms come secretly through the lines during time of war, for the purpose of committing hostile acts, are not entitled to the status of prisoners of war but are unlawful combatants punishable by military tribunals.

**Eminent Domain.**—An often-cited dictum uttered shortly after the Mexican War asserted the right of an owner to compensation for property destroyed to prevent its falling into the hands of the enemy, or for that taken for public use.\(^{1654}\) In *United States v. Russell*, decided following the Civil War, a similar conclusion was based squarely on the Fifth Amendment, although the case did not necessarily involve the point. Finally, in *United States v. Pacific R.R.*\(^{1655}\) also a Civil War case, the Court held that the United States was not responsible for the injury or destruction of private property by military operations, but added that it did not have in mind claims for property of loyal citizens taken for the use of the national forces. “In such cases,” the Court said, “it has been the practice of the government to make compensation for the property taken... although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clauses.”\(^{1656}\)

Meantime, however, in 1874, a committee of the House of Representatives, in an elaborate report on war claims growing out of the Civil War, had voiced the opinion that the Fifth Amendment embodies the distinction between a taking of property in the course of military operations or other urgent military necessity, and other takings for war purposes, and required compensation of owners in

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\(^{1649}\) 1 Stat. 577 (1798).


\(^{1652}\) 335 U.S. 160 (1948).

\(^{1653}\) Ex parte Quirin, 317 U.S. 1 (1942).


\(^{1655}\) 120 U.S. 227 (1887).

\(^{1656}\) 120 U.S. at 239.
the latter class of cases. 1657 In determining what constitutes just compensation for property requisitioned for war purposes during World War II, the Court has assumed that the Fifth Amendment is applicable to such takings. 1658 But as to property seized and destroyed to prevent its use by the enemy, it has relied on the principle enunciated in United States v. Pacific R.R. as justification for the conclusion that owners thereof are not entitled to compensation. 1659

**Rent and Price Controls.**—Even at a time when the Court was utilizing substantive due process to void economic regulations, it generally sustained such regulations in wartime. Thus, shortly following the end of World War I, it sustained, by a narrow margin, a rent control law for the District of Columbia, which not only limited permissible rent increases but also permitted existing tenants to continue in occupancy provided they paid rent and observed other stipulated conditions. 1660 Justice Holmes for the majority conceded in effect that in the absence of a war emergency the legislation might transcend constitutional limitations, 1661 but noted that “a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation.” 1662

During World War II and thereafter, economic controls were uniformly sustained. 1663 An apartment house owner who complained that he was not allowed a “fair return” on the property was dismissed with the observation that “a nation which can demand the lives of its men and women in the waging of . . . war is under no constitutional necessity of providing a system of price control . . . which will assure each landlord a ‘fair return’ on his property.” 1664 The Court also held that rental ceilings could be established with-
out a prior hearing when the exigencies of national security precluded the delay which would ensue.\footnote{1665}

But in another World War I case, the Court struck down a statute which penalized the making of “any unjust or unreasonable rate or charge in handling ... any necessaries”\footnote{1666} as repugnant to the Fifth and Sixth Amendments in that it was so vague and indefinite that it denied due process and failed to give adequate notice of what acts would violate it.\footnote{1667}

Clause 15. The Congress shall have Power *** To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Clause 16. The Congress shall have Power *** To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

THE MILITIA CLAUSES

Calling Out the Militia

The States as well as Congress may prescribe penalties for failure to obey the President’s call of the militia. They also have a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.\footnote{1668} The Federal Government may call out the militia in case of civil war; its authority to suppress rebellion is found in the power to suppress insurrection and to carry on war.\footnote{1669} The act of February 28, 1795,\footnote{1670} which delegated to the President the power to call out the militia, was held constitutional.\footnote{1671} A militiaman who refused to obey such a call was not

\footnotesize{\begin{itemize}
  \item[1665] 321 U.S. at 521. The Court stressed, however, that Congress had provided for judicial review after the regulations and orders were made effective.
  \item[1669] Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1871).
\end{itemize}}
“employed in the service of the United States so as to be subject to the article of war,” but was liable to be tried for disobedience of the act of 1795. 1672

Regulation of the Militia

The power of Congress over the militia “being unlimited, except in the two particulars of officering and training them ... it may be exercised to any extent that may be deemed necessary by Congress.... The power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government ...” 1673 Under the National Defense Act of 1916, 1674 the militia, which hitherto had been an almost purely state institution, was brought under the control of the National Government. The term “militia of the United States” was defined to comprehend “all able-bodied male citizens of the United States and all other able-bodied males who have ... declared their intention to become citizens of the United States,” between the ages of eighteen and forty-five. The act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for “three years in service and three years in reserve,” limited the appointment of officers to those who “shall have successfully passed such tests as to ... physical, moral and professional fitness as the President shall prescribe,” and authorized the President in certain emergencies to “draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and National Guard Reserve,” who thereupon should “stand discharged from the militia.” 1675

The militia clauses do not constrain Congress in raising and supporting a national army. The Court has approved the system of “dual enlistment,” under which persons enlisted in state militia (National Guard) units simultaneously enlist in the National Guard.
Guard of the United States, and, when called to active duty in the federal service, are relieved of their status in the state militia. Consequently, the restrictions in the first militia clause have no application to the federalized National Guard; there is no constitutional requirement that state governors hold a veto power over federal duty training conducted outside the United States or that a national emergency be declared before such training may take place. 1676

Clause 17. Congress shall have power *** To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

SEAT OF THE GOVERNMENT

The Convention was moved to provide for the creation of a site in which to locate the Capital of the Nation, completely removed from the control of any State, because of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, physically threatened and verbally abused the members, and caused the Congress to flee the City when neither municipal nor state authorities would take action to protect the members. 1677 Thus, Madison noted that “[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it…. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national council an imputa-

tion of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy."\textsuperscript{1678}

The actual site was selected by compromise, Northerners accepting the Southern-favored site on the Potomac in return for Southern support for a Northern aspiration, assumption of Revolutionary War debts by the National Government.\textsuperscript{1679} Maryland and Virginia both authorized the cession of territory\textsuperscript{1680} and Congress accepted.\textsuperscript{1681} Congress divided the District into two counties, Washington and Alexandria, and provided that the local laws of the two States should continue in effect.\textsuperscript{1682} It also established a circuit court and provided for the appointment of judicial and law enforcement officials.\textsuperscript{1683}

There seems to have been no consideration, at least none recorded, given at the Convention or in the ratifying conventions to the question of the governance of the citizens of the District.\textsuperscript{1684} Madison in \textit{The Federalist} did assume that the inhabitants “will have had their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed them . . .”\textsuperscript{1685} Although there was some dispute about the constitutional propriety of permitting local residents a measure of “home rule,” to use the recent term,\textsuperscript{1686} almost from the first there

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\bibitem{1678} The Federalist, No. 43 (J. Cooke ed. 1961), 288–289. See also 3 J. Story, Commentaries on the Constitution of the United States 1213, 1214 (1833).
\bibitem{1679} W. Tindall, The Origin and Government of the District of Columbia 5–30 (1903).
\bibitem{1680} Maryland Laws 1798, ch. 2, p. 46; 13 Laws of Virginia 43 (Hening 1789).
\bibitem{1681} Act of July 16, 1790, 1 Stat. 130. In 1846, Congress authorized a referendum in Alexandria County on the question of retroceding that portion to Virginia. The voters approved and the area again became part of Virginia. Laws of Virginia 1845–46, ch. 64, p. 55; Act of July 9, 1846, 9 Stat. 35; Proclamation of September 7, 1846; 9 Stat. 1000. Constitutional questions were raised about the retrocession but suit did not reach the Supreme Court until some 40 years later and the Court held that the passage of time precluded the raising of the question. Phillips v. Payne, 92 U.S. 130 (1875).
\bibitem{1682} Act of February 27, 1801, 2, 2 Stat. 103. The declaration of the continuing effect of state law meant that law in the District was frozen as of the date of cession, unless Congress should change it, which it seldom did. For some of the problems, see Tayloe v. Thompson, 30 U.S. (5 Pet.) 358 (1831); Ex parte Watkins, 32 U.S. (7 Pet.) 568 (1833); Stelle v. Carroll, 37 U.S. (12 Pet.) 201 (1838); Van Ness v. United States Bank, 38 U.S. (13 Pet.) 17 (1839); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).
\bibitem{1683} Act of March 3, 1801, 1, 2 Stat. 115.
\bibitem{1684} The objections raised in the ratifying conventions and elsewhere seemed to have consisted of prediction of the perils to the Nation of setting up the National Government in such a place. 3 J. Story, Commentaries on the Constitution of the United States 1215, 1216 (1833).
\bibitem{1685} The Federalist, No. 43 (J. Cooke ed. 1961), 289.
\bibitem{1686} Such a contention was cited and rebutted in 3 J. Story, Commentaries on the Constitution of the United States 1218 (1833).
\end{thebibliography}
were local elections provided for. In 1802, the District was divided into five divisions, in some of which the governing officials were elected; an elected mayor was provided in 1820. District residents elected some of those who governed them until this form of government was swept away in the aftermath of financial scandals in 1874 and replaced with a presidentially appointed Commission in 1878. The Commission lasted until 1967 when it was replaced by an appointed Mayor-Commissioner and an appointed city council. In recent years, Congress provided for a limited form of self-government in the District, with the major offices filled by election. District residents vote for President and Vice President and elect a nonvoting delegate to Congress. An effort by constitutional amendment to confer voting representation in the House and Senate failed of ratification.

Constitutionally, it appears that Congress is neither required to provide for a locally elected government nor precluded from delegating its powers over the District to an elective local government. The Court has indicated that the “exclusive” jurisdiction granted was meant to exclude any question of state power over the area and was not intended to require Congress to exercise all powers itself.

Chief Justice Marshall for the Court held in *Hepburn v. Ellzey* that the District of Columbia was not a State within the meaning of the diversity jurisdiction clause of Article III. This

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1689 Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11699, reprinted as appendix to District of Columbia Code, Title I.


1691 Twenty-third Amendment.


1693 H.J. Res. 554, 95th Congress, passed the House on March 2, 1978, and the Senate on August 22, 1978, but only 16 States had ratified before the expiration after seven years of the proposal.


1696 6 U.S. (2 Cr.) 445 (1805); see also Sere v. Pitot, 10 U.S. (6 Cr.) 332 (1810); New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816). The District was held to be a State within the terms of a treaty. Geofroy v. Riggs, 133 U.S. 258 (1890).
view, adhered to for nearly a century and a half, was overturned by the Court in 1949, upholding the constitutionality of a 1940 statute authorizing federal courts to take jurisdiction of non-federal controversies between residents of the District of Columbia and the citizens of a State. The decision was by a five to four division, but the five in the majority disagreed among themselves on the reasons. Three thought the statute to be an appropriate exercise of the power of Congress to legislate for the District of Columbia pursuant to this clause without regard to Article III. Two others thought that *Hepburn v. Ellzey* had been erroneously decided and would have overruled it. But six Justices rejected the former rationale and seven Justices rejected the latter one; since five Justices agreed, however, that the statute was constitutional, it was sustained.

It is not disputed that the District is a part of the United States and that its residents are entitled to all the guarantees of the United States Constitution including the privilege of trial by jury and of presentment by a grand jury. Legislation restrictive of liberty and property in the District must find justification in facts adequate to support like legislation by a State in the exercise of its police power.

Congress possesses over the District of Columbia the blended powers of a local and national legislature. This fact means that in some respects ordinary constitutional restrictions do not operate; thus, for example, in creating local courts of local jurisdiction in the District, Congress acts pursuant to its legislative powers under clause 17 and need not create courts that comply with Article III court requirements. And when legislating for the District Con-

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1698 Barney v. City of Baltimore, 73 U.S. (6 Wall.) 280 (1868); Hooe v. Jamieson, 166 U.S. 395 (1897); Hooe v. Werner, 166 U.S. 399 (1897).
1700 337 U.S. at 588–600 (Justices Jackson, Black and Burton).
1701 337 U.S. at 604 (Justices Rutledge and Murphy). The dissents were by Chief Justice Vinson, id. at 626, joined by Justice Douglas, and by Justice Frankfurter, id. at 646, joined by Justice Reed.
1706 In the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91–358, 111, 84 Stat. 475, D.C. Code, § 11–101, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the
Congress remains the legislature of the Union, so that it may give its enactments nationwide operation to the extent necessary to make them locally effective. 1707

AUTHORITY OVER PLACES PURCHASED

“Places”

This clause has been broadly construed to cover all structures necessary for carrying on the business of the National Government. 1708 It includes post offices, 1709 a hospital and a hotel located in a national park, 1710 and locks and dams for the improvement of navigation. 1711 But it does not cover lands acquired for forests, parks, ranges, wild life sanctuaries or flood control. 1712 Nevertheless, the Supreme Court has held that a State may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a State, for purposes other than those enumerated in clause 17. 1713

After exclusive jurisdiction over lands within a State has been ceded to the United States, Congress alone has the power to punish crimes committed within the ceded territory. 1714 Private property located thereon is not subject to taxation by the State, 1715 nor can state statutes enacted subsequent to the transfer have any operation therein. 1716 But the local laws in force at the date of cession that are protective of private rights continue in force until abro-

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1713 304 U.S. at 528.
gated by Congress. Moreover, as long as there is no interference with the exclusive jurisdiction of the United States, an area subject thereto may be annexed by a municipality.

Duration of Federal Jurisdiction

A State may qualify its cession of territory by a condition that jurisdiction shall be retained by the United States only so long as the place is used for specified purposes. Such a provision operates prospectively and does not except from the grant that portion of a described tract which is then used as a railroad right of way.

In 1892, the Court upheld the jurisdiction of the United States to try a person charged with murder on a military reservation, over the objection that the State had ceded jurisdiction only over such portions of the area as were used for military purposes and that the particular place on which the murder was committed was used solely for farming. The Court held that the character and purpose of the occupation having been officially established by the political department of the government, it was not open to the Court to inquire into the actual uses to which any portion of the area was temporarily put. A few years later, however, it ruled that the lease to a city, for use as a market, of a portion of an area which had been ceded to the United States for a particular purpose, suspended the exclusive jurisdiction of the United States.

The question arose whether the United States retains jurisdiction over a place which was ceded to it unconditionally, after it has abandoned the use of the property for governmental purposes and entered into a contract for the sale thereof to private persons. Minnesota asserted the right to tax the equitable interest of the purchaser in such land, and the Supreme Court upheld its right to do so. The majority assumed that “the Government’s unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power.” In separate concurring opinions, Chief Justice Stone and Justice Frankfurter reserved judgment on the question of territorial jurisdiction.

1718 Howard v. Commissioners, 344 U.S. 624 (1953). As Howard recognized, such areas of federal property do not cease to be part of the State in which they are located and the residents of the areas are for most purposes residents of the State. Thus, a State may not constitutionally exclude such residents from the privileges of suffrage if they are otherwise qualified. Evans v. Cornman, 398 U.S. 419 (1970).
1721 Benson v. United States, 146 U.S. 325, 331 (1892).
1724 327 U.S. at 570, 571.
Reservation of Jurisdiction by States

For more than a century the Supreme Court kept alive, by repeated dicta,\(^\text{1725}\) the doubt expressed by Justice Story “whether Congress are by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature, where such consent is so qualified that it will not justify the ‘exclusive legislation’ of Congress there. It may well be doubted if such consent be not utterly void.”\(^\text{1726}\) But when the issue was squarely presented in 1937, the Court ruled that where the United States purchases property within a State with the consent of the latter, it is valid for the State to convey, and for the United States to accept, “concurrent jurisdiction” over such land, the State reserving to itself the right to execute process “and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States.”\(^\text{1727}\) The holding logically renders the second half of clause 17 superfluous. In a companion case, the Court ruled further that even if a general state statute purports to cede exclusive jurisdiction, such jurisdiction does not pass unless the United States accepts it.\(^\text{1728}\)

Clause 18. 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 the Constitution in the Government of the United States, or in any Department or Officer thereof.

NECESSARY AND PROPER CLAUSE

Scope of Incidental Powers

That this clause is an enlargement, not a constriction, of the powers expressly granted to Congress, that it enables the lawmakers to select any means reasonably adapted to effectuate those powers, was established by Marshall’s classic opinion in *McCulloch v. Maryland*.\(^\text{1729}\) “Let the end be legitimate,” he wrote, “let it be within the scope of the Constitution, and all means which are ap-

\(^{1729}\)17 U.S. (4 Wheat.) 316 (1819).
propriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.” Moreover, the provision gives Congress a share in the responsibilities lodged in other departments, by virtue of its right to enact legislation necessary to carry into execution all powers vested in the National Government. Conversely, where necessary for the efficient execution of its own powers, Congress may delegate some measure of legislative power to other departments.  

Operation of Clause

Practically every power of the National Government has been expanded in some degree by the coefficient clause. Under its authority Congress has adopted measures requisite to discharge the treaty obligations of the nation; it has organized the federal judicial system and has enacted a large body of law defining and punishing crimes. Effective control of the national economy has been made possible by the authority to regulate the internal commerce of a State to the extent necessary to protect and promote interstate commerce. The right of Congress to utilize all known and appropriate means for collecting the revenue, including the distraint of property for federal taxes, and its power to acquire property needed for the operation of the Government by the exercise of the power of eminent domain, have greatly extended the range of national power. But the widest application of the necessary and proper clause has occurred in the field of monetary and fiscal controls. Inasmuch as the various specific powers granted by Article I, § 8, do not add up to a general legislative power over such matters, the Court has relied heavily upon this clause in sustaining the comprehensive control which Congress has asserted over this subject.  

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Definition of Punishment and Crimes

Although the only crimes which Congress is expressly authorized to punish are piracies, felonies on the high seas, offenses against the law of nations, treason and counterfeiting of the securities and current coin of the United States, its power to create, define, and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded. 1737 Illustrative of the offenses which have been punished under this power are the alteration of registered bonds, 1738 the bringing of counterfeit bonds into the country, 1739 conspiracy to injure prisoners in custody of a United States marshal, 1740 impersonation of a federal officer with intent to defraud, 1741 conspiracy to injure a citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, 1742 the receipt by Government officials of contributions from Government employees for political purposes, 1743 advocating the overthrow of the Government by force, 1744 Part I of Title 18 of the United States Code comprises more than 500 sections defining penal offenses against the United States. 1745

Chartering of Banks

As an appropriate means for executing “the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies . . . .” Congress may incorporate banks and kindred institutions. 1746 Moreover, it may confer upon them private powers, which, standing alone, have no relation to the functions of the Federal Government, if those privileges are essential to the effective operation of such

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1737 United States v. Fox, 95 U.S. 670, 672 (1878); United States v. Hall, 98 U.S. 343, 357 (1879); United States v. Worrall, 2 U.S. (2 Dall.) 384, 394 (1798); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). That this power has been freely exercised is attested by the pages of the United States Code devoted to Title 18, entitled “Criminal Code and Criminal Procedure.” In addition numerous regulatory measures in other titles prescribe criminal penalties.

1738 Ex parte Carll, 106 U.S. 521 (1883).


1740 Logan v. United States, 144 U.S. 263 (1892).


1742 Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Waddell, 112 U.S. 76 (1884); In re Quarles and Butler, 158 U.S. 532, 537 (1895); Motes v. United States, 178 U.S. 458 (1900); United States v. Mosley, 238 U.S. 383 (1915). See also Rakes v. United States, 212 U.S. 55 (1909).


corporations. Where necessary to meet the competition of state banks, Congress may authorize national banks to perform fiduciary functions, even though, apart from the competitive situation, federal instrumentalities might not be permitted to engage in such business. The Court will not undertake to assess the relative importance of the public and private functions of a financial institution Congress has seen fit to create. It sustained the act setting up the Federal Farm Loan Banks to provide funds for mortgage loans on agricultural land against the contention that the right of the Secretary of the Treasury, which he had not exercised, to use these banks as depositories of public funds, was merely a pretext for chartering those banks for private purposes.

Currency Regulations

Reinforced by the necessary and proper clause, the powers “to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,’ and ‘to borrow money on the credit of the United States and to coin money and regulate the value thereon . . . ,’” have been held to give Congress virtually complete control over money and currency. A prohibitive tax on the notes of state banks, the issuance of treasury notes impressed with the quality of legal tender in payment of private debts and the abrogation of clauses in private contracts, which called for payment in gold coin, were sustained as appropriate measures for carrying into effect some or all of the foregoing powers.

Power to Charter Corporations

In addition to the creation of banks, Congress has been held to have authority to charter a railroad corporation, or a corporation to construct an interstate bridge, as instrumentalities for promoting commerce among the States, and to create corpora-

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tions to manufacture aircraft\textsuperscript{1756} or merchant vessels\textsuperscript{1757} as incidental to the war power.

### Courts and Judicial Proceedings

Inasmuch as the Constitution “delineated only the great outlines of the judicial power . . . , leaving the details to Congress, . . . [t]he distribution and appropriate exercise of the judicial power must . . . be made by laws passed by Congress...”\textsuperscript{1758} As a necessary and proper provision for the exercise of the jurisdiction conferred by Article III, § 2, Congress may direct the removal from a state to a federal court of a criminal prosecution against a federal officer for acts done under color of federal law,\textsuperscript{1759} and may authorize the removal before trial of civil cases arising under the laws of the United States.\textsuperscript{1760} It may prescribe the effect to be given to judicial proceedings of the federal courts\textsuperscript{1761} and may make all laws necessary for carrying into execution the judgments of federal courts.\textsuperscript{1762} When a territory is admitted as a State, Congress may designate the court to which the records of the territorial courts shall be transferred and may prescribe the mode for enforcement and review of judgments rendered by those courts.\textsuperscript{1763} In the exercise of other powers conferred by the Constitution, apart from Article III, Congress may create legislative courts and “clothe them with functions deemed essential or helpful in carrying those powers into execution.”\textsuperscript{1764}

### Special Acts Concerning Claims

The Necessary and Proper Clause enables Congress to pass special laws to require other departments of the Government to prosecute or adjudicate particular claims, whether asserted by the Government itself or by private persons. In 1924,\textsuperscript{1765} Congress adopted a Joint Resolution directing the President to cause suit to be instituted for the cancellation of certain oil leases alleged to have been obtained from the Government by fraud and to prosecute such other actions and proceedings, civil and criminal, as were warranted by the facts. This resolution also authorized the appoint-

\textsuperscript{1756}Clallam County v. United States, 263 U.S. 341 (1923).
\textsuperscript{1757}Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549 (1922).
\textsuperscript{1758}Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).
\textsuperscript{1759}Tennessee v. Davis, 100 U.S. 257, 263 (1880).
\textsuperscript{1760}Railway Company v. Whitton, 80 U.S. (13 Wall.) 270, 287 (1872).
\textsuperscript{1761}Emery v. Palmer, 107 U.S. 3 (1883).
ment of special counsel to have charge of such litigation. Private acts providing for a review of an order for compensation under the Longshoreman’s and Harbor Workers’ Compensation Act,1766 or conferring jurisdiction upon the Court of Claims, after it had denied recovery, to hear and determine certain claims of a contractor against the Government, have been held constitutional.1767

**Maritime Law**

Congress may implement the admiralty and maritime jurisdiction conferred upon the federal courts by revising and amending the maritime law that existed at the time the Constitution was adopted, but in so doing, it cannot go beyond the reach of that jurisdiction.1768 This power cannot be delegated to the States; hence, acts of Congress that purported to make state workmen’s compensation laws applicable to maritime cases were held unconstitutional.1769

**SECTION 9. Clause 1.** The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

**IN GENERAL**

The above clause, which sanctioned the importation of slaves by the States for twenty years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters, Art. IV, § 1, cl. 3, was held by Chief Justice Taney in *Scott v. Sandford*,1770 to show conclusively that such persons and their descendants were not embraced within the term “citizen” as used in the Constitution. Today this ruling is interesting only as an historical curiosity.

1768 *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934).
1770 *60 U.S. (19 How.)* 393, 411 (1857).
Clause 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

IN GENERAL

This clause is the only place in the Constitution in which the Great Writ is mentioned, a strange fact in the context of the regard with which the right was held at the time the Constitution was written\(^{1771}\) and stranger in the context of the role the right has come to play in the Supreme Court’s efforts to constitutionalize federal and state criminal procedure.\(^{1772}\)

Only the Federal Government and not the States, it has been held obliquely, is limited by the clause.\(^{1773}\) The issue that has always excited critical attention is the authority in which the clause places the power to determine whether the circumstances warrant suspension of the privilege of the Writ.\(^{1774}\) The clause itself does not specify, and while most of the clauses of § 9 are directed at Congress not all of them are.\(^{1775}\) At the Convention, the first proposal of a suspending authority expressly vested “in the legislature” the suspending power,\(^{1776}\) but the author of this proposal did not retain this language when the matter was taken up,\(^{1777}\) the present language then being adopted.\(^{1778}\) Nevertheless, Congress’ power to suspend was assumed in early commentary\(^{1779}\) and stated in dictum by the Court.\(^{1780}\) President Lincoln suspended the privi-
Clause 3. No Bill of Attainder or ex post facto Law shall be passed.

Bills of Attainder

“Bills of attainder ... are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. ... In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions.”

The prohibition embodied in this clause is not to be strictly and narrowly construed in the context of traditional forms but is to be interpreted in accordance with the designs of the framers so as to preclude trial by legislature, a violation of the separation of powers concept. The clause thus prohibits all legislative acts, “no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial....” That the Court has applied the clause dynamically is revealed by a consideration of the three cases in which acts of Congress have been struck down.

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1788 533 U.S. at 301.
1791 United States v. Brown, 381 U.S. 437, 442–446 (1965). Four dissenting Justices, however, denied that any separation of powers concept underlay the clause. Id. at 472–73.
as violating it. In *Ex parte Garland*, the Court struck down a statute that required attorneys to take an oath that they had taken no part in the Confederate rebellion against the United States before they could practice in federal courts. The statute, and a state constitutional amendment requiring a similar oath of persons before they could practice certain professions, were struck down as legislative acts inflicting punishment on a specific group the members of which had taken part in the rebellion and therefore could not truthfully take the oath. The clause then lay unused until 1946 when the Court utilized it to strike down a rider to an appropriations bill forbidding the use of money appropriated therein to pay the salaries of three named persons whom the House of Representatives wished discharged because they were deemed to be “subversive.”

Then, in *United States v. Brown*, a sharply divided Court held void as a bill of attainder a statute making it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. Congress could, Chief Justice Warren wrote for the majority, under its commerce power, protect the economy from harm by enacting a prohibition generally applicable to any person who commits certain acts or possesses certain characteristics making him likely in Congress’ view to initiate political strikes or other harmful deeds and leaving it to the courts to determine whether a particular person committed the specified acts or possessed the specified characteristics. It was impermissible, however, for Congress to designate a class of persons—members of the Communist Party—as being forbidden to hold union office. The dissenters viewed the statute as merely expressing in shorthand the characteristics of those persons who were likely to utilize union responsibilities to accomplish harmful acts; Congress could validly conclude that all members of the Communist Party possessed those characteristics. The majority’s decision in *Brown* cast in doubt the Court’s approach and a plea to adhere to the traditional concept, see id. at 318 (Justice Frankfurter concurring).

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1793 For a rejection of the Court’s approach and a plea to adhere to the traditional concept, see id. at 318 (Justice Frankfurter concurring).
1794 71 U.S. (4 Wall.) 333 (1867).
1797 381 U.S. 437 (1965).
1798 The Court of Appeals had voided the statute as an infringement of First Amendment expression and association rights, but the Court majority did not choose to utilize this ground. 334 F. 2d 488 (9th Cir. 1964). However, in *United States v. Robel*, 389 U.S. 258 (1967), a very similar statute making it unlawful for any member of a “Communist-action organization” to be employed in a defense facility was struck down on First Amendment grounds and the bill of attainder argument was ignored.
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certain statutes and certain statutory formulations that had been held not to constitute bills of attainder. For example, a predecessor of the statute struck down in Brown, which had conditioned a union's access to the NLRB upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party, had been upheld,\(^{1800}\) and although Chief Justice Warren distinguished the previous case from Brown on the basis that the Court in the previous decision had found the statute to be preventive rather than punitive,\(^{1801}\) he then proceeded to reject the contention that the punishment necessary for a bill of attainder had to be punitive or retributive rather than preventive,\(^{1802}\) thus undermining the prior decision. Of much greater significance was the effect of the Brown decision on “conflict-of-interest” legislation typified by that upheld in Board of Governors v. Agnew.\(^{1803}\) The statute there forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank.\(^{1804}\) Chief Justice Warren distinguished the prior decision and the statute on three grounds from the statute then under consideration. First, the union statute inflicted its deprivation upon the members of a suspect political group in typical bill-of-attainder fashion, unlike the statute in Agnew. Second, in the Agnew statute, Congress did not express a judgment upon certain men or members of a particular group; it rather concluded that any man placed in the two positions would suffer a temptation any man might yield to. Third, Congress established in the Agnew statute an objective standard of conduct expressed in shorthand which precluded persons from holding the two positions.

Apparently withdrawing from the Brown analysis in upholding a statute providing for governmental custody of documents and recordings accumulated during the tenure of former President Nixon,\(^{1805}\) the Court set out a rather different formula for deciding bill of attainder cases.\(^{1806}\) The law specifically applied only to

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\(^{1800}\) American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
\(^{1802}\) Brown, 381 U.S. at 458–61.
\(^{1803}\) 329 U.S. 441 (1947).
\(^{1804}\) 12 U.S.C. § 78.
\(^{1806}\) Nixon v. Administrator of General Services, 433 U.S. 425, 468–484 (1977). Justice Stevens' concurrence is more specifically directed to the facts behind the statute than is the opinion of the Court, id. at 484, and Justice White, author of the dissent in Brown, merely noted he found the act nonpunitive. Id. at 487. Chief Justice Burger and Justice Rehnquist dissented. Id. at 504, 536–45. Adding to the

President Nixon and directed an executive agency to assume control over the materials and prepare regulations providing for ultimate public dissemination of at least some of them; the act assumed that it did not deprive the former President of property rights but authorized the award of just compensation if it should be judicially determined that there was a taking. First, the Court denied that the clause denies the power to Congress to burden some persons or groups while not so treating all other plausible individuals or groups; even the present law’s specificity in referring to the former President by name and applying only to him did not condemn the act because he “constituted a legitimate class of one” on whom Congress could “fairly and rationally” focus. Second, even if the statute’s specificity did bring it within the prohibition of the clause, the lodging of Mr. Nixon’s materials with the GSA did not inflict punishment within the meaning of the clause. This analysis was a three-pronged one: 1) the law imposed no punishment traditionally judged to be prohibited by the clause; 2) the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further nonpunitive legislative purposes; and 3) the law had no legislative record evincing a congressional intent to punish. That is, the Court, looking “to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect,” concluded that the statute served to further legitimate policies of preserving the availability of evidence for criminal trials and the functioning of the adversary legal system and in promoting the preservation of records of historical value, all in a way that did not and was not intended to punish the former President.

The clause protects individual persons and groups who are vulnerable to nonjudicial determinations of guilt and does not apply to a State; neither does a State have standing to invoke the clause for its citizens against the Federal Government.

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*impression of a departure from Brown is the quotation in the opinion of the Court at several points of the Brown dissent, id. at 470 n.31, 471 n.34, while the dissent quoted and relied on the opinion of the Court in Brown. Id. at 538, 542.*

*1807* 433 U.S. at 472. Justice Stevens carried the thought further, although in the process he severely limited the precedential value of the decision. Id. at 484.

*1808* 433 U.S. at 473–84.

Ex Post Facto Laws

Definition

Both federal and state governments are prohibited from enacting *ex post facto* laws, and the Court applies the same analysis whether the law in question is a federal or a state enactment. When these prohibitions were adopted as part of the original Constitution, many persons understood the term *ex post facto* laws to "embrace all retrospective laws, or laws governing or controlling past transactions, whether ... of a civil or a criminal nature." But in the early case of *Calder v. Bull*, the Supreme Court decided that the phrase, as used in the Constitution, was a term of art that applied only to penal and criminal statutes. But although it is inapplicable to retroactive legislation of any other kind, the constitutional prohibition may not be evaded by giving a civil form to a measure that is essentially criminal. Every law that makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution. A prosecution under a temporary statute which was extended before the date originally set for its expiration does not offend this provision even though it is instituted subsequent to the extension of the statute's duration for a violation committed prior thereto. Since this provision has no application to crimes committed outside the jurisdiction of the United States against the laws of a foreign country, it is immaterial in extradition proceedings whether the foreign law is *ex post facto* or not.

What Constitutes Punishment

The issue of whether a law is civil or punitive in nature is essentially the same for *ex post facto* and for double jeopardy analysis. "A court must ascertain whether the legislature intended the statute to establish civil proceedings. A court will reject the leg-

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1. The prohibition on state *ex post facto* legislation appears in Art. I, § 10, cl. 1.
2. 3 J. Story, Commentaries on the Constitution of the United States 1339 (1833).
3. 3 U.S. (3 Dall.) 386, 393 (1798).
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islature’s manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State’s intention.” 1819 A statute that has been held to be civil and not criminal in nature cannot be deemed punitive “as applied” to a single individual. 1820

A variety of federal laws have been challenged as ex post facto. A statute that prescribed as a qualification for practice before the federal courts an oath that the attorney had not participated in the Rebellion was found unconstitutional since it operated as a punishment for past acts. 1821 But a statute that denied to polygamists the right to vote in a territorial election was upheld even as applied to one who had not contracted a polygamous marriage and had not cohabited with more than one woman since the act was passed, because the law did not operate as an additional penalty for the offense of polygamy but merely defined it as a disqualification of a voter. 1822 A deportation law authorizing the Secretary of Labor to expel aliens for criminal acts committed before its passage is not ex post facto since deportation is not a punishment. 1823 For this reason, a statutory provision terminating payment of old-age benefits to an alien deported for Communist affiliation also is not ex post facto, for the denial of a non-contractual benefit to a deported alien is not a penalty but a regulation designed to relieve the Social Security System of administrative problems of supervision and enforcement likely to arise from disbursements to beneficiaries residing abroad. 1824 Likewise an act permitting the cancellation of naturalization certificates obtained by fraud prior to the passage of the law was held not to impose a punishment, but instead simply to deprive the alien of his ill-gotten privileges. 1825

Change in Place or Mode of Trial

A change of the place of trial of an alleged offense after its commission is not an ex post facto law. If no place of trial was pro-

1822 Murphy v. Ramsey, 114 U.S. 15 (1885).
1823 Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913); Marcello v. Bonds, 349 U.S. 302 (1955). Justices Black and Douglas, reiterating in Lehman v. United States ex rel. Carson, 355 U.S. 685, 690–691 (1957), their dissent from the premise that the ex post facto clause is directed solely to penal legislation, disapproved a holding that an immigration law, enacted in 1952, 8 U.S.C. § 1251, which authorized deportation of an alien who, in 1945, had acquired a status of nondeportability under pre-existing law is valid. In their opinion, to banish, in 1957, an alien who had lived in the United States for almost 40 years, for an offense committed in 1936, and for which he already had served a term in prison, was to subject him to new punishment retrospectively imposed.
Clause 4. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Direct Taxes

The Hylton Case

The crucial problem under clause 4 is to distinguish “direct” from other taxes. In its opinion in *Pollock v. Farmers’ Loan & Trust Co.*, the Court declared: “It is apparent ... that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it.” Against this confident dictum may be set the following brief excerpt from *Madison’s Notes on the Convention*: “Mr. King asked what was the precise meaning of direct taxation? No one answered.” The first case to come before the Court on this issue was *Hylton v. United States*, which was decided early in 1796. Congress has levied, according to the rule of uniformity, a specific tax upon all carriages, for the conveyance of persons, which were to be kept by, or for any person, for his own use, or to be let out for hire, or for the conveying of passengers. In a fictitious statement of facts, it was stipulated that the carriages involved in the case were kept exclusively for the personal use of the owner and not for hire. The principal argument for the constitutionality of the measure was made by Hamilton, who treated it as an “excise tax,” while

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1828 Hopt v. Utah, 110 U.S. 574, 589 (1884).
1829 157 U.S. 429, 573 (1895).
1831 3 U.S. (3 Dall.) 171 (1796).
1832 The Works of Alexander Hamilton 845 (J. Hamilton ed., 1851). “If the meaning of the word excise is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an excise, and then must necessarily be uniform and liable to apportionment; consequently, not a direct tax.”
Madison both on the floor of Congress and in correspondence attacked it as “direct” and so void, inasmuch as it was levied without apportionment. The Court, taking the position that the direct tax clause constituted in practical operation an exception to the general taxing powers of Congress, held that no tax ought to be classified as “direct” which could not be conveniently apportioned, and on this basis sustained the tax on carriages as one on their “use” and therefore an “excise.” Moreover, each of the judges advanced the opinion that the direct tax clause should be restricted to capitation taxes and taxes on land, or that at most, it might cover a general tax on the aggregate or mass of things that generally pervade all the States, especially if an assessment should intervene, while Justice Paterson, who had been a member of the Federal Convention, testified to his recollection that the principal purpose of the provision had been to allay the fear of the Southern States lest their Negroes and land should be subjected to a specific tax.

From the Hylton to the Pollock Case

The result of the Hylton case was not challenged until after the Civil War. A number of the taxes imposed to meet the demands of that war were assailed during the postwar period as direct taxes, but without result. The Court sustained successively, as “excises” or “duties,” a tax on an insurance company’s receipts for premiums and assessments; a tax on the circulating notes of state banks, an inheritance tax on real estate, and finally a general tax on incomes. In the last case, the Court took pains to state that it regarded the term “direct taxes” as having acquired a definite and fixed meaning, to wit, capitation taxes, and taxes on land. Then, almost one hundred years after the Hylton case, the famous case of Pollock v. Farmers’ Loan & Trust Co. arose under the Income Tax Act of 1894. Undertaking to correct “a century of error,” the Court held, by a vote of five-to-four, that a tax on income from property was a direct tax within the meaning

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1833 4 ANNALS OF CONGRESS 730 (1794); 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14 (1865).
1834 3 U.S. (3 Dall.) 171, 177 (1796).
1836 Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).
1839 102 U.S. at 602.
1840 157 U.S. 429 (1895); 158 U.S. 601 (1895).
of the Constitution and hence void because not apportioned according to the census.

**Restriction of the Pollock Decision**

The *Pollock* decision encouraged taxpayers to challenge the right of Congress to levy by the rule of uniformity numerous taxes that had always been reckoned to be excises. But the Court evinced a strong reluctance to extend the doctrine to such exactions. Purporting to distinguish taxes levied “because of ownership” or “upon property as such” from those laid upon “privileges,” it sustained as “excises” a tax on sales on business exchanges, a succession tax which was construed to fall on the recipients of the property transmitted rather than on the estate of the decedent, and a tax on manufactured tobacco in the hands of a dealer, after an excise tax had been paid by the manufacturer. Again, in *Thomas v. United States*, the validity of a stamp tax on sales of stock certificates was sustained on the basis of a definition of “duties, imposts and excises.” These terms, according to the Chief Justice, “were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.” On the same day, it ruled, in *Spreckels Sugar Refining Co. v. McClain*, that an exaction, designated a special excise tax, imposed on the business of refining sugar and measured by the gross receipts thereof, was in truth an excise and hence properly levied by the rule of uniformity. The lesson of *Flint v. Stone Tracy Co.* was the same. In the *Flint* case, what was in form an income tax was sustained as a tax on the privilege of doing business as a corporation, the value of the privilege being measured by the income, including income from investments. Similarly, in *Stanton v. Baltic Mining Co.*, a tax on the annual production of mines was held to be “independently of the effect of the operation of the Sixteenth Amendment . . . not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations.”

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1844 Knowlton v. Moore, 178 U.S. 41 (1900).
1846 192 U.S. 363 (1904).
1847 192 U.S. at 370.
1848 192 U.S. 397 (1904).
1849 220 U.S. 107 (1911).
1850 240 U.S. 103 (1916).
1851 240 U.S. at 114.
A convincing demonstration of the extent to which the Pollock decision had been whittled down by the time the Sixteenth Amendment was adopted is found in Billings v. United States.1852 In challenging an annual tax assessed for the year 1909 on the use of foreign built yachts—a levy not distinguishable in substance from the carriage tax involved in the Hylton case as construed by the Supreme Court—counsel did not even suggest that the tax should be classed as a direct tax. Instead, he based his argument that the exaction constituted a taking of property without due process of law upon the premise that it was an excise, and the Supreme Court disposed of the case upon the same assumption.

In 1921, the Court cast aside the distinction drawn in Knowlton v. Moore between the right to transmit property on the one hand and the privilege of receiving it on the other, and sustained an estate tax as an excise. “Upon this point,” wrote Justice Holmes for a unanimous Court, “a page of history is worth a volume of logic.”1853 This proposition being established, the Court had no difficulty in deciding that the inclusion in the computation of the estate tax of property held as joint tenants,1854 or as tenants by the entirety,1855 or the entire value of community property owned by husband and wife,1856 or the proceeds of insurance upon the life of the decedent,1857 did not amount to direct taxation of such property. Similarly, it upheld a graduated tax on gifts as an excise, saying that it was “a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another.”1858 Justice Sutherland, speaking for himself and two associates, urged that “the right to give away one’s property is as fundamental as the right to sell it or, indeed, to possess it.”1859

Miscellaneous

The power of Congress to levy direct taxes is not confined to the States represented in that body. Such a tax may be levied in proportion to population in the District of Columbia.1860 A penalty imposed for nonpayment of a direct tax is not a part of the tax

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1852 232 U.S. 261 (1914).
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itself and hence is not subject to the rule of apportionment. Accordingly, the Supreme Court sustained the penalty of fifty percent, which Congress exacted for default in the payment of the direct tax on land in the aggregate amount of twenty million dollars that was levied and apportioned among the States during the Civil War. 1861

Clause 5. No Tax or Duty shall be laid on Articles exported from any State.

Taxes on Exports

This prohibition applies only to the imposition of duties on goods by reason of exportation. 1862 The word “export” signifies goods exported to a foreign country, not to an unincorporated territory of the United States. 1863 A general tax laid on all property alike, including that intended for export, is not within the prohibition, if it is not levied on goods in course of exportation nor because of their intended exportation. 1864 Continuing its refusal to modify its export clause jurisprudence, 1865 the Court held unconstitutional the Harbor Maintenance Tax (HMT) under the export clause insofar as the tax was applied to goods loaded at United States ports for export. The HMT required shippers to pay a uniform charge on commercial cargo shipped through the Nation’s ports. The clause, said the Court, “categorically bars Congress from imposing any tax on exports.” 1866 However, the clause does not interdict a “user fee,” that is, a charge that lacks the attributes of a generally applicable tax or duty and is designed to compensate for government supplied services, facilities, or benefits, and it was that defense to which the Government repaired once it failed to obtain a modification of the rules under the clause. But the HMT bore the indicia of a tax. It was titled as a tax, described as a tax in the law, and codified in the Internal Revenue Code. Aside from labels, however, courts must look to how things operate, and the HMT did not qualify as a user fee. It did not represent compensation for services rendered. The value of export cargo did not correspond reliably with the federal harbor services used or usable by the exporter. Instead, the extent and manner of port use depended on such factors as size and

1863 Dooley v. United States, 183 U.S. 151, 154 (1901).
tollnage of a vessel and the length of time it spent in port. The HMT was thus a tax, and therefore invalid. Where the sale to a commission merchant for a foreign consignee was consummated by delivery of the goods to an exporting carrier, the sale was held to be a step in the exportation and hence exempt from a general tax on sales of such commodity. The giving of a bond for exportation of distilled liquor was not the commencement of exportation so as to exempt from an excise tax spirits that were not exported pursuant to such bond. A tax on the income of a corporation derived from its export trade was not a tax on “articles exported” within the meaning of the Constitution.

In United States v. IBM Corp., the Court declined the Government's argument that it should refine its export-tax-clause jurisprudence. Rather than read the clause as a bar on any tax that applies to a good in the export stream, the Court contended that the Court should bring this clause in line with the import-export clause and with dormant-commerce-clause doctrine. In that view, the Court should distinguish between discriminatory and nondiscriminatory taxes on exports. But the Court held that sufficient differences existed between the export clause and the other two clauses, so that its bar should continue to apply to any and all taxes on goods in the course of exportation.

Stamp Taxes

A stamp tax imposed on foreign bills of lading, charter parties, or marine insurance policies was in effect a tax or duty upon exports, and so void; but an act requiring the stamping

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1867 523 U.S. at 367–69.
1869 Thompson v. United States, 142 U.S. 471 (1892).
1872 Article I, § 10, cl. 2, applying to the States.
1875 Thames & Mersey Inc. v. United States, 237 U.S. 19 (1915). In United States v. IBM Corp., 517 U.S. 843 (1996), the Court adhered to Thames & Mersey, and held unconstitutional a federal excise tax upon insurance policies issued by foreign countries as applied to coverage for exported products. The Court admitted that one could question the earlier case's equating of a tax on the insurance of exported goods with a tax on the goods themselves, but it observed that the Government had chosen not to present that argument. Principles of stare decisis thus cautioned observance of the earlier case. Id. at 854–55. The dissenters argued that the issue had been presented and should be decided by overruling the earlier case. Id. at 863 (Justices Kennedy and Ginsburg dissenting).
of all packages of tobacco intended for export in order to prevent fraud was held not to be forbidden as a tax on exports. 1876

Clause 6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

The “No Preference” Clause

The limitations imposed by this section were designed to prevent preferences as between ports because of their location in different States. They do not forbid such discriminations as between individual ports. Acting under the commerce clause, Congress may do many things that benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighboring States. It may establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the convenient and economical handling of traffic. 1877 A rate order of the Interstate Commerce Commission which allowed an additional charge to be made for ferrying traffic across the Mississippi to cities on the east bank of the river was sustained over the objection that it gave an unconstitutional preference to ports in Texas. 1878 Although there were a few early intimations that this clause was applicable to the States as well as to Congress, 1879 the Supreme Court declared emphatically in 1886 that state legislation was unaffected by it. 1880 After more than a century, the Court confirmed, over the objection that this clause was offended, the power which the First Congress had exercised 1881 in sanctioning the continued supervision and regulation of pilots by the States. 1882

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1876 Pace v. Burgess, 92 U.S. 372 (1876); Turpin v. Burgess, 117 U.S. 504, 505 (1886).
1877 Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 131 (1931); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856); South Carolina v. Georgia, 93 U.S. 4 (1876). In Williams v. United States, 255 U.S. 336 (1921) the argument that an act of Congress which prohibited interstate transportation of liquor into States whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to this clause was rejected.
Clause 7. No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

Appropriations

This clause is a limitation upon the power of the Executive Department and does not restrict Congress in appropriating moneys in the Treasury.\(^{1883}\) That body may recognize and pay a claim of an equitable, moral, or honorary nature. When it directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it.\(^{1884}\) In making appropriations to pay claims arising out of the Civil War, Congress could, the Court held, lawfully provide that certain persons, i.e., those who had aided the Rebellion, should not be paid out of the funds made available by the general appropriation, but that such persons should seek relief from Congress.\(^{1885}\) The Court has also recognized that Congress has a wide discretion with regard to the extent to which it shall prescribe details of expenditures for which it appropriates funds and has approved the frequent practice of making general appropriations of large amounts to be allotted and expended as directed by designated government agencies. Citing as an example the act of June 17, 1902,\(^{1886}\) where all moneys received from the sale and disposal of public lands in a large number of States and territories were set aside as a special fund to be expended under the direction of the Secretary of the Interior upon such projects as he determined to be practicable and advisable for the reclamation of arid and semi-arid lands within those States and territories, the Court declared: “The constitutionality of this delegation of authority has never been seriously questioned.”\(^{1887}\)

Payment of Claims

No officer of the Federal Government is authorized to pay a debt due from the United States, whether reduced to judgment or not, without an appropriation for that purpose.\(^{1888}\) Nor may a gov-

\(^{1883}\) Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Knote v. United States, 95 U.S. 149, 154 (1877).


\(^{1885}\) Hart v. United States, 118 U.S. 62, 67 (1886).

\(^{1886}\) 32 Stat. 388 (1902).

\(^{1887}\) Cincinnati Soap Co. v. United States, 301 U.S. 308, 322 (1937).

Sec. 10—Powers Denied to the States

A government employee, by erroneous advice to a claimant, bind the United States through equitable estoppel principles to pay a claim for which an appropriation has not been made.\footnote{1889 OPM v. Richmond, 496 U.S. 414 (1990).}

After the Civil War, a number of controversies arose out of attempts by Congress to restrict the payment of the claims of persons who had aided the Rebellion but had thereafter received a pardon from the President. The Supreme Court held that Congress could not prescribe the evidentiary effect of a pardon in a proceeding in the Court of Claims for property confiscated during the Civil War,\footnote{1890 United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).} but that where the confiscated property had been sold and the proceeds paid into the Treasury, a pardon did not of its own force authorize the restoration of such proceeds.\footnote{1891 Knote v. United States, 95 U.S. 149, 154 (1877); Austin v. United States, 155 U.S. 417, 427 (1894).} It was within the competence of Congress to declare that the amount due to persons thus pardoned should not be paid out of the Treasury and that no general appropriation should extend to their claims.\footnote{1892 Hart v. United States, 118 U.S. 62, 67 (1886).}

Clause 8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

**IN GENERAL**

In 1871 the Attorney General of the United States ruled that: “A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power … but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative,” which is prohibited by this clause of the Constitution.\footnote{1893 13 Ops. Atty. Gen. 538 (1871).}

**SECTION 10. Clause 1.** No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but
gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Treaties, Alliances, or Confederations

At the time of the Civil War, this clause was one of the provisions upon which the Court relied in holding that the Confederation formed by the seceding States could not be recognized as having any legal existence. Today, its practical significance lies in the limitations which it implies upon the power of the States to deal with matters having a bearing upon international relations. In the early case of *Holmes v. Jennison*, Chief Justice Taney invoked it as a reason for holding that a State had no power to deliver up a fugitive from justice to a foreign State. More recently, the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, since the oil under the three mile marginal belt along the California coast might well become the subject of international dispute and since the ocean, including this three mile belt, is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the water area. In *Skiriotes v. Florida*, the Court, on the other hand, ruled that this clause did not disable Florida from regulating the manner in which its own citizens may engage in sponge fishing outside its territorial waters. Speaking for a unanimous Court, Chief Justice Hughes declared; “When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances.”

Bills of Credit

Within the sense of the Constitution, bills of credit signify a paper medium of exchange, intended to circulate between individuals, and between the Government and individuals, for the ordi-
nary purposes of society. It is immaterial whether the quality of legal tender is imparted to such paper. Interest bearing certificates, in denominations not exceeding ten dollars, which were issued by loan offices established by the State of Missouri and made receivable in payment of taxes or other moneys due to the State, and in payment of the fees and salaries of state officers, were held to be bills of credit whose issuance was banned by this section.\textsuperscript{1899} The States are not forbidden, however, to issue coupons receivable for taxes,\textsuperscript{1900} nor to execute instruments binding themselves to pay money at a future day for services rendered or money borrowed.\textsuperscript{1901} Bills issued by state banks are not bills of credit;\textsuperscript{1902} it is immaterial that the State is the sole stockholder of the bank,\textsuperscript{1903} that the officers of the bank were elected by the state legislature,\textsuperscript{1904} or that the capital of the bank was raised by the sale of state bonds.\textsuperscript{1905}

### Legal Tender

Relying on this clause, which applies only to the States and not to the Federal Government,\textsuperscript{1906} the Supreme Court has held that where the marshal of a state court received state bank notes in payment and discharge of an execution, the creditor was entitled to demand payment in gold or silver.\textsuperscript{1907} Since, however, there is nothing in the Constitution prohibiting a bank depositor from consenting when he draws a check that payment may be made by draft, a state law providing that checks drawn on local banks should, at the option of the bank, be payable in exchange drafts was held valid.\textsuperscript{1908}

### Bills of Attainder

Statutes passed after the Civil War with the intent and result of excluding persons who had aided the Confederacy from following certain callings, by the device of requiring them to take an oath

\textsuperscript{1900}Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 269 (1885); Chaffin v. Taylor, 116 U.S. 567 (1886).
\textsuperscript{1901}Houston & Texas Cent. R.R. v. Texas, 177 U.S. 66 (1900).
\textsuperscript{1905}Woodruff v. Trapnell, 51 U.S. (10 How.) 190, 205 (1851).
\textsuperscript{1906}Juilliard v. Greenman, 110 U.S. 421, 446 (1884).
\textsuperscript{1908}Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 659 (1923).
that they had never given such aid, were held invalid as being bills of attainder, as well as ex post facto laws.\(^\text{1909}\)

Other attempts to raise bill-of-attainder claims have been unsuccessful. A Court majority denied that a municipal ordinance that required all employees to execute oaths that they had never been affiliated with Communist or similar organizations, violated the clause, on the grounds that the ordinance merely provided standards of qualifications and eligibility for employment.\(^\text{1910}\) A law that prohibited any person convicted of a felony and not subsequently pardoned from holding office in a waterfront union was not a bill of attainder because the “distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt” and the prohibition “embodies no further implications of appellant’s guilt than are contained in his 1920 judicial conviction.”\(^\text{1911}\)

### Ex Post Facto Laws

**Scope of the Provision.**—This clause, like the cognate restriction imposed on the Federal Government by § 9, relates only to penal and criminal legislation and not to civil laws that affect private rights adversely.\(^\text{1912}\) There are three categories of ex post facto laws: those “which punish[ ] as a crime an act previously committed, which was innocent when done; which make[ ] more burdensome the punishment for a crime, after its commission; or which deprive[ ] one charged with crime of any defense available according to law at the time when the act was committed.”\(^\text{1913}\)


\(^{1913}\) Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting Beazell v. Ohio, 269 U.S. 167, 169–170 (1925)). Alternatively, the Court described the reach of the clause as extending to laws that “alter the definition of crimes or increase the punishment for criminal acts.” Id. at 43. Justice Chase’s oft-cited formulation has a fourth category: “every law that aggravates a crime, or makes it greater than it was, when committed.” Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), cited in, e.g., Carmell v. Texas, 529 U.S. 513, 522 (2000).
The fact that a law is *ex post facto* and invalid as to crimes committed prior to its enactment does not affect its validity as to subsequent offenses. A statute that mitigates the rigor of the law in force at the time the crime was committed, or merely penalizes the continuance of conduct lawfully begun before its passage, is not *ex post facto*. Thus, measures penalizing the failure of a railroad to cut drains through existing embankments or making illegal the continued possession of intoxicating liquors which were lawfully acquired have been held valid.

**Denial of Future Privileges to Past Offenders.**—The right to practice a profession may be denied to one who was convicted of an offense before the statute was enacted if the offense reasonably may be regarded as a continuing disqualification for the profession. Without offending the Constitution, statutes barring a person from practicing medicine after conviction of a felony or excluding convicted felons from waterfront union offices unless pardoned or in receipt of a parole board’s good conduct certificate may be enforced against a person convicted before the measures were passed. But the test oath prescribed after the Civil War, whereby office holders, teachers, or preachers were required to swear that they had not participated in the Rebellion, was held invalid on the ground that it had no reasonable relation to fitness to perform official or professional duties, but rather was a punishment for past offenses. A similar oath required of suitors in the courts also was held void.

**Changes in Punishment.**—Statutes that changed an indeterminate sentence law to require a judge to impose the maximum sentence, whereas formerly he could impose a sentence between the

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minimum and maximum, required criminals sentenced to death to be kept thereafter in solitary confinement, or allowed a warden to fix, within limits of one week, and keep secret the time of execution, were held to be *ex post facto* as applied to offenses committed prior to their enactment. Because it made more onerous the punishment for crimes committed before its enactment, a law, a law that altered sentencing guidelines to make it more likely the sentencing authority would impose on a defendant a more severe sentence than was previously likely and making it impossible for the defendant to challenge the sentence was *ex post facto* as to one who had committed the offense prior to the change. But laws providing heavier penalties for new crimes thereafter committed by habitual criminals, changing the punishment from hanging to electrocution, fixing the place therefor in the penitentiary, and permitting the presence of a greater number of invited witnesses, or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail prior to execution, and substituting the warden for the sheriff as hangman, have been sustained.

In *Dobbert v. Florida*, the Court may have formulated a new test for determining when a criminal statute *vis-a-vis* punishment is *ex post facto*. Defendant murdered two of his children; at the time of the commission of the offenses, Florida law provided the death penalty upon conviction for certain takings of life. Subsequent to the commission of the capital offenses, the Supreme Court held capital sentencing laws similar to Florida's unconstitutional, although convictions obtained under the statutes were not to be

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1924 Holden v. Minnesota, 137 U.S. 483, 491 (1890).
1925 Medley, Petitioner, 134 U.S. 160, 171 (1890).
1926 Miller v. Florida, 482 U.S. 423 (1987). *But see* California Dep't of Corrections v. Morales, 514 U.S. 499 (1995) (a law amending parole procedures to decrease frequency of parole-suitability hearings is not *ex post facto* as applied to prisoners who committed offenses before enactment). The opinion modifies previous opinions that had held impermissible some laws because they operated to the disadvantage of covered offenders. Henceforth, “the focus of *ex post facto* inquiry is ... whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.” Id. at 506 n.3. *Accord*, Garner v. Jones, 529 U.S. 244 (2000) (evidence insufficient to determine whether change in frequency of parole hearings significantly increases the likelihood of prolonging incarceration). *But see* Lynce v. Mathis, 519 U.S. 433 (1997) (cancellation of release credits already earned and used, resulting in reincarceration, violates the Clause).
overturned, and the Florida Supreme Court voided its death penalty statutes on the authority of the High Court decision. The Florida legislature then enacted a new capital punishment law, which was sustained. Dobbert was convicted and sentenced to death under the new law, which was enacted after the commission of his offenses. The Court rejected the *ex post facto* challenge to the sentence on the basis that whether the old statute was constitutional or not, “it clearly indicated Florida’s view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.” Whether the “fair warning” standard is to have any prominent place in *ex post facto* jurisprudence may be an interesting question, but it is problematical whether the fact situation will occur often enough to make the principle applicable in very many cases.

**Changes in Procedure.**—An accused person does not have a right to be tried in all respects in accordance with the law in force when the crime charged was committed. Laws shifting the place of trial from one county to another, increasing the number of appellate judges and dividing the appellate court into divisions, granting a right of appeal to the State, changing the method of selecting and summoning jurors, making separate trials for persons jointly indicted a matter of discretion for the trial court rather than a matter of right, and allowing a comparison of handwriting experts have been sustained over the objection that they were *ex post facto*. It was said or suggested in a number of these cases, and two decisions were rendered precisely on the basis, that the mode of procedure might be changed only so long as the substantial rights of the accused were not curtailed. The

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1932 432 U.S. at 297.
1940 E.g., Duncan v. Missouri, 152 U.S. 377, 382–383 (1894); Malloy v. South Carolina, 237 U.S. 180, 183 (1915); Beazell v. Ohio, 269 U.S. 167, 171 (1925). The two cases decided on the basis of the distinction were Thompson v. Utah, 170 U.S. 343 (1898) (application to felony trial for offense committed before enactment of change from 12-person jury to an eight-person jury void under clause), and Kring v. Missouri, 107 U.S. 221 (1883) (as applied to a case arising before change, a law abolishing a rule under which a guilty plea functioned as an acquittal of a more seri-
Court has now disavowed this position. All that the language of most of these cases meant was that a legislature might not evade the *ex post facto* clause by labeling changes as alteration of “procedure.” If a change labeled “procedural” affects a substantive change in the definition of a crime or increases punishment or denies a defense, the clause is invoked; however, if a law changes the procedures by which a criminal case is adjudicated, the clause is not implicated, regardless of the increase in the burden on a defendant.

Changes in evidentiary rules that allow conviction on less evidence than was required at the time the crime was committed can also run afoul of the *ex post facto* clause. This principle was applied in the Court’s invalidation of retroactive application of a Texas law that eliminated the requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses, and allowed conviction on the victim’s testimony alone.

### Obligation of Contracts

**“Law” Defined.** —The term comprises statutes, constitutional provisions, municipal ordinances, and administrative regulations having the force and operation of statutes. But are judicial decisions within the clause? The abstract principle of the separation of powers, at least until recently, forbade the idea that the courts “make” law and the word “pass” in the above clause seemed to confine it to the formal and acknowledged methods of exercise of the law-making function. Accordingly, the Court has frequently said that the clause does not cover judicial decisions, however erroneous, or whatever their effect on existing contract rights.
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Nevertheless, there are important exceptions to this rule that are set forth below.

**Status of Judicial Decisions.**—While the highest state court usually has final authority in determining the construction as well as the validity of contracts entered into under the laws of the State, and the national courts will be bound by their decision of such matters, nevertheless, for reasons that are fairly obvious, this rule does not hold when the contract is one whose obligation is alleged to have been impaired by state law. Otherwise, the challenged state authority could be vindicated through the simple device of a modification or outright nullification by the state court of the contract rights in issue. Similarly, the highest state court usually has final authority in construing state statutes and determining their validity in relation to the state constitution. But this rule too has had to bend to some extent to the Supreme Court's interpretation of the obligation of contracts clause.

Suppose the following situation: (1) a municipality, acting under authority conferred by a state statute, has issued bonds in aid of a railway company; (2) the validity of this statute has been sustained by the highest state court; (3) later the state legislature passes an act to repeal certain taxes to meet the bonds; (4) it is sustained in doing so by a decision of the highest state court holding that the statute authorizing the bonds was unconstitutional ab initio. In such a case the Supreme Court would take an appeal from the state court and would reverse the latter's decision of unconstitutionality because of its effect in rendering operative the act to repeal the tax.

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Suppose further, however, that the state court has reversed itself on the question of the constitutionality of the bonds in a suit by a creditor for payment without there having been an act of repeal. In this situation, the Supreme Court would still afford relief if the case is one between citizens of different States, which reaches it via a lower federal court. This is because in cases of this nature the Court formerly felt free to determine questions of fundamental justice for itself. Indeed, in such a case, the Court has apparently in the past regarded itself as free to pass upon the constitutionality of the state law authorizing the bonds even though there has been no prior decision by the highest state court sustaining them, the idea being that contracts entered into simply on the faith of the presumed constitutionality of a state statute are entitled to this protection.

In other words, in cases of which it has jurisdiction because of diversity of citizenship, the Court has held that the obligation of contracts is capable of impairment by subsequent judicial decisions no less than by subsequent statutes and that it is able to prevent such impairment. In cases, on the other hand, of which it obtains jurisdiction only on the constitutional ground and by appeal from a state court, it has always adhered in terms to the doctrine that the word “laws” as used in Article I, § 10, does not comprehend judicial decisions. Yet even in these cases, it will intervene to protect contracts entered into on the faith of existing decisions from an impairment that is the direct result of a reversal of such decisions, but there must be in the offing, as it were, a statute of some kind—one possibly many years older than the contract rights involved—on which to pin its decision.

In 1922, Congress, through an amendment to the Judicial Code, endeavored to extend the reviewing power of the Supreme Court to suits involving “... the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States....” This appeared to be an invitation to the Court to say frankly that the obligation of a contract can be impaired by a subsequent court decision. The Court, however, declined the invitation in an opinion by

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Chief Justice Taft that reviewed many of the cases covered in the preceding paragraphs.

Dealing with *Gelpcke* and adherent decisions, Chief Justice Taft said: “These cases were not writs of error to the Supreme Court of a State. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a State prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the state law was, and to enforce it as laid down by the state Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third Article of the Federal Constitution they were empowered to do. *Burgess v. Seligman*, 107 U.S. 20 (1883).”

While doubtless this was an available explanation in 1924, the decision in 1938 in *Erie Railroad Co. v. Tompkins*, so cut down the power of the federal courts to decide diversity of citizenship cases according to their own notions of “general principles of common law” as to raise the question whether the Court will not be required eventually to put *Gelpcke* and its companions and descendants squarely on the obligation of contracts clause or else abandon them.

**“Obligation” Defined.**—A contract is analyzable into two elements: the agreement, which comes from the parties, and the obligation, which comes from the law and makes the agreement binding on the parties. The concept of obligation is an importation from the Civil Law and its appearance in the contracts clause is supposed to have been due to James Wilson, a graduate of Scottish universities and a Civilian. Actually, the term as used in the contracts clause has been rendered more or less superfluous by the doctrine that the law in force when a contract is made enters into and comprises a part of the contract itself. Hence, the Court sometimes recognizes the term in its decisions applying the clause, sometimes ignores it. In *Sturges v. Crowninshield*, Marshall defined “obligation of contract” as “the law which binds the parties to perform their agreement;” but a little later the same year he set

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1955 304 U.S. 64 (1938).
forth the points presented for consideration in *Dartmouth College v. Woodward*,\(^{1958}\) to be: “1. Is this contract protected by the Constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?”\(^{1959}\) The word “obligation” undoubtedly does carry the implication that the Constitution was intended to protect only executory contracts—i.e., contracts still awaiting performance, but this implication was early rejected for a certain class of contracts, with immensely important result for the clause.

**“Impair” Defined.**—“The obligations of a contract,” said Chief Justice Hughes for the Court in *Home Building & Loan Ass’n v. Blaisdell*,\(^{1960}\) “are impaired by a law which renders them invalid, or releases or extinguishes them . . ., and impairment . . . has been predicated upon laws which without destroying contracts derogate from substantial contractual rights.”\(^{1961}\) But he adds: “Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.”\(^{1962}\) In short, the law from which the obligation stems must be understood to include constitutional law and, moreover a “progressive” constitutional law.\(^{1963}\)

**Vested Rights Not Included.**—The term “contracts” is used in the contracts clause in its popular sense of an agreement of minds. The clause therefore does not protect vested rights that are not referable to such an agreement between the State and an individual, such as the right of recovery under a judgment. The individual in question may have a case under the Fourteenth Amendment, but not one under Article I, § 10.\(^{1964}\)

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1959 17 U.S. at 627.
1961 290 U.S. at 431.
1963 The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency.” Justice Black, in Wood v. Lovett, 313 U.S. 362, 383 (1941).
1964 Crane v. Hahlo, 258 U.S. 142, 145–146 (1922); Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 288 (1883); Morley v. Lake Shore Ry., 146 U.S. 162, 169 (1892). That the obligation of contracts clause did not protect vested rights merely as such was stated by the Court as early as Satterlee v. Matthewson,
Public Grants That Are Not “Contracts”.—Not all grants by a State constitute “contracts” within the sense of Article I, § 10. In his *Dartmouth College* decision, Chief Justice Marshall conceded that “if the act of incorporation be a grant of political power, if it creates a civil institution, to be employed in the administration of the government... the subject is one in which the legislature of the State may act according to its own judgment,” unrestrained by the Constitution—thereby drawing a line between “public” and “private” corporations that remained undisturbed for more than half a century.

It has been subsequently held many times that municipal corporations are mere instrumentalities of the State for the more convenient administration of local governments, whose powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the legislature. The same principle applies, moreover, to the property rights which the municipality derives either directly or indirectly from the State. This was first held as to the grant of a franchise to a municipality to operate a ferry and has since then been recognized as the universal rule. It was stated in a case decided in 1923 that the distinction between the municipality as an agent of the State for governmental purposes and as an organization to care for local needs in a private or proprietary capacity, while it limited the legal liability of municipalities for the negligent acts or omissions of its officers or agents, did not, on the other hand, furnish ground for the application of constitutional restraints against the State in favor of its own municipalities. Thus, no contract rights were impaired by a statute relocating a county seat, even though the former location was by law to be “permanent” and the citizens of the community had donated land and furnished bonds for the erection of public buildings. Similarly, a statute changing the boundaries of a school district, giving to the new district...
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the property within its limits that had belonged to the former district, and requiring the new district to assume the debts of the old district, did not impair the obligation of contracts.\(^{1971}\) Nor was the contracts clause violated by state legislation authorizing state control over insolvent communities through a Municipal Finance Commission.\(^{1972}\)

On the same ground of public agency, neither appointment nor election to public office creates a contract in the sense of Article I, § 10, whether as to tenure, or salary, or duties, all of which remain, so far as the Constitution of the United States is concerned, subject to legislative modification or outright repeal.\(^{1973}\) Indeed, there can be no such thing in this country as property in office, although the common law sustained a different view sometimes reflected in early cases.\(^{1974}\) When, however, services have once been rendered, there arises an implied contract that they shall be compensated at the rate in force at the time they were rendered.\(^{1975}\) Also, an express contract between the State and an individual for the performance of specific services falls within the protection of the Constitution. Thus, a contract made by the governor pursuant to a statute authorizing the appointment of a commissioner to conduct, over a period of years, a geological, mineralogical, and agricultural survey of the State, for which a definite sum had been authorized, was held to have been impaired by repeal of the statute.\(^{1976}\) But a resolution of a local board of education reducing teachers’ salaries for the school year 1933–1934, pursuant to an act of the legislature authorizing such action, was held not to impair the contract of a teacher who, having served three years, was by earlier legislation exempt from having his salary reduced except for inefficiency or misconduct.\(^{1977}\) Similarly, it was held that an Illinois statute that reduced the annuity payable to retired teachers under an earlier act did not violate the contracts clause, since it had not been the intention of the earlier act to propose a contract but only to put


into effect a general policy. On the other hand, the right of one, who had become a “permanent teacher” under the Indiana Teachers Tenure Act of 1927, to continued employment was held to be contractual and to have been impaired by the repeal in 1933 of the earlier act.

**Tax Exemptions: When Not “Contracts”**.—From a different point of view, the Court has sought to distinguish between grants of privileges, whether to individuals or to corporations, which are contracts and those which are mere revocable licenses, although on account of the doctrine of presumed consideration mentioned earlier, this has not always been easy to do. In pursuance of the precedent set in *New Jersey v. Wilson*, the legislature of a State “may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation, to which such property shall be subjected,” and such an exemption is frequently a contract within the sense of the Constitution. Indeed this is always so when the immunity is conferred upon a corporation by the clear terms of its charter. When, on the other hand, an immunity of this sort springs from general law, its precise nature is more open to doubt, as a comparison of decisions will serve to illustrate.

In *State Bank of Ohio v. Knoop*, a closely divided Court held that a general banking law of Ohio, which provided that companies complying therewith and their stockholders should be exempt from all but certain taxes, was, as to a bank organized under it and its stockholders, a contract within the meaning of Article I, § 10. The provision was not, the Court said, “a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted.” When, however, the State of Michigan pledged itself, by a general legislative act, not to tax any corporation, company, or individual undertaking to manufacture salt in the State from water there obtained by boring on property used for this purpose and, furthermore, to pay a bounty on the salt so manufactured, it was held not to have engaged itself within the constitutional sense. “General encouragements,”

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1980 11 U.S. (7 Cr.) 164 (1812).
1983 57 U.S. at 382–83.
said the Court, "held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time." So far as exemption from taxation is concerned the difference between these two cases is obviously slight, but the later one is unquestionable authority for the proposition that legislative bounties are repealable at will.

Furthermore, exemptions from taxation have in certain cases been treated as gratuities repealable at will, even when conferred by specific legislative enactments. This would seem always to be the case when the beneficiaries were already in existence when the exemption was created and did nothing of a more positive nature to qualify for it than to continue in existence. Yet the cases are not always easy to explain in relation to each other, except in light of the fact that the Court's point of view has altered from time to time.

"Contracts" Include Public Contracts and Corporate Charters.—The question, which was settled very early, was whether the clause was intended to be applied solely in protection of private contracts or in the protection also of public grants, or, more broadly, in protection of public contracts, in short, those to which a State is a party. Support for the affirmative answer accorded this question could be derived from the following sources.

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1987 According to Benjamin F. Wright, throughout the first century of government under the Constitution "the contract clause had been considered in almost forty per cent of all cases involving the validity of State legislation," and of these the vast proportion involved legislative grants of one type or other, the most important category being charters of incorporation. However, the numerical prominence of such grants in the cases does not overrate their relative importance from the point of view of public interest. B. Wright, The Contract Clause of the Constitution 95 (1938).

Madison explained the clause by allusion to what had occurred "in the internal administration of the States" in the years preceding the Constitutional Convention, in regard to private debts. Violations of contracts had become familiar in the form of depreciated paper made legal tender, of property substituted for money, of installment laws, and of the omissions of the courts of justice. 3 M. Farrand, The Records of the Federal Convention of 1787 548 (rev. ed. 1937); The Federalist, No. 44 (J. Cooke ed. 1961), 301–302.
For one thing, the clause departed from the comparable provision in the Northwest Ordinance (1787) in two respects: first, in the presence of the word “obligation;” secondly, in the absence of the word “private.” There is good reason for believing that James Wilson may have been responsible for both alterations, inasmuch as two years earlier he had denounced a current proposal to repeal the Bank of North America’s Pennsylvania charter in the following words: “If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, every precedent will be established for repealing, in the same manner, every other legislative charter in Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will never be wanting on any future occasion. Those acts of the state, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politicks, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction.”

Furthermore, in its first important constitutional case, that of *Chisholm v. Georgia*, the Court ruled that its original jurisdiction extended to an action in assumpsit brought by a citizen of South Carolina against the State of Georgia. This construction of the federal judicial power was, to be sure, promptly repealed by the Eleventh Amendment, but without affecting the implication that the contracts protected by the Constitution included public contracts.

One important source of this diversity of opinion is to be found in that ever welling spring of constitutional doctrine in early days, the prevalence of natural law notions and the resulting vague significance of the term “law.” In *Sturges v. Crowninshield*, Marshall defined the obligation of contracts as “the law which binds the parties to perform their undertaking.” Whence, however, comes this law? If it comes from the State alone, which Marshall was later to deny even as to private contracts, then it is hardly possible to hold that the States’ own contracts are covered by the clause, which manifestly does not create an obligation for contracts but only protects such obligation as already exists. But, if, on the other hand, the law furnishing the obligation of contracts comprises Natural Law and kindred principles, as well as law which springs from state authority, then, inasmuch as the State itself is presumably

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1989 2 U.S. (2 Dall.) 419 (1793).
bound by such principles, the State's own obligations, so far as harmonious with them, are covered by the clause.

_Fletcher v. Peck_ 1991 has the double claim to fame that it was the first case in which the Supreme Court held a state enactment to be in conflict with the Constitution, and also the first case to hold that the contracts clause protected public grants. By an act passed on January 7, 1795, the Georgia Legislature directed the sale to four land companies of public lands comprising most of what are now the States of Alabama and Mississippi. As soon became known, the passage of the measure had been secured by open and wholesale bribery. So when a new legislature took over in the winter of 1795–1796, almost its first act was to revoke the sale made the previous year.

Meantime, however, the land companies had disposed of several millions of acres of their holdings to speculators and prospective settlers, and following the rescinding act some of these took counsel with Alexander Hamilton as to their rights. In an opinion which was undoubtedly known to the Court when it decided _Fletcher v. Peck_, Hamilton characterized the repeal as contravening "the first principles of natural justice and social policy," especially so far as it was made "to the prejudice . . . of third persons . . . innocent of the alleged fraud or corruption; . . . moreover," he added, "the Constitution of the United States, article first, section tenth, declares that no State shall pass a law impairing the obligations of contract. This must be equivalent to saying no State shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be a State or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the Constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null. And that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so." 1992 In the debate to which the "Yazoo Land Frauds," as they were contemporaneously known, gave rise in Congress, Hamilton's views were quoted frequently.

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So far as it invoked the obligation of contracts clause, Marshall’s opinion in *Fletcher v. Peck* performed two creative acts. He recognized that an obligatory contract was one still to be performed—in other words, an executory contract, also that a grant of land was an executed contract—a conveyance. But, he asserted, every grant is attended by “an implied contract” on the part of the grantor not to claim again the thing granted. Thus, grants are brought within the category of contracts having continuing obligation and so within Article I, § 10. But the question still remained of the nature of this obligation. Marshall’s answer to this can only be inferred from his statement at the end of his opinion. The State of Georgia, he says, “was restrained” from the passing of the rescinding act “either by general principles which are common to our free institutions, or by particular provisions of the Constitution of the United States.”

The protection thus thrown about land grants was presently extended, in the case of *New Jersey v. Wilson*, to a grant of immunity from taxation that the State of New Jersey had accorded certain Indian lands, and several years after that, in the *Dartmouth College* case, to the charter privileges of an eleemosynary corporation.

In *City of El Paso v. Simmons*, the Court held, over a vigorous dissent by Justice Black, that Texas had not violated this clause when it amended its laws governing the sale of public lands so as to restrict the previously unlimited right of a delinquent to reinstate himself upon forfeited land by a single payment of all past interest due.

**Corporate Charters: Different Ways of Regarding.**—There are three ways in which the charter of a corporation may be regarded. In the first place, it may be thought of simply as a license terminable at will by the State, like a liquor-seller’s license or an auctioneer’s license, but affording the incorporators, so long as it remains in force, the privileges and advantages of doing business in the form of a corporation. Nowadays, indeed, when corporate

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1993 10 U.S. (6 Cr.) 87, 139 (1810). Justice Johnson, in his concurring opinion, relied exclusively on general principles. “I do not hesitate to declare, that a State does not possess the power of revoking its own grants. But I do it, on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity.” Id. at 143.

1994 11 U.S. (7 Cr.) 164 (1812). The exemption from taxation which was involved in this case was held in 1886 to have lapsed through the acquiescence for sixty years by the owners of the lands in the imposition of taxes upon these. Given v. Wright, 117 U.S. 648 (1886).


charters are usually issued to all legally qualified applicants by an administrative officer who acts under a general statute, this would probably seem to be the natural way of regarding them were it not for the Dartmouth College decision. But, in 1819 charters were granted directly by the state legislatures in the form of special acts and there were very few profit-taking corporations in the country. The later extension of the benefits of the Dartmouth College decision to corporations organized under general law took place without discussion.

Secondly, a corporate charter may be regarded as a franchise constituting a vested or property interest in the hands of the holders, and therefore as forfeitable only for abuse or in accordance with its own terms. This is the way in which some of the early state courts did regard them at the outset.\footnote{In 1806 Chief Justice Parsons of the Supreme Judicial Court of Massachusetts, without mentioning the contracts clause, declared that rights legally vested in a corporation cannot be “controlled of destroyed by a subsequent statute, unless a power [for that purpose] be reserved to the legislature in the act of incorporation,” Wales v. Stetson, 2 Mass. 142 (1806). See also Stoughton v. Baker, 4 Mass. 521 (1808) to like effect; cf. Locke v. Dune, 9 Mass. 360 (1812), in which it is said that the purpose of the contracts clause was to provide against paper money and insolvent laws. Together these holdings add up to the conclusion that the reliance of the Massachusetts court was on “fundamental principles,” rather than the contracts clause.} It is also the way in which Blackstone regarded them in relation to the royal prerogative, although not in relation to the sovereignty of Parliament, and the same point of view found expression in Story’s concurring opinion in Dartmouth College v. Woodward, as it did also in Webster’s argument in that case.\footnote{17 U.S. (4 Wheat.) at 577–595 (Webster’s argument); id. at 666 (Story’s opinion). See also Story’s opinion for the Court in Terrett v. Taylor, 13 U.S. (9 Cr.) 43 (1815).}

The third view is the one formulated by Chief Justice Marshall in his controlling opinion in Dartmouth College v. Woodward.\footnote{17 U.S. (4 Wheat.) 518 (1819).} This is that the charter of Dartmouth College, a purely private institution, was the outcome and partial record of a contract between the donors of the college, on the one hand, and the British Crown, on the other, and the contract still continued in force between the State of New Hampshire, as the successor to the Crown and Government of Great Britain, and the trustees, as successors to the donors. The charter, in other words, was not simply a grant—rather it was the documentary record of a still existent agreement between still existent parties.\footnote{17 U.S. at 627.} Taking this view, which he developed with great ingenuity and persuasiveness, Marshall was able to appeal to the obligation of contracts clause directly, and without...
further use of his fiction in *Fletcher v. Peck* of an executory contract accompanying the grant.

A difficulty still remained, however, in the requirement that a contract, before it can have obligation, must import consideration, that is to say, must be shown not to have been entirely gratuitous on either side. Moreover, the consideration, which induced the Crown to grant a charter to Dartmouth College, was not merely a speculative one. It consisted of the donations of the donors to the important public interest of education. Fortunately or unfortunately, in dealing with this phase of the case, Marshall used more sweeping terms than were needed. “The objects for which a corporation is created,” he wrote, “are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant.” In other words, the simple fact of the charter having been granted imports consideration from the point of view of the State. With this doctrine before it, the Court in *Providence Bank v. Billings*, and again in *Charles River Bridge v. Warren Bridge*, admitted without discussion of the point, the applicability of the *Dartmouth College* decision to purely business concerns.

**Reservation of Right to Alter or Repeal Corporate charters.**—It is next in order to consider four principles or doctrines whereby the Court has itself broken down the force of the *Dartmouth College* decision in great measure in favor of state legislative power. By the logic of the *Dartmouth College* decision itself, the State may reserve in a corporate charter the right to “amend, alter, and repeal” the same, and such reservation becomes a part of the contract between the State and the incorporators, the obligation of which is accordingly not impaired by the exercise of the right. Later decisions recognize that the State may reserve the right to amend, alter, and repeal by general law, with the result of incorporating the reservation in all charters of subsequent date. There is, however, a difference between a reservation by a statute and one by constitutional provision. While the former may be re-

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2001 17 U.S. at 637; *see also* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 437 (1869).
pealed as to a subsequent charter by the specific terms thereof, the latter may not. 2006

Is the right reserved by a State to “amend” or “alter” a charter without restriction? When it is accompanied, as it generally is, by the right to “repeal,” one would suppose that the answer to this question was self-evident. Nonetheless, there are a number of judicial dicta to the effect that this power is not without limit, that it must be exercised reasonably and in good faith, and that the alterations made must be consistent with the scope and object of the grant. 2007 Such utterances amount, apparently, to little more than an anchor to windward, for while some of the state courts have applied tests of this nature to the disallowance of legislation, it does not appear that the Supreme Court of the United States has ever done so. 2008

Quite different is it with the distinction pointed out in the cases between the franchises and privileges that a corporation derives from its charter and the rights of property and contract that accrue to it in the course of its existence. Even the outright repeal of the former does not wipe out the latter or cause them to escheat to the State. The primary heirs of the defunct organization are its creditors, but whatever of value remains after their valid claims are met goes to the former shareholders. 2009 By the earlier weight of authority, on the other hand, persons who contract with companies whose charters are subject to legislative amendment or repeal do so at their own risk; any “such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the State and the corporation in respect to the right of the State to alter, modify, or amend such a charter…” 2010 But later holdings becloud this rule. 2011
Corporation Subject to the Law and Police Power.—But suppose the State neglects to reserve the right to amend, alter, or repeal. Is it, then, without power to control its corporate creatures? By no means. Private corporations, like other private persons, are always presumed to be subject to the legislative power of the State, from which it follows that immunities conferred by charter are to be treated as exceptions to an otherwise controlling rule. This principle was recognized by Chief Justice Marshall in the case of Providence Bank v. Billings, in which he held that in the absence of express stipulation or reasonable implication to the contrary in its charter, the bank was subject to the taxing power of the State, notwithstanding that the power to tax is the power to destroy.

And of course the same principle is equally applicable to the exercise by the State of its police powers. Thus, in what was perhaps the leading case before the Civil War, the Supreme Court of Vermont held that the legislature of that State had the right, in furtherance of the public safety, to require chartered companies operating railways to fence in their tracks and provide cattle guards. In a matter of this nature, said the court, corporations are on a level with individuals engaged in the same business, unless, from their charter, they can prove the contrary.

Since then the rule has been applied many times in justification of state regulation of railroads, and even of the application of a state prohibition law.

Likewise the State, in the public interest, may require a railroad to reestablish an abandoned station, even though the railroad commission had previously authorized its abandonment on condition that another station be established elsewhere, a condition which had been complied with. Railroad Co. v. Hamersley, 104 U.S. 1 (1881). It may impose upon a railroad liability for fire communicated by its locomotives, even though the State had previously authorized the company to use said type of locomotive power, St. Louis & S. F. Ry. v. Mathews, 165 U.S. 1, 5 (1897), and it may penalize the failure to cut drains through embankments so as to prevent flooding of adjacent lands. Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915).
Strict Construction of Charters, Tax Exemptions.—Long, however, before the cases last cited were decided, the principle that they illustrate had come to be powerfully reinforced by two others, the first of which is that all charter privileges and immunities are to be strictly construed as against the claims of the State, or as it is otherwise often phrased, “nothing passes by implication in a public grant.”

The leading case was that of the Charles River Bridge v. Warren Bridge, which was decided shortly after Chief Justice Marshall’s death by a substantially new Court. The question at issue was whether the charter of the complaining company, which authorized it to operate a toll bridge, stood in the way of the State’s permitting another company of later date to operate a free bridge in the immediate vicinity. Inasmuch as the first company could point to no clause in its charter specifically vesting it with an exclusive right, the Court held the charter of the second company to be valid on the principle just stated. Justice Story, presented a vigorous dissent, in which he argued cogently, but unavailingly, that the monopoly claimed by the Charles River Bridge Company was fully as reasonable an implication from the terms of its charter and the circumstances surrounding its concession as perpetuity had been from the terms of the Dartmouth College charter and the ensuing transaction.

The Court was in fact making new law, because it was looking at things from a new point of view. This was the period when judicial recognition of the Police Power began to take on a doctrinal character. It was also the period when the railroad business was just beginning. Chief Justice Taney’s opinion evinces the influence of both these developments. The power of the State to provide for its own internal happiness and prosperity was not, he asserted, to be pared away by mere legal intendments, nor was its ability to avail itself of the lights of modern science to be frustrated by obsolete interests such as those of the old turnpike companies, the charter privileges of which, he apprehended, might easily become a bar to the development of transportation along new lines.

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2017 36 U.S. at 548–53.
The rule of strict construction has been reiterated by the Court many times. In the Court’s opinion in *Blair v. City of Chicago*, decided nearly seventy years after the *Charles River Bridge* case, it said: “Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privilege may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed…. The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State.”

An excellent illustration of the operation of the rule in relation to tax exemptions was furnished by the derivative doctrine that an immunity of this character must be deemed as intended solely for the benefit of the corporation receiving it and hence, in the absence of express permission by the State, may not be passed on to a successor. Thus, where two companies, each exempt from taxation, were permitted by the legislature to consolidate, the new corporation was held to be subject to taxation. Again, a statute which granted a corporation all “the rights and privileges” of an earlier corporation was held not to confer the latter’s “immunity” from taxation. Yet again, a legislative authorization of the transfer by one corporation to another of the former’s “estate, property, right,
privileges, and franchises” was held not to clothe the later company with the earlier one’s exemption from taxation. 2023

Furthermore, an exemption from taxation is to be strictly construed even in the hands of one clearly entitled to it. So the exemption conferred by its charter on a railway company was held not to extend to branch roads constructed by it under a later statute. 2024 Also, a general exemption of the property of a corporation from taxation was held to refer only to the property actually employed in its business. 2025 Also, the charter exemption of the capital stock of a railroad from taxation “for ten years after completion of the said road” was held not to become operative until the completion of the road. 2026 So also the exemption of the campus and endowment fund of a college was held to leave other lands of the college, though a part of its endowment, subject to taxation. 2027 Provisions in a statute that bonds of the State and its political subdivisions were not to be taxed and should not be taxed were held not to exempt interest on them from taxation as income of the owners. 2028

**Strict Construction and the Police Power.**—The police power, too, has frequently benefitted from the doctrine of strict construction, although this recourse is today seldom, if ever, necessary in this connection. Some of the more striking cases may be briefly summarized. The provision in the charter of a railway company permitting it to set reasonable charges still left the legislature free to determine what charges were reasonable. 2029 On the other hand, when a railway agreed to accept certain rates for a specified period, it thereby foreclosed the question of the reasonableness of such rates. 2030 The grant to a company of the right to supply a city with water for twenty-five years was held not to prevent a similar concession to another company by the same city. 2031 The promise by a city in the charter of a water company not to make a similar

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2027 Millsaps College v. City of Jackson, 275 U.S. 129 (1927).
2029 Railroad Comm’n Cases (Stone v. Farmers’ Loan & Trust Co.), 116 U.S. 307, 330 (1886), extended in Southern Pacific Co. v. Campbell, 230 U.S. 537 (1913) to cases in which the word “reasonable” does not appear to qualify the company’s right to prescribe tolls. See also American Bridge Co. v. Railroad Comm’n, 307 U.S. 486 (1999).
2031 City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 15 (1898).
grant to any other person or corporation was held not to prevent
the city itself from engaging in the business. 2032 A municipal
cession to a water company to run for thirty years, and accom-
panied by the provision that the “said company shall charge the
following rates,” was held not to prevent the city from reducing
such rates. 2033 But more broadly, the grant to a municipality of
the power to regulate the charges of public service companies was held
not to bestow the right to contract away this power. 2034 Indeed,
any claim by a private corporation that it received the rate-making
power from a municipality must survive a two-fold challenge: first,
as to the right of the municipality under its charter to make such
a grant, secondly, as to whether it has actually done so, and in
both respects an affirmative answer must be based on express
words and not on implication. 2035

_Doctrine of Inalienability as Applied to Eminent Domain,
Taxing, and Police Powers._—The second of the doctrines men-
tioned above, whereby the principle of the subordination of all per-
sons, corporate and individual alike, to the legislative power of the
State has been fortified, is the doctrine that certain of the State's
powers are inalienable, and that any attempt by a State to alienate
them, upon any consideration whatsoever, is _ipso facto_ void and
hence incapable to producing a “contract” within the meaning of
Article I, § 10. One of the earliest cases to assert this principle oc-
curred in New York in 1826. The corporation of the City of New
York, having conveyed certain lands for the purposes of a church
and cemetery together with a covenant for quiet enjoyment, later
passed a by-law forbidding their use as a cemetery. In denying an
action against the city for breach of covenant, the state court said
the defendants “had no power as a party, [to the covenant] to make
a contract which should control or embarrass their legislative pow-
ers and duties.” 2036

The Supreme Court first applied similar doctrine in 1848 in a
case involving a grant of exclusive right to construct a bridge at a

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2032 Skaneateles Water Co. v. Village of Skaneateles, 184 U.S. 354 (1902); Water
Co. v. City of Knoxville, 200 U.S. 22 (1906); Madera Water Works v. City of Madera,
228 U.S. 454 (1913).
2033 Rogers Park Water Co. v. Fergus, 180 U.S. 624 (1901).
2034 Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908); Wyandotte
2035 See also Puget Sound Traction Co. v. Reynolds, 244 U.S. 574 (1917). “Before
we can find impairment of a contract we must find an obligation of the contract
which has been impaired. Since the contract here relied upon is one between a polit-
ical subdivision of a state and private individuals, settled principles of construc-
tion require that the obligation alleged to have been impaired be clearly and unequiv-
ocularly expressed.” Justice Black for the Court in Keefe v. Clark, 322 U.S. 393, 396–
397 (1944).
2036 Brick Presbyterian Church v. New York, 5 Cow. (N.Y.) 538, 540 (1826).
specified locality. Sustaining the right of the State of Vermont to make a new grant to a competing company, the Court held that the obligation of the earlier exclusive grant was sufficiently recognized in making just compensation for it; and that corporate franchises, like all other forms of property, are subject to the overruling power of eminent domain. This reasoning was reinforced by an appeal to the theory of state sovereignty, which was held to involve the corollary of the inalienability of all the principal powers of a State.

The subordination of all charter rights and privileges to the power of eminent domain has been maintained by the Court ever since; not even an explicit agreement by the State to forego the exercise of the power will avail against it. Conversely, the State may revoke an improvident grant of public property without recourse to the power of eminent domain, such a grant being inherently beyond the power of the State to make. So when the legislature of Illinois in 1869 devised to the Illinois Central Railroad Company, its successors and assigns, the State’s right and title to nearly a thousand acres of submerged land under Lake Michigan along the harbor front of Chicago, and four years later sought to repeal the grant, the Court, a four-to-three decision, sustained an action by the State to recover the lands in question. Said Justice Field, speaking for the majority: “Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property…. Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time.”

On the other hand, repeated endeavors to subject tax exemptions to the doctrine of inalienability, though at times supported by powerful minorities on the Bench, have failed. As recently as January, 1952, the Court ruled that the Georgia Railway Company was entitled to seek an injunction in the federal courts against an attempt by Georgia’s Revenue Commission to compel it to pay ad valorem taxes contrary to the terms of its special charter issued in

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1833. In answer to the argument that this was a suit contrary to the Eleventh Amendment, the Court declared that the immunity from federal jurisdiction created by the Amendment “does not extend to individuals who act as officers without constitutional authority.”

The leading case involving the police power is *Stone v. Mississippi*. In 1867, the legislature of Mississippi chartered a company to which it expressly granted the power to conduct a lottery. Two years later, the State adopted a new Constitution which contained a provision forbidding lotteries, and a year later the legislature passed an act to put this provision into effect. In upholding this act and the constitutional provision on which it was based, the Court said: “The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights,” and these agencies can neither give away nor sell their discretion. All that one can get by a charter permitting the business of conducting a lottery “is suspension of certain governmental rights in his favor, subject to withdrawal at will.”

The Court shortly afterward applied the same reasoning in a case in which was challenged the right of Louisiana to invade the exclusive privilege of a corporation engaged in the slaughter of cattle in New Orleans by granting another company the right to engage in the same business. Although the State did not offer to compensate the older company for the lost monopoly, its action was sustained on the ground that it had been taken in the interest of the public health. When, however, the City of New Orleans, in reliance on this precedent, sought to repeal an exclusive franchise which it had granted a company for fifty years to supply gas to its inhabitants, the Court interposed its veto, explaining that in this instance neither the public health, the public morals, nor the public safety was involved.

Later decisions, nonetheless, apply the principle of inalienability broadly. To quote from one: “It is settled that neither the ‘contract’ clause nor the ‘due process’ clause has the effect of over-
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riding the power to the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise.”

It would scarcely suffice today for a company to rely upon its charter privileges or upon special concessions from a State in resisting the application to it of measures alleged to have been enacted under the police power thereof; if this claim is sustained, the obligation of the contract clause will not avail, and if it is not, the due process of law clause of the Fourteenth Amendment will furnish a sufficient reliance. That is to say, the discrepancy that once existed between the Court’s theory of an overriding police power in these two adjoining fields of constitutional law is today apparently at an end. Indeed, there is usually no sound reason why rights based on public grant should be regarded as more sacrosanct than rights that involve the same subject matter but are of different provenience.

**Private Contracts**.—The term “private contract” is, naturally, not all-inclusive. A judgment, though granted in favor of a creditor, is not a contract in the sense of the Constitution, nor is marriage. And whether a particular agreement is a valid contract is a question for the courts, and finally for the Supreme Court, when the protection of the contract clause is invoked.

The question of the nature and source of the obligation of a contract, which went by default in *Fletcher v. Peck* and the *Dartmouth College* case, with such vastly important consequences, had eventually to be met and answered by the Court in connection with

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private contracts. The first case involving such a contract to reach the Supreme Court was *Sturges v. Crowninshield*, in which a debtor sought escape behind a state insolvency act of later date than his note. The act was held inoperative, but whether this was because of its retroactivity in this particular case or for the broader reason that it assumed to excuse debtors from their promises was not at the time made clear. As noted earlier, Chief Justice Marshall’s definition on this occasion of the obligation of a contract as the law which binds the parties to perform their undertakings was not free from ambiguity, owing to the uncertain connotation of the term law.

These obscurities were finally cleared up for most cases in *Ogden v. Saunders*, in which the temporal relation of the statute and the contract involved was exactly reversed—the former antedating the latter. Marshall contended, but unsuccessfully, that the statute was void, inasmuch as it purported to release the debtor from that original, intrinsic obligation which always attaches under natural law to the acts of free agents. “When,” he wrote, “we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contracts,” and that they took their views on these subjects from those sources. He also posed the question of what would happen to the obligation of contracts clause if States might pass acts declaring that all contracts made subsequently thereto should be subject to legislative control.

For the first and only time, a majority of the Court abandoned the Chief Justice’s leadership. Speaking by Justice Washington, it held that the obligation of private contracts is derived from the municipal law—state statutes and judicial decisions—and that the inhibition of Article I, § 10, is confined to legislative acts made after the contracts affected by them, subject to the following exception. By a curiously complicated line of reasoning, it was also held in the same case that when the creditor is a nonresident, then a State by an insolvency law may not alter the former’s rights under a contract, albeit one of later date.

With the proposition established that the obligation of a private contract comes from the municipal law in existence when the contract is made, a further question presents itself, namely, what

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2052 25 U.S. at 353–54.
part of the municipal law is referred to? No doubt, the law which
determines the validity of the contract itself is a part of such law.
Also part of such law is the law which interprets the terms used
in the contract, or which supplies certain terms when others are
used, as for instance, constitutional provisions or statutes which
determine what is “legal tender” for the payment of debts, or judi-
cial decisions which construe the term “for value received” as used
in a promissory note, and so on. In short, any law which at the
time of the making of a contract goes to measure the rights and
duties of the parties to it in relation to each other enters into its
obligation.

Remedy a Part of the Private Obligation.—Suppose, how-
ever, that one of the parties to a contract fails to live up to his obli-
gation as thus determined. The contract itself may now be regarded
as at an end, but the injured party, nevertheless, has a new set of
rights in its stead, those which are furnished him by the remedial
law, including the law of procedure. In the case of a mortgage, he
may foreclose; in the case of a promissory note, he may sue; and
in certain cases, he may demand specific performance. Hence the
further question arises, whether this remedial law is to be consid-
ered a part of the law supplying the obligation of contracts. Origi-
nally, the predominating opinion was negative, since as we have
just seen, this law does not really come into operation until the
contract has been broken. Yet it is obvious that the sanction which
this law lends to contracts is extremely important—indeed, indis-
ensible. In due course it became the accepted doctrine that that
part of the law which supplies one party to a contract with a rem-
edy if the other party does not live up to his agreement, as authori-
tatively interpreted, entered into the “obligation of contracts” in the
constitutional sense of this term, and so might not be altered to the
material weakening of existing contracts. In the Court’s own words:
“Nothing can be more material to the obligation than the means of
enforcement. Without the remedy the contract may, indeed, in the
sense of the law, be said not to exist, and its obligation to fall with-
in the class of those moral and social duties which depend for their
fulfillment wholly upon the will of the individual. The ideas of va-
lidity and remedy are inseparable . . .”

This rule was first definitely announced in 1843 in the case of
*Bronson v. Kinzie*. Here, an Illinois mortgage giving the mort-
gagee an unrestricted power of sale in case of the mortgagor’s de-
fault was involved, along with a later act of the legislature that re-

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2054 42 U.S. (1 How.) 311 (1843).
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Cl. 1—Treaties, Coining Money, Etc.

required mortgaged premises to be sold for not less than two-thirds of the appraised value and allowed the mortgagor a year after the sale to redeem them. It was held that the statute, in altering the preexisting remedies to such an extent, violated the constitutional prohibition and hence was void. The year following a like ruling was made in the case of McCracken v. Hayward,\(^{2055}\) as to a statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value.

But the rule illustrated by these cases does not signify that a State may make no changes in its remedial or procedural law that affect existing contracts. “Provided,” the Court has said, “a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract, the Legislature may modify or change existing remedies or prescribe new modes of procedure.”\(^{2056}\) Thus, States are constantly remodelling their judicial systems and modes of practice unembarrassed by the obligation of contracts clause.\(^{2057}\) The right of a State to abolish imprisonment for debt was early asserted.\(^{2058}\) Again, the right of a State to shorten the time for the bringing of actions has been affirmed even as to existing causes of action, but with the proviso added that a reasonable time must be left for the bringing of such actions.\(^{2059}\) On the other hand, a statute which withdrew the judicial power to enforce satisfaction of a certain class of judgments by mandamus was held invalid.\(^{2060}\) In the words of the Court: “Every case must be determined upon its own circumstances;”\(^{2061}\) and it later added: “In all such cases the question becomes . . . one of reasonableness, and of that the legislature is primarily the judge.”\(^{2062}\)

\(^{2055}\) 43 U.S. (2 How.) 608 (1844).


\(^{2057}\) Antoni v. Greenhow, 107 U.S. 769 (1883).

\(^{2058}\) The right was upheld in Mason v. Haile, 25 U.S. (12 Wheat.) 370 (1827), and again in Penniman’s Case, 103 U.S. 714 (1881).


\(^{2060}\) Louisiana v. New Orleans, 102 U.S. 203 (1880).


Sec. 10—Powers Denied to the States

There is one class of cases resulting from the doctrine that the law of remedy constitutes a part of the obligation of a contract to which a special word is due. This comprises cases in which the contracts involved were municipal bonds. While a city is from one point of view but an emanation from the government’s sovereignty and an agent thereof, when it borrows money it is held to be acting in a corporate or private capacity and so to be suable on its contracts. Furthermore, as was held in the leading case of United States ex rel. Von Hoffman v. Quincy,2063 “where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied.” In this case the Court issued a mandamus compelling the city officials to levy taxes for the satisfaction of a judgment on its bonds in accordance with the law as it stood when the bonds were issued.2064 Nor may a State by dividing an indebted municipality among others enable it to escape its obligations. The debt follows the territory and the duty of assessing and collecting taxes to satisfy it devolves upon the succeeding corporations and their officers.2065 But where a municipal organization has ceased practically to exist through the vacation of its offices, and the government’s function is exercised once more by the State directly, the Court has thus far found itself powerless to frustrate a program of repudiation.2066 However, there is no reason why the State should enact the role of particeps criminis in an attempt to relieve its municipalities of the obligation to meet their honest debts. Thus, in 1931, during the Great Depression, New Jersey created a Municipal Finance Commission with power to assume control over its insolvent municipalities. To the complaint of certain bondholders that this legislation impaired the contract obligations of their debtors,


Combine the following cases, where changes in remedies were deemed to be of such character as to interfere with substantial rights: Wilmington & Weldon R.R. v. King, 91 U.S. 3 (1875); Memphis v. United States, 97 U.S. 293 (1878); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 269, 270, 298, 299 (1885); Effinger v. Kenney, 115 U.S. 566 (1885); Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Bradley v. Lightcap, 195 U.S. 1 (1904); Bank of Minden v. Clement, 256 U.S. 126 (1921).


2064See also Nelson v. St. Martin’s Parish, 111 U.S. 716 (1884).


the Court, speaking by Justice Frankfurter, pointed out that the practical value of an unsecured claim against a city is “the effectiveness of the city's taxing power,” which the legislation under review was designed to conserve. 2067

**Private Contracts and the Police Power.**—The increasing subjection of public grants to the police power of the States has been previously pointed out. That purely private contracts should be in any stronger situation in this respect obviously would be anomalous in the extreme. In point of fact, the ability of private parties to curtail governmental authority by the easy device of contracting with one another is, with an exception to be noted, even less than that of the State to tie its own hands by contracting away its own powers. So, when it was contended in an early Pennsylvania case that an act prohibiting the issuance of notes by unincorporated banking associations was violative of the obligation of contracts clause because of its effect upon certain existing contracts of members of such association, the state Supreme Court answered: “But it is said, that the members had formed a contract between themselves, which would be dissolved by the stoppage of their business. And what then? Is that such a violation of contracts as is prohibited by the Constitution of the United States? Consider to what such a construction would lead. Let us suppose, that in one of the States there is no law against gaming, cock-fighting, horse-racing or public masquerades, and that companies should be formed for the purpose of carrying on these practices…” Would the legislature then be powerless to prohibit them? The answer returned, of course, was no. 2068

The prevailing doctrine was stated by the Supreme Court of the United States in the following words: “It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts pre-

2067 Faitoute Co. v. City of Asbury Park, 316 U.S. 502, 510 (1942). Alluding to the ineffectiveness of purely judicial remedies against defaulting municipalities, Justice Frankfurter says: “For there is no remedy when resort is had to ‘devices and contrivances’ to nullify the taxing power which can be carried out only through authorized officials.” See Rees v. City of Watertown, 86 U.S. (19 Wall.) 107, 124 (1874). And so we have had the spectacle of taxing officials resigning from office in order to frustrate tax levies through mandamus, and officials running on a platform of willingness to go to jail rather than to enforce a tax levy (see Raymond, State and Municipal Bonds, 342–343), and evasion of service by tax collectors, thus making impotent a court's mandate. Yost v. Dallas County, 236 U.S. 50, 57 (1915).” Id. at 511.

viously entered into between individuals may thereby be affected. ... In other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."\textsuperscript{2069}

So, in an early case, we find a state recording act upheld as applying to deeds dated before the passage of the act.\textsuperscript{2070} Later cases have brought the police power in its more customary phases into contact with private as well as with public contracts. Lottery tickets, valid when issued, were necessarily invalidated by legislation prohibiting the lottery business;\textsuperscript{2071} contracts for the sale of beer, valid when entered into, were similarly nullified by a state prohibition law;\textsuperscript{2072} and contracts of employment were modified by later laws regarding the liability of employers and workmen’s compensation.\textsuperscript{2073} Likewise, a contract between plaintiff and defendant did not prevent the State from making the latter a concession which rendered the contract worthless;\textsuperscript{2074} nor did a contract as to rates between two railway companies prevent the State from imposing different rates;\textsuperscript{2075} nor did a contract between a public utility company and a customer protect the rates agreed upon from being superseded by those fixed by the State.\textsuperscript{2076} Similarly, a contract for the conveyance of water beyond the limits of a State did not prevent the State from prohibiting such conveyance.\textsuperscript{2077}

But the most striking exertions of the police power touching private contracts, as well as other private interests within recent years, have been evoked by war and economic depression. Thus, in World War I, the State of New York enacted a statute which, declaring that a public emergency existed, forbade the enforcement of covenants for the surrender of the possession of premises on the expiration of leases, and wholly deprived for a period owners of dwellings, including apartment and tenement houses, within the City of New York and contiguous counties, of possessory remedies for the eviction from their premises of tenants in possession when the law took effect, providing the latter were able and willing to pay a reasonable rent. In answer to objections leveled against this legislation

\textsuperscript{2069}Manigault v. Springs, 199 U.S. 473, 480 (1905).
\textsuperscript{2071}Stone v. Mississippi, 101 U.S. 814 (1880).
\textsuperscript{2072}Beer Co. v. Massachusetts, 97 U.S. 25 (1878).
\textsuperscript{2073}New York Cent. R.R. v. White, 243 U.S. 188 (1917). In this and the preceding two cases the legislative act involved did not except from its operation existing contracts.
\textsuperscript{2074}Manigault v. Springs, 199 U.S. 473 (1905).
\textsuperscript{2075}Portland Ry. v. Oregon R.R. Comm'n, 229 U.S. 397 (1913).
\textsuperscript{2076}Midland Co. v. Kansas City Power Co., 300 U.S. 109 (1937).
\textsuperscript{2077}Hudson Water Co. v. McCarter, 209 U.S. 349 (1908).
on the basis of the obligation of contracts clause, the Court said: “But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be.” In a subsequent case, however, the Court added that, while the declaration by the legislature of a justifying emergency was entitled to great respect, it was not conclusive; a law “depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change,” and whether they have changed was always open to judicial inquiry.

Summing up the result of the cases above referred to, Chief Justice Hughes, speaking for the Court in *Home Building & Loan Ass'n v. Blaisdell*, remarked in 1934: “It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.... The principle of this development is ... that the reservation of the reasonable exercise of the protective power of the States is read into all contracts....”

**Evaluation of the Clause Today.**—It should not be inferred that the obligation of contracts clause is today totally moribund. Even prior to the most recent decisions, it still furnished the basis...
for some degree of judicial review as to the substantiality of the factual justification of a professed exercise by a state legislature of its police power, and in the case of legislation affecting the remedial rights of creditors, it still affords a solid and palpable barrier against legislative erosion. Nor is this surprising in view of the fact that, as we have seen, such rights were foremost in the minds of the framers of the clause. The Court’s attitude toward insolvency laws, redemption laws, exemption laws, appraisement laws and the like, has always been that they may not be given retroactive operation, and the general lesson of these earlier cases is confirmed by the Court’s decisions between 1934 and 1945 in certain cases involving state moratorium statutes. In *Home Building & Loan Ass’n v. Blaisdell*, the leading case, a closely divided Court sustained the Minnesota Moratorium Act of April 18, 1933, which, reciting the existence of a severe financial and economic depression for several years and the frequent occurrence of mortgage foreclosure sales for inadequate prices, and asserting that these conditions had created an economic emergency calling for the exercise of the State’s police power, authorized its courts to extend the period for redemption from foreclosure sales for such additional time as they might deem just and equitable, although in no event beyond May 1, 1935.

The act also left the mortgagor in possession during the period of extension, subject to the requirement that he pay a reasonable rental for the property as fixed by the court. Contemporaneously, however, less carefully drawn statutes from Missouri and Arkansas, acts which were not as considerate of creditor’s rights, were set aside as violative of the contracts clause. “A State is free to regulate the procedure in its courts even with reference to contracts already made,” said Justice Cardozo for the Court, “and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow…. What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral secu-

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2083 290 U.S. 398 (1934).
On the other hand, in the most recent of this category of cases, the Court gave its approval to an extension by the State of New York of its moratorium legislation. While recognizing that business conditions had improved, the Court was of the opinion that there was reason to believe that “the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate.”

And meantime the Court had sustained legislation of the State of New York under which a mortgagee of real property was denied a deficiency judgment in a foreclosure suit where the state court found that the value of the property purchased by the mortgagee at the foreclosure sale was equal to the debt secured by the mortgage. “Mortgagees,” the Court said, “are constitutionally entitled to no more than payment in full.... To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts.... The contract clause does not protect such a strategic, procedural advantage.”

More important, the Court has been at pains most recently to reassert the vitality of the clause, although one may wonder whether application of the clause will be more than episodic.

“[T]he Contract Clause remains a part of our written Constitution.” So saying, the Court struck down state legislation in two instances, one law involving the government’s own contractual obligation and the other affecting private contracts. A finding that

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2085 295 U.S. at 62.
2088 313 U.S. at 233–34.
2089 United States Trust Co. v. New Jersey, 431 U.S. 1, 16 (1977). “It is not a dead letter.” Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978). A majority of the Court seems fully committed to using the clause. Only Justices Brennan, White, and Marshall dissented in both cases. Chief Justice Burger and Justices Rehnquist and Stevens joined both opinions of the Court. Of the three remaining Justices, who did not participate in one or the other case, Justice Blackmun wrote the opinion in United States Trust while Justice Stewart wrote the opinion in Spannaus and Justice Powell joined it.
2090 United States Trust involved a repeal of a covenant statutorily enacted to encourage persons to purchase New York-New Jersey Port Authority bonds by limiting the Authority’s ability to subsidize rail passenger transportation. Spannaus involved a statute requiring prescribed employers who had a qualified pension plan to provide funds sufficient to cover full pensions for all employees who had worked at least 10 years if the employer either terminated the plan or closed his offices in
a contract has been “impaired” in some way is merely the preliminary step in evaluating the validity of the state action. 2091 But in both cases the Court applied a stricter-than-usual scrutiny to the statutory action, in the public contracts case precisely because it was its own obligation that the State was attempting to avoid and in the private contract case, apparently, because the legislation was in aid of a “narrow class.” 2092 The approach in any event is one of balancing. “The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.” 2093 Having determined that a severe impairment had resulted in both cases, 2094 the Court moved on to assess the justification for the state action. In United States Trust, the test utilized by the Court was that an impairment would be upheld only if it were “necessary” and “reasonable” to serve an important public purpose. But the two terms were given somewhat restrictive meanings. Necessity is shown only when the State’s objectives could not have been achieved through less dramatic modifications of the contract; reasonableness is a function of the extent to which alteration of the contract was prompted by circumstances unforeseen at the time of its formation. The repeal of the covenant in issue was found to fail both prongs of the test. 2095 In Spannaus, the Court drew from its prior cases four standards: did the law deal with a broad generalized economic or social problem, did it operate in an area already subject to state regulation at the time the contractual obligations were entered into, did it effect simply a temporary alteration of the contractual relationship, and did the law operate upon a broad class of affected individuals or concerns. The Court found the State, a law that greatly altered the company’s liabilities under its contractual pension plan.

2091 431 U.S. at 21; 438 U.S. at 244.
2092 431 U.S. at 22-26; 438 U.S. at 248.
2093 438 U.S. at 245.
2094 431 U.S. at 17-21 (the Court was unsure of the value of the interest impaired but deemed it “an important security provision”); 438 U.S. 244–47 (statute mandated company to recalculate, and in one lump sum, contributions previously adequate).
2095 431 U.S. at 25–32 (State could have modified the impairment to achieve its purposes without totally abandoning the covenant, though the Court reserved judgment whether lesser impairments would have been constitutional, id. at 30 n.28, and it had alternate means to achieve its purposes; the need for mass transportation was obvious when covenant was enacted and State could not claim that unforeseen circumstances had arisen.)
that the challenged law did not possess any of these attributes and thus struck it down. 2096

Whether these two cases portend an active judicial review of economic regulatory activities, in contrast to the extreme deference shown such legislation under the due process and equal protection clauses, is problematical. Both cases contain language emphasizing the breadth of the police powers of government that may be used to further the public interest and admitting limited judicial scrutiny. Nevertheless, “[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.” 2097

Clause 2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

Duties on Exports or Imports

Scope

Only articles imported from or exported to a foreign country, or “a place over which the Constitution has not extended its commands with respect to imports and their taxation,” are comprehended by the terms “imports” and “exports.” 2098 With respect to exports, the exemption from taxation “attaches to the export and not to the article before its exportation,” 2099 requiring an essentially factual inquiry into whether there have been acts of movement toward a final destination constituting sufficient entrance

2096 438 U.S. at 244–51. See also Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (emphasizing the first but relying on all but the third of these tests in upholding a prohibition on pass-through of an oil and gas severance tax).
2097 438 U.S. at 242 (emphasis by Court).
2099 Cornell v. Coyne, 192 U.S. 418, 427 (1904).
Sec. 10—Powers Denied to the States

To determine how long imported wares remain under the protection of this clause, the Supreme Court enunciated the original package doctrine in the leading case of Brown v. Maryland. “When the importer has so acted upon the thing imported,” wrote Chief Justice Marshall, “that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution.”

A box, case, or bale in which separate parcels of goods have been placed by the foreign seller is regarded as the original package, and upon the opening of such container for the purpose of using the separate parcels, or of exposing them for sale, each loses its character as an import and becomes subject to taxation as a part of the general mass of property in the State. Imports for manufacture cease to be such when the intended processing takes place, or when the original packages are broken. Where a manufacturer imports merchandise and stores it in his warehouse in the original packages, that merchandise does not lose its quality as an import, at least so long as it is not required to meet such immediate needs. The purchaser of imported goods is deemed to be the importer if he was the efficient cause of the importation, whether the title to the goods vested in him at the time of shipment, or after its arrival in this country. A state franchise tax measured by properly apportioned gross receipts may be imposed upon a railroad company in respect of the company’s receipts for services in handling imports and exports at its marine terminal.

Privilege Taxes

A state law requiring importers to take out a license to sell imported goods amounts to an indirect tax on imports and hence is

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2104 Low v. Austin, 80 U.S. (13 Wall.) 29 (1872); May v. New Orleans, 178 U.S. 496 (1900).
2106 324 U.S. at 664.
unconstitutional. Likewise, a franchise tax upon foreign corporations engaged in importing nitrate and selling it in the original packages, a tax on sales by brokers and auctioneers of imported merchandise in original packages, and a tax on the sale of goods in foreign commerce consisting of an annual license fee plus a percentage of gross sales, have been held invalid. On the other hand, pilotage fees, a tax upon the gross sales of a purchaser from the importer, a license tax upon dealing in fish which, through processing, handling, and sale, have lost their distinctive character as imports, an annual license fee imposed on persons engaged in buying and selling foreign bills of exchange, and a tax upon the right of an alien to receive property as heir, legatee, or donee of a deceased person have been held not to be duties on imports or exports.

Property Taxes

Overruling a line of prior decisions which it thought misinterpreted the language of Brown v. Maryland, the Court now holds that the clause does not prevent a State from levying a nondiscriminatory, ad valorem property tax upon goods that are no longer in import transit. Thus, a company’s inventory of imported tires maintained at its wholesale distribution warehouse could be included in the State’s tax upon the entire inventory. The clause does not prohibit every “tax” with some impact upon imports or exports but reaches rather exactions directed only at imports or exports or commercial activity therein as such.
ART. I—LEGISLATIVE DEPARTMENT

Sec. 10—Powers Denied to the States  Cl. 3—Tonnage Duties and Interstate Compacts

**Inspection Laws**

Inspection laws “are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption.”

In *Turner v. Maryland*, the Court listed as recognized elements of inspection laws, the “quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds . . .” It sustained as an inspection law a charge for storage and inspection imposed upon every hogshead of tobacco grown in the State and intended for export, which the law required to be brought to a state warehouse to be inspected and branded. The Court has cited this section as a recognition of a general right of the States to pass inspection laws, and to bring within their reach articles of interstate, as well as of foreign, commerce. But on the ground that, “it has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequence of its use or abuse,” it held that a state law forbidding the importation of intoxicating liquors into the State could not be sustained as an inspection law.

Clause 3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

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*bacco stored for aging in customs-bonded warehouse and destined for domestic manufacture and sale); but cf. Xerox Corp. v. County of Harris, 459 U.S. 145, 154 (1982) (similar tax on goods stored in customs-bonded warehouse is preempted “by Congress’ comprehensive regulation of customs duties;” case, however, dealt with goods stored for export).*

2121 107 U.S. 38 (1883).
2122 107 U.S. at 55.
Tonnage Duties

The prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, whether measured by the tonnage of the vessel or not, which are in effect charges for the privilege of entering, trading in, or lying in a port. But it does not extend to charges made by state authority, even if graduated according to tonnage, for services rendered to the vessel, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, or storage. For the purpose of determining wharfage charges, it is immaterial whether the wharf was built by the State, a municipal corporation, or an individual. Where the wharf was owned by a city, the fact that the city realized a profit beyond the amount expended did not render the toll objectionable. The services of harbor masters for which fees are allowed must be actually rendered, and a law permitting harbor masters or port wardens to impose a fee in all cases is void. A State may not levy a tonnage duty to defray the expenses of its quarantine system, but it may exact a fixed fee for examination of all vessels passing quarantine. A state license fee for ferrying on a navigable river is not a tonnage tax but rather is a proper exercise of the police power and the fact that a vessel is enrolled under federal law does not exempt it. In the State Tonnage Tax Cases, an annual tax on steamboats measured by their registered tonnage was held invalid despite the contention that it was a valid tax on the steamboat as property.

Keeping Troops

This provision contemplates the use of the State’s military power to put down an armed insurrection too strong to be con-
trolled by civil authority,2134 and the organization and maintenance of an active state militia is not a keeping of troops in time of peace within the prohibition of this clause. 2135

Interstate Compacts

Background of Clause

Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the States to make compacts with each other was not surrendered under the Constitution.2136 “The Compact,” as the Supreme Court has put it, “adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations.” 2137 In American history, the compact technique can be traced back to the numerous controversies that arose over the ill-defined boundaries of the original colonies. These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.2138 When the political ties with Britain were broken, the Articles of Confederation provided for appeal to Congress in all disputes between two or more States over boundaries or “any cause whatever”2139 and required the approval of Congress for any “treaty confederation or alliance” to which a State should be a party. 2140

The Framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against “any treaty, alliance or confederation,” and by the third clause they required the consent of Congress for “any agreement or compact.” The significance of this distinction was pointed out by Chief Justice Taney in Holmes v. Jennison. 2141 “As these words (‘agreement or compact’) could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. . . . The word ‘agreement,’ does not necessarily import and direct any express stipulation; nor is it necessary that it should be in writing.”

“If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an ‘agreement.’ And

2134 Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).
2137 Hinderlider v. La Plata Co., 304 U.S. 92, 104 (1938).
2139 Article IX.
2140 Article VI.
the use of all of these terms, ‘treaty,’ ‘agreement,’ ‘compact,’ show that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power; and we shall fail to execute that evident intention, unless we give to the word ‘agreement’ its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.” 2142 But in Virginia v. Tennessee, 2143 decided more than a half century later, the Court shifted position, holding that the unqualified prohibition of compacts and agreements between States without the consent of Congress did not apply to agreements concerning such minor matters as adjustments of boundaries, which have no tendency to increase the political powers of the contracting States or to encroach upon the just supremacy of the United States. Adhering to this later understanding of the clause, the Court found no enhancement of state power quoad the Federal Government through entry into the Multistate Tax Compact and thus sustained the agreement among participating States without congressional consent. 2144

Subject Matter of Interstate Compacts

For many years after the Constitution was adopted, boundary disputes continued to predominate as the subject matter of agreements among the States. Since the turn of the twentieth century, however, the interstate compact has been used to an increasing extent as an instrument for state cooperation in carrying out affirmative programs for solving common problems. 2145 The execution of vast public undertakings, such as the development of the Port of New York by the Port Authority created by compact between New York and New Jersey, flood control, the prevention of pollution, and the conservation and allocation of water supplied by interstate streams, are among the objectives accomplished by this means. Another important use of this device was recognized by Congress in the act of June 6, 1934, 2146 whereby it consented in advance to agreements for the control of crime. The first response to this stim-

2142 39 U.S. at 570, 571, 572.
2143 148 U.S. 503, 518 (1893). See also Stearns v. Minnesota, 179 U.S. 223, 244 (1900).
Sec. 10—Powers Denied to the States  Cl. 3—Tonnage Duties and Interstate Compacts

ulius was the Crime Compact of 1934, providing for the supervision of parolees and probationers, to which most of the States have given adherence.\footnote{2147 F. Zimmerman and M. Wendell, Interstate Compacts Since 1925 91 (1951).} Subsequently, Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters. Moreover, many States have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments, the creation of special commissions for the study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, et cetera, and the framing of uniform state legislation for dealing with some of these.\footnote{2148 7 U.S.C. § 515; 15 U.S.C. § 717j; 16 U.S.C. § 552; 33 U.S.C. §§ 11, 567–567b.}

**Consent of Congress**

The Constitution makes no provision with regard to the time when the consent of Congress shall be given or the mode or form by which it shall be signified.\footnote{2149 While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.} The required consent is not necessarily an expressed consent; it may be inferred from circumstances.\footnote{2150 It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.} The consent of Congress may be granted conditionally “upon terms appropriate to the subject and transgressing no constitutional limitations.”\footnote{2151 Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.} Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.\footnote{2152 The consent of Congress may be granted conditionally “upon terms appropriate to the subject and transgressing no constitutional limitations.”\footnote{2153 James v. Dravo Contracting Co., 302 U.S. 134 (1937). See also Arizona v. California, 292 U.S. 341, 345 (1934). When it approved the New York-New Jersey Waterfront Compact, 67 Stat. 541, Congress, for the first time, expressly gave its consent to the subsequent adoption of implementing legislation by the participating States. De Veau v. Braisted, 363 U.S. 144, 145 (1960).} grants of franchise to corporations by two states.\footnote{2154 Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856).}

It is competent for a railroad corporation organized under the laws of one State, when authorized so to do by the consent of the
State which created it, to accept authority from another State to extend its railroad into such State and to receive a grant of powers to own and control, by lease or purchase, railroads therein and to subject itself to such rules and regulations as may be prescribed by the second State. Such legislation on the part of two or more States is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between States.  

**Legal Effect of Interstate Compacts**

Whenever, by the agreement of the States concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts become binding upon all citizens of the signatory States and are conclusive as to their rights. Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judicial determination of existing rights. Valid interstate compacts are within the protection of the obligation of contracts clause, and a “sue and be sued” provision therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment. The Supreme Court in the exercise of its original jurisdiction may enforce interstate compacts following principles of general contract law. Congress also has authority to compel compliance with such compacts. Nor may a State read herself out of a compact which she has ratified and to which Congress has consented by pleading that under the State’s constitution as interpreted by the highest state court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the state constitution in such a case rests with the Supreme Court.

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2155 St. Louis & S. F. Ry. v. James, 161 U.S. 545, 562 (1896).
2157 Hinderlider v. La Plata Co., 304 U.S. 92, 104, 106 (1938).
2160 Texas v. New Mexico, 482 U.S. 124 (1987). If the compact makes no provision for resolving impasse, then the Court may exercise its jurisdiction to apportion waters of interstate streams. In doing so, however, the Court will not rewrite the compact by ordering appointment of a third voting commissioner to serve as a tie-breaker; rather, the Court will attempt to apply the compact to the extent that its provisions govern the controversy. Texas v. New Mexico, 482 U.S. 554 (1987).
# ARTICLE II

## EXECUTIVE DEPARTMENT

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EXECUTIVE DEPARTMENT

ARTICLE II

SECTION 1. Clause 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years and, together with the Vice President, chosen for the same Term, be elected, as follows:

NATURE AND SCOPE OF PRESIDENTIAL POWER

Creation of the Presidency

Of all the issues confronting the members of the Philadelphia Convention, the nature of the presidency ranks among the most important and the resolution of the question one of the most significant steps taken. The immediate source of Article II was the New York constitution, in which the governor was elected by the people and thus independent of the legislature, his term was three years and he was indefinitely re-eligible, his decisions except with regard to appointments and vetoes were unencumbered with a council, he was in charge of the militia, he possessed the pardoning power, and he was charged to take care that the laws were faithfully executed. But when the Convention assembled and almost to its closing days, there was no assurance that the executive department would not be headed by plural administrators, would not be unalterably tied to the legislature, and would not be devoid of many of the powers normally associated with an executive.

Debate in the Convention proceeded against a background of many things, but most certainly uppermost in the delegates’ minds was the experience of the States and of the national government under the Articles of Confederation. Reacting to the exercise of powers by the royal governors, the framers of the state constitu-

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tions had generally created weak executives and strong legislatures, though not in all instances. The Articles of Confederation vested all powers in a unicameral congress. Experience had demonstrated that harm was to be feared as much from an unfettered legislature as from an uncurbed executive and that many advantages of a reasonably strong executive could not be conferred on the legislative body. 3

Nonetheless, the Virginia Plan, which formed the basis of discussion, offered in somewhat vague language a weak executive. Selection was to be by the legislature, and that body was to determine the major part of executive competency. The executive’s salary was, however, to be fixed and not subject to change by the legislative branch during the term of the executive, and he was ineligible for re-election so that he need not defer overly to the legislature. A council of revision was provided, of which the executive was a part, with power to negative national and state legislation. The executive power was said to be the power to “execute the national laws” and to “enjoy the Executive rights vested in Congress by the Confederation.” The Plan did not provide for a single or plural executive, leaving that issue open. 4

When the executive portion of the Plan was taken up on June 1, James Wilson immediately moved that the executive should consist of a single person. 5 In the course of his remarks, Wilson demonstrated his belief in a strong executive, advocating election by the people, which would free the executive of dependence on the national legislature and on the States, proposing indefinite re-eligibility, and preferring an absolute negative though in concurrence with a council of revision. 6 The vote on Wilson’s motion was put over until the questions of method of selection, term, mode of removal, and powers to be conferred had been considered; subsequently, the motion carried, 7 and the possibility of the development of a strong President was made real.

Only slightly less important was the decision finally arrived at not to provide for an executive council, which would participate not only in the executive’s exercise of the veto power but also in the exercise of all his executive duties, notably appointments and treaty making. Despite strong support for such a council, the Conven-

3 C. Thach, The Creation of the Presidency 1775-1789 chs. 1-3 (1923).
5 Id. at 65.
6 Id. at 65, 66, 68, 69, 70, 71, 73.
7 Id. at 93.
tion ultimately rejected the proposal and adopted language vesting in the Senate the power to “advise and consent” with regard to these matters.8

Finally, the designation of the executive as the “President of the United States” was made in a tentative draft reported by the Committee on Detail9 and accepted by the Convention without discussion.10 The same clause had provided that the President’s title was to be “His Excellency,”11 and, while this language was also accepted without discussion,12 it was subsequently omitted by the Committee on Style and Arrangement13 with no statement of the reason and no comment in the Convention.

Executive Power: Theory of the Presidential Office

The most obvious meaning of the language of Article II, § 1, is to confirm that the executive power is vested in a single person, but almost from the beginning it has been contended that the words mean much more than this simple designation of locus. Indeed, contention with regard to this language reflects the much larger debate about the nature of the Presidency. With Justice Jackson, we “may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.”14 At the least, it is no doubt true that the “loose and general expressions” by which the powers and duties of the executive branch are denominated place the President in a position in which he, as Professor Woodrow Wilson noted, “has the right, in law and conscience, to be as big a man as he can” and in which “only his capacity will set the limit.”15

8 The last proposal for a council was voted down on September 7. 2 id. at 542.
9 Id. at 185.
10 Id. at 401.
11 Id. at 185.
12 Id. at 401.
13 Id. at 597.
14 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-635 (1952) (concurring opinion).
Hamilton and Madison.—Hamilton’s defense of President Washington’s issuance of a neutrality proclamation upon the outbreak of war between France and Great Britain contains not only the lines but most of the content of the argument that Article II vests significant powers in the President as possessor of executive powers not enumerated in subsequent sections of Article II. 17 Said Hamilton: “The second article of the Constitution of the United States, section first, establishes this general proposition, that ‘the Executive Power shall be vested in a President of the United States of America.’ The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, and to take care that the laws be faithfully executed. It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties.”

“The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, ‘All legislative powers herein granted shall be vested in a congress of the United States.’ In that which grants the executive power, the expressions are, ‘The executive power shall be vested in a President of the United States.’ The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free gov-

government. The general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument.”

Madison’s reply to Hamilton, in five closely reasoned articles, was almost exclusively directed to Hamilton’s development of the contention from the quoted language that the conduct of foreign relations was in its nature an executive function and that the powers vested in Congress which bore on this function, such as the power to declare war, did not diminish the discretion of the President in the exercise of his powers. Madison’s principal reliance was on the vesting of the power to declare war in Congress, thus making it a legislative function rather than an executive one, combined with the argument that possession of the exclusive power carried with it the exclusive right to judgment about the obligations to go to war or to stay at peace, negating the power of the President to proclaim the nation’s neutrality. Implicit in the argument was the rejection of the view that the first section of Article II bestowed powers not vested in subsequent sections. “Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature, may be claimed by the executive; if granted, are to be taken strictly, with a residuary right in the executive; or . . . perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative.” The arguments are today pursued with as great fervor, as great learning, and with two hundred years experience, but the constitutional part of the

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18 7 WORKS OF ALEXANDER HAMILTON 76, 80-81 (J. C. Hamilton ed., 1851) (emphasis in original).

19 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611-654 (1865).

20 Id. at 621. In the congressional debates on the President’s power to remove executive officeholders, cf. C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 ch. 6 (1923), Madison had urged contentions quite similar to Hamilton’s, finding in the first section of Article II and in the obligation to execute the laws a vesting of executive powers sufficient to contain the power solely on his behalf to remove subordinates. 1 ANNALS OF CONGRESS 496-497. Madison’s language here was to be heavily relied on by Chief Justice Taft on this point in Myers v. United States, 272 U.S. 52, 115-126 (1926), but compare, Corwin, The President’s Removal Power Under the Constitution, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467, 1474-1483, 1485-1486 (1938).
contentiousness still settles upon the reading of the vesting clauses of Articles I, II, and III. 21

The Myers Case.—However much the two arguments are still subject to dispute, Chief Justice Taft, himself a former President, appears in Myers v. United States 22 to have carried a majority of the Court with him in establishing the Hamiltonian conception as official doctrine. That case confirmed one reading of the “Decision of 1789” in holding the removal power to be constitutionally vested in the President. 23 But its importance here lies in its interpretation of the first section of Article II. That language was read, with extensive quotation from Hamilton and from Madison on the removal power, as vesting all executive power in the President, the subsequent language was read as merely particularizing some of this power, and consequently the powers vested in Congress were read as exceptions which must be strictly construed in favor of powers retained by the President. 24 Myers remains the fountainhead of the latitudinarian constructionists of presidential power, but its dicta, with regard to the removal power, were first circumscribed in Humphrey’s Executor v. United States, 25 and then considerably altered in Morrison v. Olson; 26 with regard to the President’s “inherent” powers, the Myers dicta were called into considerable question by Youngstown Sheet & Tube Co. v. Sawyer. 27

The Curtiss-Wright Case.—Further Court support of the Hamiltonian view was advanced in United States v. Curtiss-Wright Export Corp., 28 in which Justice Sutherland posited the doctrine that the power of the National Government in foreign relations is not one of enumerated powers, but rather is inherent. The doctrine was then combined with Hamilton’s contention that control of for-


24 Myers v. United States, 272 U.S. 52, 163-164 (1926). Professor Taft had held different views. “The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary in its exercise. Such specific grant must be either in the federal constitution or in an act of congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest….” W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-140 (1916).


27 343 U.S. 579 (1952).

eign relations is exclusively an executive function with obvious implications for the power of the President. The case arose as a challenge to the delegation of power from Congress to the President with regard to a foreign relations matter. Justice Sutherland denied that the limitations on delegation in the domestic field were at all relevant in foreign affairs.

“The broad statement that the federal government can exercise no powers except those specifically enumerated in the constitution, and such implied powers—as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as were thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states . . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source . . . .”

“As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America . . . .”

“It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties if they had never been mentioned in the Constitution, would have been vested in the federal government as necessary concomitants of nationality . . . .”

“Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . .”

Scholarly criticism of Justice Sutherland’s reasoning has demonstrated that his essential postulate, the passing of sovereignty in external affairs directly from the British Crown to the colonies as

29 U.S. at 315-16, 318
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a collective unit, is in error. Dicta in later cases controvert the conclusions drawn in Curtiss-Wright about the foreign relations power being inherent rather than subject to the limitations of the delegated powers doctrine. The holding in Kent v. Dulles that delegation to the Executive of discretion in the issuance of passports must be measured by the usual standards applied in domestic delegations appeared to circumscribe Justice Sutherland's more expansive view, but the subsequent limitation of that decision, though formally reasoned within its analytical framework, coupled with language addressed to the President's authority in foreign affairs, leaves clouded the vitality of that decision. The case nonetheless remains with Myers v. United States the source and support of those contending for broad inherent executive powers.

The Youngstown Case.—The only recent case in which the “inherent” powers of the President or the issue of what executive powers are vested by the first section of Article II has been exten-

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31E.g., Ex parte Quirin, 317 U.S. 1, 25 (1942) (Chief Justice Stone); Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion, per Justice Black).


33Haig v. Agee, 453 U.S. 280 (1981). For the reliance on Curtiss-Wright, see id. at 291, 293-94 & n.24, 307-08. But see Dames & Moore v. Regan, 453 U.S. 654, 659-62 (1981), qualified by id. at 678. Compare Webster v. Doe, 486 U.S. 592 (1988) (construing National Security Act as not precluding judicial review of constitutional challenges to CIA Director’s dismissal of employee, over dissent relying in part on Curtiss-Wright as interpretive force counseling denial of judicial review), with Department of the Navy v. Egan, 484 U.S. 518 (1988) (denying Merit Systems Protection Board authority to review the substance of an underlying security-clearance determination in reviewing an adverse action and noticing favorably President’s inherent power to protect information without any explicit legislative grant). In Loving v. United States, 517 U.S. 748 (1996), the Court recurred to the original setting of Curtiss-Wright, a delegation to the President without standards. Congress, the Court found, had delegated to the President authority to structure the death penalty provisions of military law so as to bring the procedures, relating to aggravating and mitigating factors, into line with constitutional requirements, but Congress had provided no standards to guide the presidential exercise of the authority. Standards were not required, held the Court, because his role as Commander-in-Chief gave him responsibility to superintend the military establishment and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising the delegated authority itself possesses independent authority over the subject matter, the familiar limitations on delegation do not apply. Id. at 771-74.

34That the opinion “remains authoritative doctrine” is stated in L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 25-26 (1972). It is utilized as an interpretive precedent in AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW, THE FOREIGN RELATIONS LAW OF THE UNITED STATES see, e.g., §§ 1, 204, 339 (1987). It will be noted, however, that the Restatement is circumspect about the reach of the opinion in controversies between presidential and congressional powers.
sively considered is Youngstown Sheet & Tube Co. v. Sawyer, and the multiple opinions there produced make difficult an evaluation of the matter. During the Korean War, President Truman seized the steel industry then in the throes of a strike. No statute authorized the seizure, and the Solicitor General defended the action as an exercise of the President’s executive powers which were conveyed by the first section of Article II, by the obligation to enforce the laws, and by the vesting of the function of commander-in-chief. By vote of six-to-three, the Court rejected this argument and held the seizure void. But the doctrinal problem is complicated by the fact that Congress had expressly rejected seizure proposals in considering labor legislation and had authorized procedures not followed by the President which did not include seizure. Thus, four of the majority Justices appear to have been decisively influenced by the fact that Congress had denied the power claimed and this in an area in which the Constitution vested the power to decide at least concurrently if not exclusively in Congress. Three and perhaps four Justices appear to have rejected the Government’s argument on the merits while three accepted it in large measure. Despite the inconclusiveness of the opinions, it seems clear that the


36 See Corwin, The Steel Seizure Case: A Judicial Brick Without Straw, 53 COLUM. L. REV. 53 (1953). A case similar to Youngstown was AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979), sustaining a presidential order denying government contracts to companies failing to comply with certain voluntary wage and price guidelines on the basis of statutory interpretation of certain congressional delegations.

37 343 U.S. 593, 597-602 (Justice Frankfurter concurring, though he also noted he expressly joined Justice Black’s opinion as well), 654, 655-60 (Justice Jackson concurring), 655, 657 (Justice Burton concurring), 660 (Justice Clark concurring).

38 343 U.S. at 582 (Justice Black delivering the opinion of the Court), 629 (Justice Douglas concurring, but note his use of the Fifth Amendment just compensation argument), 634 (Justice Jackson concurring), 655 (Justice Burton concurring).

39 343 U.S. at 667 (Chief Justice Vinson and Justices Reed and Minton dissenting).
result was a substantial retreat from the proclamation of vast presidential powers made in *Myers* and *Curtiss-Wright*. 40

**The Practice in the Presidential Office.**—However contested the theory of expansive presidential powers, the practice in fact has been one of expansion of those powers, an expansion that a number of “weak” Presidents and the temporary ascendency of Congress in the wake of the Civil War has not stemmed. Perhaps the point of no return in this area was reached in 1801 when the Jefferson-Madison “strict constructionists” came to power and, instead of diminishing executive power and federal power in general, acted rather to enlarge both, notably by the latitudinarian construction of implied federal powers to justify the Louisiana Purchase. 41 After a brief lapse into Cabinet government, the executive in the hands of Andrew Jackson stamped upon the presidency the outstanding features of its final character, thereby reviving, in the opinion of Henry Jones Ford, “the oldest political institution of the race, the elective Kingship.” 42 While the modern theory of presidential power was conceived primarily by Alexander Hamilton, the modern conception of the presidential office was the contribution primarily of Andrew Jackson. 43

**Executive Power: Separation-of-Powers Judicial Protection**

In recent cases, the Supreme Court has pronouncedly protected the Executive Branch, applying separation-of-powers principles to invalidate what it perceived to be congressional usurpation of executive power, but its mode of analysis has lately shifted seemingly to permit Congress a greater degree of discretion. 44

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41 For the debates on the constitutionality of the Purchase, see E. Brown, *The Constitutional History of the Louisiana Purchase*, 1803-1812 (1920). The differences and similarities between the Jeffersonians and the Federalists can be seen by comparing L. White, *The Jeffersonians—A Study in Administrative History* 1801-1829 (1951), with L. White, *The Federalists—A Study in Administrative History* (1948). That the responsibilities of office did not turn the Jeffersonians into Hamiltonians may be gleaned from Madison’s veto of an internal improvements bill. *2 Messages and Papers of the Presidents* 569 (J. Richardson comp., 1897).


44 Not that there have not been a few cases prior to the present period. See *Myers* v. United States, 272 U.S. 52 (1926). But a hallmark of previous disputes between President and Congress has been the use of political combat to resolve them, rather than a resort to the courts. The beginning of the present period was *Buckley v. Valeo*, 424 U.S. 1, 109-143 (1976).
Significant change in the position of the Executive Branch respecting its position on separation of powers may be discerned in two briefs of the Department of Justice's Office of Legal Counsel, which may spell some measure of judicial modification of the formalist doctrine of separation and adoption of the functionalist approach to the doctrine. The two opinions withdraw from the Department's earlier contention, following Buckley v. Valeo, that the execution of the laws is an executive function that may be carried out only by persons appointed pursuant to the appointments clause, thus precluding delegations to state and local officers and to private parties (as in *qui tam* actions), as well as to glosses on the take care clause and other provisions of the Constitution. Whether these memoranda signal long-term change depends on several factors, importantly on whether they are adhered to by subsequent administrations.

In striking down the congressional veto as circumventing Article I's bicameralism and presentment requirements attending exercise of legislative power, the Court also suggested in *INS v. Chadha* that the particular provision in question, involving veto of the Attorney General's decision to suspend deportation of an alien, in effect allowed Congress impermissible participation in execution of the laws. And in *Bowsher v. Synar*, the Court held that Congress had invalidly vested executive functions in a legislative branch official. Underlying both decisions was the premise, stated by Chief Justice Burger's opinion of the Court in *Chadha*, that "the powers delegated to the three Branches are functionally
identifiable,” distinct, and definable.\footnote{49} In a “standing-to-sue” case, Justice Scalia for the Court denied that Congress could by statute confer standing on citizens not suffering particularized injuries to sue the Federal Government to compel it to carry out a duty imposed by Congress, arguing that to permit this course would be to allow Congress to divest the President of his obligation under the “take care” clause and to delegate the power to the judiciary.\footnote{50} On the other hand, the Court in the independent counsel case, while acknowledging that the contested statute did restrict to some degree a constitutionally delegated function, law enforcement, upheld the law upon a flexible analysis that emphasized that neither the legislative nor the judicial branch had aggrandized its power and that the incursion into executive power did not impermissibly interfere with the President’s constitutionally assigned functions.\footnote{51}

At issue in Synar were the responsibilities vested in the Comptroller General by the “Gramm-Rudman-Hollings” Deficit Control Act,\footnote{52} which set maximum deficit amounts for federal spending for fiscal years 1986 through 1991, and which directed across-the-board cuts in spending when projected deficits would exceed the target deficits. The Comptroller was to prepare a report for each fiscal year containing detailed estimates of projected federal revenues and expenditures, and specifying the reductions, if any, necessary to meet the statutory target. The President was required to implement the reductions specified in the Comptroller’s report. The Court viewed these functions of the Comptroller “as plainly entailing execution of the law in constitutional terms. Interpreting a law . . . to implement the legislative mandate is the very essence of ‘execution’ of the law,” especially where “exercise [of] judgment” is called for, and where the President is required to implement the
interpretation. Because Congress by earlier enactment had retained authority to remove the Comptroller General from office, the Court held, executive powers may not be delegated to him. “By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.”

The Court in Chadha and Synar ignored or rejected assertions that its formalistic approach to separation of powers may bring into question the validity of delegations of legislative authority to the modern administrative state, sometimes called the “fourth branch.” As Justice White asserted in dissent in Chadha, “by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments . . . . There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term.” Moreover, Justice White noted, “rules and adjudications by the agencies meet the Court’s own definition of legislative action.” Justice Stevens, concurring in Synar, sounded the same chord in suggesting that the Court’s holding should not depend on classification of “chameleon-like” powers as executive, legislative, or judicial. The Court answered these assertions on two levels: that the bicameral protection “is not necessary” when legislative power has been delegated to another branch confined to implementing statutory standards set by Congress, and that “the Constitution does not so require.” In the same context, the Court acknowledged without disapproval that it had described some agency action as resembling lawmaking. Thus Chadha may not be read as requiring that all “legislative power” as the Court defined it must be exercised by Congress, and Synar may not be read as requiring that all “executive power” as the Court defined it must be exercised by the executive. A more limited reading is that when Congress elects to exercise legislative power itself rather than delegate it, it must follow the prescribed bicameralism and presentment procedures, and when Congress elects to delegate legislative power or assign executive functions to the executive branch, it may not control exercise of those functions by itself exercising removal (or appointment) powers.

53 478 U.S. at 732-33.
54 478 U.S. at 734.
55 462 U.S. at 985-86.
56 462 U.S. at 989.
57 478 U.S. at 736, 750.
58 462 U.S. at 953 n.16.
59 Id.
A more flexible approach was followed in the independent counsel case. Here, there was no doubt that the statute limited the President’s law enforcement powers. Upon a determination by the Attorney General that reasonable grounds exist for investigation or prosecution of certain high ranking government officials, he must notify a special, Article III court which appoints a special counsel. The counsel is assured full power and independent authority to investigate and, if warranted, to prosecute. Such counsel may be removed from office by the Attorney General only for cause as prescribed in the statute. The independent counsel was assuredly more free from executive supervision than other federal prosecutors. Instead of striking down the law, however, the Court undertook a careful assessment of the degree to which executive power was invaded and the degree to which the President retained sufficient powers to carry out his constitutionally assigned duties. Also considered by the Court was the issue whether in enacting the statute Congress had attempted to aggrandize itself or had attempted to enlarge the judicial power at the expense of the executive.

In the course of deciding that the President’s action in approving the closure of a military base, pursuant to statutory authority, was not subject to judicial review, the Court enunciated a principle that may mean a great deal, constitutionally speaking, or that may not mean much of anything. The lower court had held that, while review of presidential decisions on statutory grounds might be precluded, his decisions were reviewable for constitutionality; in that court’s view, whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine. The Supreme Court found this analysis flawed. “Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority.” Thus, the Court drew a distinction between executive action undertaken without even the purported warrant of statutory authorization and executive action in excess of statutory authority.

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63 511 U.S. at 472.
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authority. The former may violate separation of powers, while the latter will not. 64

Doctrinally, the distinction is important and subject to unfortunate application. 65 Whether the brief, unilluminating discussion in *Dalton* will bear fruit in constitutional jurisprudence, however, is problematic.

**TENURE**

Formerly, the term of four years during which the President “shall hold office” was reckoned from March 4 of the alternate odd years beginning with 1789. This came about from the circumstance that under the act of September 13, 1788, of “the Old Congress,” the first Wednesday in March, which was March 4, 1789, was fixed as the time for commencing proceedings under the Constitution. Although as a matter of fact Washington was not inaugurated until April 30 of that year, by an act approved March 1, 1792, it was provided that the presidential term should be reckoned from the fourth day of March next succeeding the date of election. And so things stood until the adoption of the Twentieth Amendment, by which the terms of President and Vice-President end at noon on the 20th of January. 66

The prevailing sentiment of the Philadelphia Convention favored the indefinite eligibility of the President. It was Jefferson who raised the objection that indefinite eligibility would in fact be for life and degenerate into an inheritance. Prior to 1940, the idea that no President should hold office for more than two terms was generally thought to be a fixed tradition, although some quibbles had been raised as to the meaning of the word “term.” The voters’ departure from the tradition in electing President Franklin D. Roosevelt to third and fourth terms led to the proposal by Congress on March 24, 1947, of an amendment to the Constitution to embody the tradition in the Constitutional Document. The proposal became a part of the Constitution on February 27, 1951, in consequence of

64See *The Supreme Court, Leading Cases, 1993 Term*, 108 Harv. L. Rev. 139, 300-10 (1994).
65“As a matter of constitutional logic, the executive branch must have some warrant, either statutory or constitutional, for its actions. The source of all federal governmental authority is the Constitution and, because the Constitution contemplates that Congress may delegate a measure of its power to officials in the executive branch, statutes. The principle of separation of powers is a direct consequence of this scheme. Absent statutory authorization, it is unlawful for the President to exercise the powers of the other branches because the Constitution does not vest those powers in the President. The absence of statutory authorization is not merely a statutory defect; it is a constitutional defect as well.” Id. at 305-06 (footnote citations omitted).
66As to the meaning of “the fourth day of March,” see Warren, *Political Practice and the Constitution*, 89 U. Pa. L. Rev. 1003 (1941).
Clause 2. Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Clause 3. The Electors shall meet in their respective States and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a majority of the whole Number of Electors appointed: and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member

\(^{67}\) E. Corwin, supra at 34-38, 331-339.
or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.

Clause 4. The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

ELECTORAL COLLEGE

The electoral college was one of the compromises by which the delegates were able to agree on the document finally produced. “This subject,” said James Wilson, referring to the issue of the manner in which the President was to be selected, “has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide.”

Adoption of the electoral college plan came late in the Convention, which had previously adopted on four occasions provisions for election of the executive by the Congress and had twice defeated proposals for election by the people directly. Itself the product of compromise, the electoral college probably did not work as any member of the Convention could have foreseen, because the development of political parties and nomination of presidential candidates through them and designation of electors by the parties soon reduced the concept of the elector as an independent force to the vanishing point in practice if not in theory. But the college remains despite numerous efforts to adopt another method, a relic perhaps but still a significant one. Clause 3 has, of course, been superceded by the Twelfth Amendment.

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68 2 M. Farrand, supra, p. 501.
“Appoint”

The word “appoint” as used in Clause 2 confers on state legislatures “the broadest power of determination.”\(^71\) Upholding a state law providing for selection of electors by popular vote from districts rather than statewide, the Court described the variety of permissible methods. “Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.”\(^72\)

State Discretion in Choosing Electors

Although Clause 2 seemingly vests complete discretion in the States, certain older cases had recognized a federal interest in protecting the integrity of the process. Thus, the Court upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any legally qualified person as a presidential elector.\(^73\) Its power to protect the choice of electors from fraud or corruption was sustained.\(^74\) “If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is helpless

\(^{71}\) McPherson v. Blacker, 146 U.S. 1, 27 (1892).
\(^{72}\) 146 U.S. at 28-29.
\(^{73}\) Ex parte Yarbrough, 110 U.S. 651 (1884).
\(^{74}\) Burroughs and Cannon v. United States, 290 U.S. 534 (1934).
before the two great natural and historical enemies of all republics, open violence and insidious corruption.”

More recently, substantial curbs on state discretion have been instituted by both the Court and the Congress. In *Williams v. Rhodes*, the Court struck down a complex state system which effectively limited access to the ballot to the electors of the two major parties. In the Court's view, the system violated the equal protection clause of the Fourteenth Amendment because it favored some and disfavored others and burdened both the right of individuals to associate together to advance political beliefs and the right of qualified voters to cast ballots for electors of their choice. For the Court, Justice Black denied that the language of Clause 2 immunized such state practices from judicial scrutiny. Then, in *Oregon v. Mitchell*, the Court upheld the power of Congress to reduce the voting age in presidential elections and to set a thirty-day durational residency period as a qualification for voting in presidential elections. Although the Justices were divided on the reasons, the rationale emerging from this case, considered with *Williams v. Rhodes*, is that the Fourteenth Amendment limits state discretion in prescribing the manner of selecting electors and that Congress in enforcing the Fourteenth Amendment may override state practices which violate that Amendment, and may substitute standards of its own.

Whether state enactments implementing the authority to appoint electors are subject to the ordinary processes of judicial re-

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75 Ex parte Yarbrough, 110 U.S. 651, 657-658 (1884) (quoted in Burroughs and Cannon v. United States, 290 U.S. 534, 546 (1934)).
76 393 U.S. 23 (1968).
77 “There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution .... [It cannot be] thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. [citing the Fifteenth, Nineteenth, and Twenty-fourth Amendments].... Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions.” 393 U.S. at 29.
79 The Court divided five-to-four on this issue. Of the majority, four relied on Congress' power under the Fourteenth Amendment, and Justice Black relied on implied and inherent congressional powers to create and maintain a national government. 400 U.S. at 119-124 (Justice Black announcing opinion of the Court).
80 The Court divided eight-to-one on this issue. Of the majority, seven relied on Congress' power to enforce the Fourteenth Amendment, and Justice Black on implied and inherent powers.
81 393 U.S. 23 (1968).
82 Cf. Fourteenth Amendment, § 5.
view within a state, or whether placement of the appointment authority in state legislatures somehow limits the role of state judicial review, became an issue during the controversy over the Florida recount and the outcome of the 2000 presidential election. The Supreme Court did not resolve this issue, but in a remand to the Florida Supreme Court, suggested that the role of state courts in applying state constitutions may be constrained by operation of Clause 2. Three Justices elaborated on this view in Bush v. Gore, but the Court ended the litigation—and the recount—on the basis of an equal protection interpretation, without ruling on the Article II argument.

**Constitutional Status of Electors**

Dealing with the question of the constitutional status of the electors, the Court said in 1890: “The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the State legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress... In accord with the provisions of the Constitution, Congress has determined the times as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them.” The truth of the matter is that the electors are not “officers” at all, by the usual tests of office. They have neither tenure nor salary, and

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83 Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam) (remanding for clarification as to whether the Florida Supreme Court “saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, § 1, cl. 2”).
84 Bush v. Gore, 531 U.S. 98, 111 (2000) (opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas). Relying in part on dictum in McPherson v. Blacker, 146 U.S. 1, 27 (1892), the three Justices reasoned that, because Article II confers the authority on a particular branch of state government (the legislature) rather than on a state generally, the customary rule requiring deference to state court interpretations of state law is not fully operative, and the Supreme Court “must ensure that postelection state-court actions do not frustrate” the legislature’s policy as expressed in the applicable statute. 531 U.S. at 113.
85 In re Green, 134 U.S. 377, 379-80 (1890).
86 United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).
having performed their single function they cease to exist as electors.

This function is, moreover, “a federal function,”87 because electors’ capacity to perform results from no power which was originally resident in the States, but instead springs directly from the Constitution of the United States.88

In the face of the proposition that electors are state officers, the Court has upheld the power of Congress to act to protect the integrity of the process by which they are chosen.89 But in Ray v. Blair,90 the Court reasserted the conception of electors as state officers, with some significant consequences.

Electors as Free Agents

“No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation’s highest offices.”91 Writing in 1826, Senator Thomas Hart Benton admitted that the framers had intended electors to be men of “superior discernment, virtue, and information,” who would select the President “according to their own will” and without reference to the immediate wishes of the people. “That this invention has failed of its objective in every election is a fact of such universal notoriety, that no one can dispute it. That it ought to have failed is equally uncontestable; for such independence in the electors was wholly incompatible with the safety of the people. [It] was, in fact, a chimerical and impractical idea in any community.”92

Electors constitutionally remain free to cast their ballots for any person they wish and occasionally they have done so.93 A recent instance occurred when a 1968 Republican elector in North Carolina chose to cast his vote not for Richard M. Nixon, who had won a plurality in the State, but for George Wallace, the independent candidate who had won the second greatest number of votes. Members of both the House of Representatives and of the Senate objected to counting that vote for Mr. Wallace and insisted

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87 Hawke v. Smith, 253 U.S. 221 (1920).
89 Ex parte Yarbrough, 110 U.S. 651 (1884); Burroughs and Cannon v. United States, 290 U.S. 534 (1934).
90 343 U.S. 214 (1952).
93 All but the most recent instances are summarized in N. Pierce, supra, 122-124.
that it should be counted for Mr. Nixon, but both bodies decided to count the vote as cast. 94

The power of either Congress 95 or of the States to enact legislation binding electors to vote for the candidate of the party on the ticket of which they run has been the subject of much argument. 96 It remains unsettled and the Supreme Court has touched on the issue only once and then tangentially. In Ray v. Blair, 97 the Court upheld, against a challenge of invalidity under the Twelfth Amendment, a rule of the Democratic Party of Alabama, acting under delegated power of the legislature, which required each candidate for the office of presidential elector to take a pledge to support the nominees of the party’s convention for President and Vice President. The state court had determined that the Twelfth Amendment, following language of Clause 3, required that electors be absolutely free to vote for anyone of their choice. Said Justice Reed for the Court:

“It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector’s announcing his choice beforehand, pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice. Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead, in one form or another, they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party’s nominees for the electoral college. This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one here required, in the primary.”

“However, even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art.

95 Congress has so provided in the case of electors of the District of Columbia, 75 Stat. 818 (1961), D.C. Code § 1-1108(g), but the reference in the text is to the power of Congress to bind the electors of the States.
96 At least thirteen States do have statutes binding their electors, but none has been tested in the courts.
97 343 U.S. 214 (1952).
II, § 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. A candidacy in the primary is a voluntary act of the applicant. He is not barred, discriminatorily, from participating but must comply with the rules of the party. Surely one may voluntarily assume obligations to vote for a certain candidate. The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary. Ala. Code, Tit. 17, § 145. Even though the victory of an independent candidate for elector in Alabama cannot be anticipated, the state does offer the opportunity for the development of other strong political organizations where the need is felt for them by a sizable block of voters. Such parties may leave their electors to their own choice."

"We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the nominees of the National Convention. Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge." 98 Justice Jackson, with Justice Douglas, dissented: "It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice. If custom were sufficient authority for amendment of the Constitution by Court decree, the decision in this matter would be warranted. Usage may sometimes impart changed content to constitutional generalities, such as 'due process of law,' 'equal protection,' or 'commerce among the states.' But I do not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions." 99

Clause 5. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been Fourteen Years a Resident within the United States.

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98 343 U.S. at 228-31.
99 343 U.S. at 232-33.
QUALIFICATIONS

All Presidents since and including Martin Van Buren were born in the United States subsequent to the Declaration of Independence. The principal issue with regard to the qualifications set out in this clause is whether a child born abroad of American parents is "a natural born citizen" in the sense of the clause. Whatever the term "natural born" means, it no doubt does not include a person who is "naturalized." Thus, the answer to the question might be seen to turn on the interpretation of the first sentence of the first section of the Fourteenth Amendment, providing that "[a]ll persons born or naturalized in the United States" are citizens. Significantly, however, Congress, in which a number of Framers sat, provided in the Naturalization act of 1790 that "the children of citizens of the United States, that may be born beyond the sea, ... shall be considered as natural born citizens ...." This phrasing followed the literal terms of British statutes, beginning in 1350, under which persons born abroad, whose parents were both British subjects, would enjoy the same rights of inheritance as those born in England; beginning with laws in 1709 and 1731, these statutes expressly provided that such persons were natural-born subjects of the crown. There is reason to believe, therefore, that the phrase includes persons who become citizens at birth by statute because of their status in being born abroad of American citizens. Whether the Supreme Court would decide the issue should it ever arise

\[100\] U.S.C. § 1401.
\[101\] Reliance on the provision of an Amendment adopted subsequent to the constitutional provision being interpreted is not precluded by but is strongly militated against by the language in Freytag v. Commissioner, 501 U.S. 868, 886-887 (1991), in which the Court declined to be bound by the language of the 25th Amendment in determining the meaning of "Heads of Departments" in the appointments clause. See also id. at 917 (Justice Scalia concurring). If the Fourteenth Amendment is relevant and the language is exclusive, that is, if it describes the only means by which persons can become citizens, then, anyone born outside the United States would have to be considered naturalized in order to be a citizen, and a child born abroad of American parents is to be considered "naturalized" by being statutorily made a citizen at birth. Although dictum in certain cases supports this exclusive interpretation of the Fourteenth Amendment, United States v. Wong Kim Ark, 169 U.S. 649, 702-703 (1898); cf. Montana v. Kennedy, 366 U.S. 308, 312 (1961), the most recent case in its holding and language rejects it. Rogers v. Bellei, 401 U.S. 815 (1971).

\[102\] Act of March 26, 1790, 1 Stat. 103, 104 (emphasis supplied). See Weedin v. Chin Bow, 274 U.S. 657, 661-666 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 672-675 (1898). With minor variations, this language remained law in subsequent reenactments until an 1802 Act, which omitted the italicized words for reasons not discernable. See Act of Feb. 10, 1855, 10 Stat. 604 (enacting same provision, for offspring of American-citizen fathers, but omitting the italicized phrase).

\[103\] 25 Edw. 3, Stat. 2 (1350); 7 Anne, ch. 5, § 3 (1709); 4 Geo. 2, ch. 21 (1731).

in a “case or controversy”—as well as how it might decide it—can only be speculated about.

Clause 6. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President declaring what Officer shall then act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected.

**PRESIDENTIAL SUCCESSION**

When the President is disabled or is removed or has died, to what does the Vice President succeed: to the “powers and duties of the said office,” or to the office itself? There is a reasonable amount of evidence from the proceedings of the convention from which to conclude that the Framers intended the Vice President to remain Vice President and to exercise the powers of the President until, in the words of the final clause, “a President shall be elected.” Nonetheless, when President Harrison died in 1841, Vice President Tyler, after initial hesitation, took the position that he was automatically President, a precedent which has been followed subsequently and which is now permanently settled by section 1 of the Twenty-fifth Amendment. That Amendment also settles a number of other pressing questions with regard to presidential inability and succession.

Clause 7. The President shall, at stated Times, receive for his Services, a Compensation which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

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105 E. Corwin, supra at 53-59, 344 n. 46.
ART. II—EXECUTIVE DEPARTMENT

Sec. 1—The President

COMPENSATION AND EMOLUMENTS

Clause 7 may be advantageously considered in the light of the rulings and learning arising out of parallel provision regarding judicial salaries.\(^\text{106}\)

Clause 8. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:— "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

OATH OF OFFICE

What is the time relationship between a President's assumption of office and his taking the oath? Apparently, the former comes first, this answer appearing to be the assumption of the language of the clause. The Second Congress assumed that President Washington took office on March 4, 1789,\(^\text{107}\) although he did not take the oath until the following April 30.

That the oath the President is required to take might be considered to add anything to the powers of the President, because of his obligation to "preserve, protect and defend the Constitution," might appear to be rather a fanciful idea. But in President Jackson's message announcing his veto of the act renewing the Bank of the United States there is language which suggests that the President has the right to refuse to enforce both statutes and judicial decisions based on his own independent decision that they were unwarranted by the Constitution.\(^\text{108}\) The idea next turned up in a message by President Lincoln justifying his suspension of the writ of habeas corpus without obtaining congressional authorization.\(^\text{109}\) And counsel to President Johnson during his impeachment trial adverted to the theory, but only in passing.\(^\text{110}\) Beyond these

\(^{106}\) Cf. 13 Ops. Atty. Gen. 161 (1869), holding that a specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would by law be payable as such salary, is a diminution of the compensation to be paid to him which, in the case of the President, would be unconstitutional if the act of Congress levying the tax was passed during his official term.

\(^{107}\) Act of March 1, 1792, 1 Stat. 239, § 12.

\(^{108}\) 2 J. Richardson, supra at 576. Chief Justice Taney, who as a member of Jackson's Cabinet had drafted the message, later repudiated this possible reading of the message. 2 C. Warren, THE SUPREME COURT IN UNITED STATES HISTORY 223-224 (1926).

\(^{109}\) 6 J. Richardson, supra at 25.

\(^{110}\) 2 TRIAL OF ANDREW JOHNSON 200, 293, 296 (1868).
ART. II—EXECUTIVE DEPARTMENT

Sec. 2—Powers, Duties of the President

isolated instances, it does not appear to be seriously contended that
the oath adds anything to the President’s powers.

SECTION 2. Clause 1. The President shall be Commander in
Chief of the Army and Navy of the United States, and of the
Militia of the several States, when called into the actual Service
of the United States; he may require the Opinion, in writing,
of the principal Officer in each of the executive Departments,
upon any Subject relating to the Duties of their respective
Office, and he shall have Power to grant Reprieves and
Pardons for Offences against the United States, except in Cases
of Impeachment.

COMMANDER-IN-CHIEF

Development of the Concept

Surprisingly little discussion of the Commander-in-Chief clause
is found in the Convention or in the ratifying debates. From the
evidence available, it appears that the Framers vested the duty in
the President because experience in the Continental Congress had
disclosed the inexpediency of vesting command in a group and be-
cause the lesson of English history was that danger lurked in vest-
ing command in a person separate from the responsible political
leaders. 111 But the principal concern here is the nature of the
power granted by the clause.

The Limited View.—The purely military aspects of the Com-
mander-in-Chiefship were those that were originally stressed.
Hamilton said the office “would amount to nothing more than the
supreme command and direction of the Military and naval forces,
as first general and admiral of the confederacy.” 112 Story wrote in
his Commentaries: “The propriety of admitting the president to be

111 May, The President Shall Be Commander in Chief, in The Ultimate De-
cision—The President as Commander in Chief (E. May ed., 1960), 1. In the Vir-
ginia ratifying convention, Madison, replying to Patrick Henry’s objection that dan-
ger lurked in giving the President control of the military, said: “Would the honor-
able member say that the sword ought to be put in the hands of the representatives
of the people, or in other hands independent of the government altogether?” 3 J. Eli-
liot, The Debates in the Several State Conventions on the Adoption of the Federal
Constitution 393 (1836). In the North Carolina convention, Iredell said:
“From the nature of the thing, the command of armies ought to be delegated to one
person only. The secrecy, dispatch, and decision, which are necessary in military
operations can only be expected from one person.” 4 id. at 107.

commander in chief, so far as to give orders, and have a general superintendence, was admitted. But it was urged, that it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. The consent of both houses of Congress ought, therefore, to be required, before he should take the actual command. The answer then given was, that though the president might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents.\footnote{113} In 1850, Chief Justice Taney, for the Court, said: “His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.”

“... But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question.”\footnote{114} Even after the Civil War, a powerful minority of the Court described the role of President as Commander-in-Chief simply as “the command of the forces and the conduct of campaigns.”\footnote{115}

\textbf{The Prize Cases}.—The basis for a broader conception was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the laws.\footnote{116} In his famous message to Congress of July 4, 1861,\footnote{117} Lincoln advanced the claim that the “war power” was his for the purpose of suppressing rebellion, and in the \textit{Prize Cases}\footnote{118} of 1863 a divided Court sustained

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\begin{itemize}
  \item \footnote{113}{J. Story, \textit{Commentaries on the Constitution of the United States} 1486 (1833).}
  \item \footnote{114}{Fleming v. Page, 50 U.S. (9 How.) 603, 615, 618 (1850).}
  \item \footnote{115}{Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).}
  \item \footnote{116}{1 Stat. 424 (1795); 2 Stat. 443 (1807), now 10 U.S.C. §§ 331-334. \textit{See also} Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32-33 (1827), asserting the finality of the President’s judgment of the existence of a state of facts requiring his exercise of the powers conferred by the act of 1795.}
  \item \footnote{117}{7 J. Richardson, supra at 3221, 3232.}
  \item \footnote{118}{67 U.S. (2 Bl.) 635 (1863).}
\end{itemize}
this theory. The immediate issue was the validity of the blockade which the President, following the attack on Fort Sumter, had proclaimed of the Southern ports. The argument was advanced that a blockade to be valid must be an incident of a “public war” validly declared, and that only Congress could, by virtue of its power “to declare war,” constitutionally impart to a military situation this character and scope. Speaking for the majority of the Court, Justice Grier answered: “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be ‘unilateral.’ Lord Stowell (1 Dodson, 247) observes, ‘It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers of the law of nations. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other.’”

“The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized ‘a state of war as existing by the act of the Republic of Mexico.’ This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.”

“This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.”

“... Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. ‘He must determine what degree of force the crisis demands.’ The proclamation of blockade is itself official and conclusive evidence to the Court

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1197 J. Richardson, supra at 3215, 3216, 3481.
that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." 120

Impact of the Prize Cases on World Wars I and II.—In brief, the powers claimable for the President under the Commander-in-Chief clause at a time of wide-spread insurrection were equated with his powers under the clause at a time when the United States is engaged in a formally declared foreign war. 121 And since Lincoln performed various acts especially in the early months of the Civil War which, like increasing the Army and Navy, admittedly fell within the constitutional provinces of Congress, it seems to have been assumed during World Wars I and II that the Commander-in-Chiefship carried with it the power to exercise like powers practically at discretion, not merely in wartime but even at a time when war became a strong possibility. No attention was given the fact that Lincoln had asked Congress to ratify and confirm his acts, which Congress promptly did, 122 with the exception of his suspension of the habeas corpus privilege, which was regarded by many as attributable to the President in the situation then existing, by virtue of his duty to take care that the laws be faithfully executed. 123 Nor was this the only respect in which war or the approach of war was deemed to operate to enlarge the scope of power claimable by the President as Commander-in-Chief in wartime. 124

Presidential Theory of the Commander-in-Chiefship in World War II—And Beyond

In his message to Congress of September 7, 1942, in which he demanded that Congress forthwith repeal certain provisions of the

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120 67 U.S. (2 Bl.) at 668-70.
121 See generally, E. Corwin, Total War and the Constitution (1946).
122 12 Stat. 326 (1861).
124 E.g., Attorney General Biddle's justification of seizure of a plant during World War II: "As Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war.... In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor disturbances that threaten to interfere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort." 40 Ops. Atty. Gen. 312, 319-320 (1944). Prior to the actual beginning of hostilities, Attorney General Jackson asserted the same justification upon seizure of an aviation plant. E. Corwin, Total War and the Constitution 47-48 (1946).
Emergency Price Control Act of the previous January 30th, President Roosevelt formulated his conception of his powers as "Commander in Chief in wartime" as follows:

"I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos."

"In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."

"At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do."

"The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war."

"I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress...."

"The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat."

"When the war is won, the powers under which I act automatically revert to the people—to whom they belong."

Presidential War Agencies.—While congressional compliance with the President's demand rendered unnecessary an effort on his part to amend the Price Control Act, there were other matters as to which he repeatedly took action within the normal field of congressional powers, not only during the war, but in some instances prior to it. Thus, in exercising both the powers which he claimed as Commander-in-Chief and those which Congress conferred upon him to meet the emergency, Mr. Roosevelt employed new emergency agencies, created by himself and responsible directly to him, rather than the established departments or existing independent regulatory agencies.

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125 56 Stat. 23 (1942).
126 88 CONG. REC. 7044 (1942). Congress promptly complied, 56 Stat. 765 (1942), so that the President was not required to act on his own. But see E. Corwin, supra, 65-66.
127 For a listing of the agencies and an account of their creation to the close of 1942, see Vanderbilt, War Powers and Their Administration, in 1942 Annual Survey of American Law 106 (New York Univ.).
Constitutional Status of Presidential Agencies.—The question of the legal status of the presidential agencies was dealt with judicially but once. This was in the decision of the United States Court of Appeals of the District of Columbia in Employers Group v. National War Labor Board, which was a suit to annul and enjoin a “directive order” of the War Labor Board. The Court refused the injunction on the ground that the time when the directive was issued any action of the Board was “informatory,” “at most advisory.” In support of this view the Court quoted approvingly a statement by the chairman of the Board itself: “These orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the nonstrike, no-lock-out agreement and . . . to carry out the directives of the tribunal created under that agreement by the Commander in Chief.” Nor, the Court continued, had the later War Labor Disputes Act vested War Labor Board orders with any greater authority, with the result that they were still judicially unenforceable and unreviewable. Following this theory, the War Labor Board was not an office wielding power, but a purely advisory body, such as Presidents have frequently created in the past without the aid or consent of Congress. Congress itself, nevertheless, both in its appropriation acts and in other legislation, treated the presidential agencies as in all respects offices.

Evacuation of the West Coast Japanese.—On February 19, 1942, President Roosevelt issued an executive order, “by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy,” providing, as a safeguard against subversion and sabotage, power for his military commanders to designate areas from which “any person” could be excluded or removed and to set up facilities for such persons elsewhere. Pursuant to this order, more than 112,000 residents of the Western States, all of Japanese descent and more than two out of every three of whom were natural-born citizens, were removed from their homes and herded into temporary camps and later into “relocation centers” in several States.

It was apparently the original intention of the Administration to rely on the general principle of military necessity and the power of the Commander-in-Chief in wartime as authority for the reloca-
ART. II—EXECUTIVE DEPARTMENT

Sec. 2—Powers, Duties of the President

Cl. 1—Commander-In-Chiefship

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134 Korematsu v. United States, 323 U.S. 214 (1944). Long afterward, in 1984, a federal court granted a writ of coram nobis and overturned Korematsu’s conviction, Korematsu v. United States, 584 F. Supp. 1406 (N.D.Cal. 1984), and in 1986, a federal court vacated Hirabayashi’s conviction for failing to register for evacuation but let stand the conviction for curfew violations. Hirabayashi v. United States, 627 F. Supp. 1445 (W.D.Wash. 1986). Other cases were pending, but Congress then implemented the recommendations of the Commission on Wartime Relocation and Internment of Civilians by acknowledging “the fundamental injustice of the evacuation, relocation and internment,” and apologizing on behalf of the people of the United States. P. L. 100-383, 102 Stat. 903, 50 U.S.C. App. § 1989 et seq. Reparations were approved, and each living survivor of the internment was to be compensated in an amount roughly approximating $20,000.
to exist by joint resolutions of Congress, ... the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and Whereas as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for a peaceful adjustment of such disputes. Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered: 1. There is hereby created in the Office for Emergency Management a National War Labor Board . . .”137 In this field, too, Congress intervened by means of the War Labor Disputes Act of June 25, 1943, 138 which, however, still left ample basis for presidential activity of a legislative character. 139

**Sanctions Implementing Presidential Directives.**—To implement his directives as Commander-in-Chief in wartime, and especially those which he issued in governing labor disputes, President Roosevelt often resorted to “sanctions,” which may be described as penalties lacking statutory authorization. Ultimately, the President sought to put sanctions in this field on a systematic basis. The order empowered the Director of Economic Stabilization, on receiving a report from the National War Labor Board that someone was not complying with its orders, to issue “directives” to the appropriate department or agency requiring that privileges, benefits, rights, or preferences enjoyed by the noncomplying party be withdrawn. 140

Sanctions were also occasionally employed by statutory agencies, such as OPA, to supplement the penal provisions of the Emergency Price Control Act of January 30, 1942. 141 In *Steuart & Bro. v. Bowles*, 142 the Supreme Court had the opportunity to regularize this type of executive emergency legislation. Here, a retail dealer in fuel oil was charged with having violated a rationing order of OPA by obtaining large quantities of oil from its supplier without surrendering ration coupons, by delivering many thousands of gallons of fuel oil without requiring ration coupons, and so on, and was prohibited by the agency from receiving oil for resale or trans-

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141 56 Stat. 23 (1942).
142 322 U.S. 398 (1944).
fer for the ensuing year. The offender conceded the validity of the rationing order in support of which the suspension order was issued but challenged the validity of the latter as imposing a penalty that Congress had not enacted and asked the district court to enjoin it.

The court refused to do so and was sustained by the Supreme Court in its position. Said Justice Douglas, speaking for the Court: "Without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. . . . But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. . . . These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. . . . Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a previous supply of material needed for the manufacture of articles of war. . . . From the point of view of the factory owner from whom the materials were diverted the action would be harsh. . . . But in time of war the national interest cannot wait on individual claims to preference. Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil." 143 Sanctions were, therefore, constitutional when the deprivations they wrought were a reasonably implied amplification of the substantive power which they supported and were directly conservative of the interests which this power was created to protect and advance. It is certain, however, that sanctions not uncommonly exceeded this pattern. 144

The Postwar Period.—The end of active hostilities did not terminate either the emergency or the federal-governmental response to it. President Truman proclaimed the termination of hostilities on December 31, 1946, 145 and Congress enacted a joint resolution which repealed a great variety of wartime statutes and set termination dates for others in July, 1947. 146 Signing the resolution, the President said that the emergencies declared in 1939 and

143 322 U.S. at 404-05.
144 E. Corwin, supra at 249-250.
1940 continued to exist and that it was “not possible at this time to provide for terminating all war and emergency powers.” The hot war was giving way to the Cold War.

Congress thereafter enacted a new Housing and Rent Act to continue the controls begun in 1942 and continued the military draft. With the outbreak of the Korean War, legislation was enacted establishing general presidential control over the economy again, and by executive order the President created agencies to exercise the power. The Court continued to assume the existence of a state of wartime emergency prior to Korea, but with misgivings. In *Woods v. Cloyd W. Miller Co.*, the Court held constitutional the new rent control law on the ground that cessation of hostilities did not conclude the Government's powers but that the power continued to remedy the evil arising out of the emergency. Yet, Justice Douglas noted for the Court that “We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision.” Justice Jackson, while concurring, noted that he found the war power “the most dangerous one to free government in the whole catalogue of powers” and cautioned that its exercise should “be scrutinized with care.” And in *Ludecke v. Watkins*, four Justices were prepared to hold that the presumption in the statute under review of continued war with Germany was fiction and not to be utilized.

But the postwar was a time of reaction against the wartime exercise of power by President Roosevelt, and President Truman was not permitted the same liberties. The Twenty-second Amendment, writing into permanent law the two-term custom, the “Great Debate” about our participation in NATO, the attempt to limit the treaty-making power, and other actions, bespoke the reaction. The Supreme Court signalized this reaction when it struck down

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153 333 U.S. at 143-44.
154 333 U.S. at 146-47.
155 335 U.S. 160 (1948).
the President’s action in seizing the steel industry while it was struck during the Korean War.\textsuperscript{157}

Nonetheless, the long period of the Cold War and of active hostilities in Korea and Indochina, in addition to the issue of the use of troops in the absence of congressional authorization, further created conditions for consolidation of powers in the President. In particular, a string of declarations of national emergencies, most, in whole or part, under the Trading with the Enemy Act,\textsuperscript{158} undergirded the exercise of much presidential power. In the storm of response to the Vietnamese conflict, here, too, Congress reasserted legislative power to curtail what it viewed as excessive executive power, repealing the Trading with the Enemy Act and enacting in its place the International Emergency Economic Powers Act,\textsuperscript{159} which did not alter most of the range of powers delegated to the President but which did change the scope of the power delegated to declare national emergencies.\textsuperscript{160} Congress also passed the National Emergencies Act, prescribing procedures for the declaration of national emergencies, for their termination, and for presidential reporting to Congress in connection with national emergencies. To end the practice of declaring national emergencies for an indefinite duration, Congress provided that any emergency not otherwise terminated would expire one year after its declaration unless the President published in the Federal Register and transmitted to Congress a notice that the emergency would continue in effect.\textsuperscript{161} Whether the balance of power between President and Congress shifted at all is not really a debatable question.

The Cold War and After: Presidential Power To Use Troops Overseas Without Congressional Authorization

Reaction after World War II did not persist, but soon ran its course, and the necessities, real and only perceived, of the United States’ role as world power and chief guarantor of the peace operated to expand the powers of the President and to diminish congressional powers in the foreign relations arena. President Truman did not seek congressional authorization before sending troops to Korea, and subsequent Presidents similarly acted on their own in putting troops into many foreign countries, including the Domini-
can Republic, Lebanon, Grenada, Panama, and the Persian Gulf, and most notably Indochina. \(^{162}\) Eventually, public opposition precipitated another constitutional debate whether the President had the authority to commit troops to foreign combat without the approval of Congress, a debate that went on inconclusively between Congress and Executive \(^{163}\) and one which the courts were content generally to consign to the exclusive consideration of those two bodies. The substance of the debate concerns many facets of the President’s powers and responsibilities, including his obligations to protect the lives and property of United States citizens abroad, to execute the treaty obligations of the Nation, to further the national security interests of the Nation, and to deal with aggression and threats of aggression as they confront him. Defying neat summarization, the considerations nevertheless merit at least an historical survey and an attempted categorization of the arguments.

**The Historic Use of Force Abroad.**—In 1912, the Department of State published a memorandum prepared by its Solicitor which set out to justify the *Right to Protect Citizens in Foreign Countries by Landing Forces*. \(^{164}\) In addition to the justification, the memorandum summarized 47 instances in which force had been used, in most of them without any congressional authorization. Twice revised and reissued, the memorandum was joined by a 1928 independent study and a 1945 work by a former government official in supporting conclusions that drifted away from the original justification of the use of United States forces abroad to the use of such forces at the discretion of the President and free from control by Congress. \(^{165}\)

New lists and revised arguments were published to support the actions of President Truman in sending troops to Korea and of Presidents Kennedy and Johnson in sending troops first to Viet-

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\(^{163}\) See under Article I, § 8, cls. 11-14.

\(^{164}\) J. Clark, *Memorandum by the Solicitor for the Department of State*, in *Right to Protect Citizens in Foreign Countries by Landing Forces* (1912).

\(^{165}\) Id., (Washington: 1929; 1934); M. Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928); J. Rogers, *World Policing and the Constitution* (1945). The burden of the last cited volume was to establish that the President was empowered to participate in United Nations peacekeeping actions without having to seek congressional authorization on each occasion; it may be said to be one of the earliest, if not the earliest, propoundings of the doctrine of inherent presidential powers to use troops abroad outside the narrow compass traditionally accorded those powers.
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niew and then to Indochina generally, and new lists have been propounded. The great majority of the instances cited involved fights with pirates, landings of small naval contingents on barbarous or semibarbarous coasts to protect commerce, the dispatch of small bodies of troops to chase bandits across the Mexican border, and the like, and some incidents supposedly without authorization from Congress did in fact have underlying statutory or other legislative authorization. Some instances, e.g., President Polk’s use of troops to precipitate war with Mexico in 1846, President Grant’s attempt to annex the Dominican Republic, President McKinley’s dispatch of troops into China during the Boxer Rebellion, involved considerable exercises of presidential power, but in general purposes were limited and congressional authority was sought for the use of troops against a sovereign state or in such a way as to constitute war. The early years of this century saw the expansion in the Caribbean and Latin America both of the use of troops for the furthering of what was perceived to be our national

166 E.g., H. Rep. No. 127, 82d Congress, 1st Sess. (1951), 55-62; Corwin, Who Has the Power to Make War? NEW YORK TIMES MAGAZINE (July 31, 1949), 11; Authority of the President to Repel the Attack in Korea, 23 DEPT. STATE BULL. 173 (1950); Department of State, Historical Studies Division, Armed Actions Taken by the United States Without a Declaration of War, 1789-1967 (Res. Proj. No. 806A (Washington: 1967)). That the compilation of such lists was more than a defense against public criticism can be gleaned from a revealing discussion in Secretary of State Acheson’s memoirs detailing why the President did not seek congressional sanction for sending troops to Korea. “There has never, I believe, been any serious doubt—in the sense of non-politically inspired doubt—of the President’s constitutional authority to do what he did. The basis for this conclusion in legal theory and historical precedent was fully set out in the State Department’s memorandum of July 3, 1950, extensively published. But the wisdom of the decision not to ask for congressional approval has been doubted....” D. ACHESON, PRESENT AT THE CREATION 414, 415 (1969).

interests and of the power of the President to deploy the military force of the United States without congressional authorization.\(^\text{168}\)

The pre-war actions of Presidents Wilson and Franklin Roosevelt advanced in substantial degrees the fact of presidential initiative, although the theory did not begin to catch up with the fact until the “Great Debate” over the commitment of troops by the United States to Europe under the Atlantic Pact. While congressional authorization was obtained, that debate, the debate over the United Nations charter, and the debate over Article 5 of the North Atlantic Treaty of 1949, declaring that “armed attack” against one signatory was to be considered as “an attack” against all signatories, provided the occasion for the formulation of a theory of independent presidential power to use the armed forces in the national interest at his discretion.\(^\text{169}\) Thus, Secretary of State Acheson told Congress: “Not only has the President the authority to use the armed forces in carrying out the broad foreign policy of the United States implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.”\(^\text{170}\)

**The Theory of Presidential Power.**—The fullest expression of the presidential power proponents has been in defense of the course followed in Indochina. Thus, the Legal Adviser of the State Department, in a widely circulated document, contended: “Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power


\(^{169}\) For some popular defenses of presidential power during the “Great Debate,” see Corwin, Who Has the Power to Make War? NEW YORK TIMES MAGAZINE (July 31, 1949), 11; Commager, Presidential Power: The Issue Analyzed, NEW YORK TIMES MAGAZINE (January 14, 1951), 11. Cf: Douglas, The Constitutional and Legal Basis for the President’s Action in Using Armed Forces to Repel the Invasion of South Korea, 96 CONG. REC. 9647 (1950). President Truman and Secretary Acheson utilized the argument from the U. N. Charter in defending the United States actions in Korea, and the Charter defense has been made much of since. See, e.g., Stromseth, Rethinking War Powers: Congress, the President, and the United Nations, 81 GEO. L. J. 597 (1993).

\(^{170}\) Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Foreign Relations and Armed Services Committees, 82d Congress, 1st sess. (1951), 92.
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to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States...."

"In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet Nam would endanger the peace and security of the United States."

"Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet Nam is required, and that military measures against the source of Communist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures."

Opponents of such expanded presidential powers have contended, however, that the authority to initiate war was not divided between the Executive and Congress but was vested exclusively in Congress. The President had the duty and the power to repeal sudden attacks and act in other emergencies, and in his role as Commander-in-Chief he was empowered to direct the armed forces for any purpose specified by Congress. Though Congress asserted itself in some respects, it never really managed to confront the President's power with any sort of effective limitation, until recently.

The Power of Congress to Control the President's Discretion.—Over the President's veto, Congress enacted the War Powers


172 E.g., F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR (2d ed. 1989), F.; J. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1990); U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations, 90th Congress, 1st sess. (1967), 9 (Professor Bartlet); War Powers Legislation: Hearings Before the Senate Committee on Foreign Relations, 92d Cong., 1st sess. (1971), 7 (Professor Commager), 75 (Professor Morris), 251 (Professor Mason).
Resolution, designed to redistribute the war powers between the President and Congress. Although ambiguous in some respects, the Resolution appears to define restrictively the President’s powers, to require him to report fully to Congress upon the introduction of troops into foreign areas, to specify a maximum time limitation on the engagement of hostilities absent affirmative congressional action, and to provide a means for Congress to require cessation of hostilities in advance of the time set. The Resolution states that the President’s power to commit United States troops into hostilities, or into situations of imminent involvement in hostilities, is limited to instances of (1) a declaration of war, (2) a specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces. In the absence of a declaration of war, a President must within 48 hours report to Congress whenever he introduces troops (1) into hostilities or situations of imminent hostilities, (2) into a foreign nation while equipped for combat, except in certain nonhostile situations, or (3) in numbers which substantially enlarge United States troops equipped for combat already located in a foreign nation. The President is required to terminate the use of troops in the reported situation within 60 days of reporting, unless Congress (1) has declared war, (2) has extended the period, or (3) is unable to meet as a result of an attack on the United States, but the period can be extended another 30 days by the President’s certification to Congress of unavoidable military necessity respecting the safety of the troops. Congress may through the passage of a concurrent resolution require the President to remove the troops sooner. The Resolution further states that no legislation, whether enacted prior to or subsequent to passage of the Resolution will be taken to empower the President to use troops abroad unless the legislation specifically does so and that no treaty may

175 Id. at § 1543(a).
176 Id. at § 1544(b).
177 Id. at § 1544(c). It is the general consensus that, following INS v. Chadha, 462 U.S. 919 (1983), this provision of the Resolution is unconstitutional.
so empower the President unless it is supplemented by implementing legislation specifically addressed to the issue. 178

Aside from its use as a rhetorical device, the War Powers Resolution has been of little worth in reordering presidential-congressional relations in the years since its enactment. All Presidents operating under it have expressly or implicitly considered it to be an unconstitutional infringement on presidential powers, and on each occasion of use abroad of United States troops the President in reporting to Congress has done so “consistent[ly] with” the reporting section but not pursuant to the provision. 179 Upon the invasion of Kuwait by Iraqi troops in 1990, President Bush sought not congressional authorization but a United Nations Security Council resolution authorizing the use of force by member Nations. Only at the last moment did the President seek authorization from Congress, he and his officials contending he had the power to act unilaterally. 180 Congress after intensive debate voted, 250 to 183 in the House of Representatives and 53 to 46 in the Senate, to authorize the President to use United States troops pursuant to the U. N. resolution and purporting to bring the act within the context of the War Powers Resolution. 181

Although there is recurrent talk within Congress and without with regard to amending the War Powers Resolution to strengthen it, no consensus has emerged, and there is little evidence that there exists within Congress the resolve to exercise the responsibility concomitant with strengthening it. 182

The President as Commander of the Armed Forces

While the President customarily delegates supreme command of the forces in active service, there is no constitutional reason why

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178 50 U.S.C. § 1547(a).
180 See Crisis in the Persian Gulf Region: U. S. Policy Options and Implications: Hearings Before the Senate Committee on Armed Services, 101st Cong., 2d Sess. (1990), 701 (Secretary Cheney) (President did not require “any additional authorization from the Congress” before attacking Iraq). On the day following his request for supporting legislation from Congress, President Bush, in answer to a question about the requested action, stated: “I don’t think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions.” 27 WEEKLY COMP. PERS. DOC. 25 (Jan. 8, 1991).
181 P. L. 102-1, 105 Stat. 3.
he should do so, and he has been known to resolve personally important questions of military policy. Lincoln early in 1862 issued orders for a general advance in the hopes of stimulating McClellan to action; Wilson in 1918 settled the question of an independent American command on the Western Front; Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki. As against an enemy in the field, the President possesses all the powers which are accorded by international law to any supreme commander. “He may invade the hostile country, and subject it to the sovereignty and authority of the United States.” In the absence of attempts by Congress to limit his power, he may establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States, and his authority to do this sometimes survives cessation of hostilities. He may employ secret agents to enter the enemy’s lines and obtain information as to its strength, resources, and movements. He may, at least with the assent of Congress, authorize commercial intercourse with the enemy. He may also requisition property and compel services from American citizens and friendly aliens who are situated within the theatre of military operations when necessity requires, thereby incurring for the United States the obligation to render “just compensation.” By the same warrant, he may bring hostilities to a conclusion by arranging an armistice, stipulating conditions which may determine to a great extent the ensuing peace. He may not, however, affect a permanent acquisition of territory, though he may govern recently acquired territory until Congress sets up a more permanent regime.

The President is the ultimate tribunal for the enforcement of the rules and regulations which Congress adopts for the govern-

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183 For a review of how several wartime Presidents have operated in this sphere, see The Ultimate Decision—The President as Commander in Chief (E. May ed., 1960).
186 Totten v. United States, 92 U.S. 105 (1876).
189 Cf. the Protocol of August 12, 1898, which largely foreshadowed the Peace of Paris, 30 Stat. 1742 and President Wilson’s Fourteen Points, which were incorporated in the Armistice of November 11, 1918.
ment of the forces, and which are enforced through courts-martial. Indeed, until 1830, courts-martial were convened solely on the President’s authority as Commander-in-Chief. Such rules and regulations are, moreover, it would seem, subject in wartime to his amendment at discretion. Similarly, the power of Congress to “make rules for the government and regulation of the land and naval forces” (Art. I, § 8, cl. 14) did not prevent President Lincoln from promulgating in April, 1863, a code of rules to govern the conduct in the field of the armies of the United States which was prepared at his instance by a commission headed by Francis Lieber and which later became the basis of all similar codifications both here and abroad.

One important power that the President lacks is that of choosing his subordinates, whose grades and qualifications are determined by Congress and whose appointment is ordinarily made by and with the advice and consent of the Senate, though undoubtedly Congress could if it wished vest their appointment in “the President alone.” Also, the President’s power to dismiss an officer from the service, once unlimited, is today confined by statute in time of peace to dismissal “in pursuance of the sentence of a general court-martial or in mitigation thereof.” But the provision is not regarded by the Court as preventing the President from displacing an officer of the Army or Navy by appointing with the advice and consent of the Senate another person in his place. The President’s power of dismissal in time of war Congress has never attempted to limit.

The Commander-in-Chief a Civilian Officer.—Is the Commander-in-Chiefship a military or a civilian office in the contemplation of the Constitution? Unquestionably the latter. An opinion by a New York surrogate deals adequately, though not authoritatively, with the subject: “The President receives his compensation for his services, rendered as Chief Executive of the Nation, not for the individual parts of his duties. No part of his compensation is paid from sums appropriated for the military or naval forces; and it is equally clear under the Constitution that the President’s duties as

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192 Swaim v. United States, 165 U.S. 553 (1897); and cases there reviewed. See also Givens v. Zerbst, 255 U.S. 11 (1921).
194 Ex parte Quirin, 317 U.S. 1, 28-29 (1942).
Commander in Chief represent only a part of duties ex officio as Chief Executive [Article II, sections 2 and 3 of the Constitution] and that the latter's office is a civil office. [Article II, section 1 of the Constitution . . . .] The President does not enlist in, and he is not inducted or drafted into, the armed forces. Nor, is he subject to court-martial or other military discipline. On the contrary, Article II, section 4 of the Constitution provides that ‘The President, [Vice President] and All Civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery or other high Crimes and Misdemeanors.’ . . . The last two War Presidents, President Wilson and President Roosevelt, both clearly recognized the civilian nature of the President's position as Commander in Chief. President Roosevelt, in his Navy Day Campaign speech at Shibe Park, Philadelphia, on October 27, 1944, pronounced this principle as follows:—'It was due to no accident and no oversight that the framers of our Constitution put the command of our armed forces under civilian authority. It is the duty of the Commander in Chief to appoint the Secretaries of War and Navy and the Chiefs of Staff.' It is also to be noted that the Secretary of War, who is the regularly constituted organ of the President for the administration of the military establishment of the Nation, has been held by the Supreme Court of the United States to be merely a civilian officer, not in military service. ([United States v. Burns, 79 U.S. 246 (1871)]). On the general principle of civilian supremacy over the military, by virtue of the Constitution, it has recently been said: 'The supremacy of the civil over the military is one of our great heritages.' [Duncan v. Kahanamoku, 327 U.S. 304, 325 (1945).]

Martial Law and Constitutional Limitations

Two theories of martial law are reflected in decisions of the Supreme Court. The first, which stems from the Petition of Right, 1628, provides that the common law knows no such thing as martial law; that is to say, martial law is not established by official authority of any sort, but arises from the nature of things, being the law of paramount necessity, leaving the civil courts to be the final judges of necessity. By the second theory, martial law can

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199 Surrogate's Court, Duchess County, New York, ruling July 25, 1950, that the estate of Franklin D. Roosevelt was not entitled to tax benefits under sections 421 and 939 of the Internal Revenue Code, which extends certain tax benefits to persons dying in the military services of the United States. New York Times, July 26, 1950, p. 27, col. 1.


201 Id. at 539-44.
be validly and constitutionally established by supreme political authority in wartime. In the early years of the Supreme Court, the American judiciary embraced the latter theory as it held in *Luther v. Borden* 202 that state declarations of martial law were conclusive and therefore not subject to judicial review. 203 In this case, the Court found that the Rhode Island legislature had been within its rights in resorting to the rights and usages of war in combating insurrection in that State. The decision in the *Prize Cases*, 204 while not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863.

The Civil War being safely over, however, a divided Court, in the elaborately argued *Milligan* case, 205 reverting to the older doctrine, pronounced void President Lincoln's action, following his suspension of the writ of *habeas corpus* in September, 1863, in ordering the trial by military commission of persons held in custody as "spies" and "abettors of the enemy." The salient passage of the Court's opinion bearing on this point is the following: "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." 206 Four Justices, speaking by Chief Justice Chase, while holding Milligan's trial to have been void because violative of the Act of March 3, 1863, governing the custody and trial of persons who had been deprived of the *habeas corpus* privilege, declared their belief that Congress could have authorized Milligan's trial. Said the Chief Justice: "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct

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203 48 U.S. (7 How.) at 45.
205 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
206 71 U.S. at 127.
of campaigns. That power and duty belong to the President and Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions."

"... We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists."

"Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety." 207 In short, only Congress can authorize the substitution of military tribunals for civil tribunals for the trial of offenses; and Congress can do so only in wartime.

At the turn of the century, however, the Court appears to have retreated from its stand in Milligan insofar as it held in Moyer v. Peabody 208 that "the Governor's declaration that a state of insurrection existed is conclusive of that fact.... The plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances.... So long as such arrests are made in good faith and in honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." 209 The "good faith" test of Moyer, however, was superseded by the "direct relation" test of Sterling v. Constantin, 210 where the Court made it very clear that "[i]t does not follow ... that every sort of action the Governor may take, no matter how justified by the exigency or subversive of pri-

207 71 U.S. at 139-40. In Ex parte Vallandigham, 68 U.S. (1 Wall.) 243 (1864), the Court had held while war was still flagrant that it had no power to review by certiorari the proceedings of a military commission ordered by a general officer of the Army, commanding a military department.
208 212 U.S. 78 (1909).
209 212 U.S. at 83-85.
210 287 U.S. 378 (1932). "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decision, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace" Id. at 399-400.
vate right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat…. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

**Martial Law in Hawaii**—The question of the constitutional status of martial law was raised again in World War II by the proclamation of Governor Poindexter of Hawaii, on December 7, 1941, suspending the writ of *habeas corpus* and conferring on the local commanding General of the Army all his own powers as governor and also “all of the powers normally exercised by the judicial officers … of this territory … during the present emergency and until the danger of invasion is removed.” Two days later the Governor’s action was approved by President Roosevelt. The regime which the proclamation set up continued with certain abatements until October 24, 1944.

By section 67 of the Organic Act of April 30, 1900, the Territorial Governor was authorized “in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of *habeas corpus*, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known.” By section 5 of the Organic Act, “the Constitution … shall have the same force and effect within the said Territory as elsewhere in the United States.” In a brace of cases which reached it in February 1945, but which it contrived to postpone deciding till February 1946, the Court, speaking by Justice Black, held that the term “martial law” as employed in the Organic Act, “while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.”

The Court relied on the majority opinion in *Ex parte Miligan*. Chief Justice Stone concurred in the result. “I assume also,” he said, “that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts,” but added

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211 287 U.S. at 400-01. This holding has been ignored by States on numerous occasions. E.g., Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935); Hearn v. Calus, 178 S.C. 381, 183 S.E. 13 (1935); and Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn. 1939).

212 31 Stat. 141, 153 (1900).


214 327 U.S. at 324.

215 327 U.S. at 336.
that the military authorities themselves had failed to show justifying facts in this instance. Justice Burton, speaking for himself and Justice Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion. He warned that "courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight." 216

Articles of War: The Nazi Saboteurs.—In 1942 eight youths, seven Germans and one an American, all of whom had received training in sabotage in Berlin, were brought to this country aboard two German submarines and put ashore, one group on the Florida coast, the other on Long Island, with the idea that they would proceed forthwith to practice their art on American factories, military equipment, and installations. Making their way inland, the saboteurs were soon picked up by the FBI, some in New York, others in Chicago, and turned over to the Provost Marshal of the District of Columbia. On July 2, the President appointed a military commission to try them for violation of the laws of war, to wit: for not wearing fixed emblems to indicate their combatant status. In the midst of the trial, the accused petitioned the Supreme Court and the United States District Court for the District of Columbia for leave to bring habeas corpus proceedings. Their argument embraced the contentions: (1) that the offense charged against them was not known to the laws of the United States; (2) that it was not one arising in the land and naval forces; and (3) that the tribunal trying them had not been constituted in accordance with the requirements of the Articles of War.

The first argument the Court met as follows: The act of Congress in providing for the trial before military tribunals of offenses against the law of war is sufficiently definite, although Congress has not undertaken to codify or mark the precise boundaries of the law of war, or to enumerate or define by statute all the acts which that law condemns. "... [T]hose who during time of war pass surreptitiously from enemy territory into ... [that of the United States], discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission." 217 The second argument it disposed of by showing that petitioners' case was of a kind that was never deemed to be within the terms of the Fifth and Sixth Amendments, citing in confirma-

216 Ex parte Quirin, 317 U.S. 1, 29-30, 35 (1942).
217 Ex parte Quirin, 317 U.S. 1, 29-30, 35 (1942).
tion of this position the trial of Major Andre. The third contention the Court overruled by declining to draw the line between the powers of Congress and the President in the premises, thereby, in effect, attributing to the President the right to amend the Articles of War in a case of the kind before the Court ad libitum.

The decision might well have rested on the ground that the Constitution is without restrictive force in wartime in a situation of this sort. The saboteurs were invaders; their penetration of the boundary of the country, projected from units of a hostile fleet, was essentially a military operation, their capture was a continuation of that operation. Punishment of the saboteurs was therefore within the President’s purely martial powers as Commander-in-Chief. Moreover, seven of the petitioners were enemy aliens, and so, strictly speaking, without constitutional status. Even had they been civilians properly domiciled in the United States at the outbreak of the war, they would have been subject under the statutes to restraint and other disciplinary action by the President without appeals to the courts.

**Articles of War: World War II Crimes.**—As a matter of fact, in General Yamashita’s case, which was brought after the termination of hostilities for alleged “war crimes,” the Court abandoned its restrictive conception altogether. In the words of Justice Rutledge’s dissenting opinion in this case: “The difference between the Court’s view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.” And the adherence of the United States to the Charter of London in August 1945, under which the Nazi leaders were brought to trial, is explicable by the same theory. These individuals were charged with the crime of instigating aggressive war, which at the time of its commission was not a crime either under international law or under the laws of the prosecuting governments. It must be presumed that the President is not in his capacity as Supreme Commander bound by the prohibition in the Constitution of *ex post facto* laws, nor does international law forbid *ex post facto* laws.

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218 317 U.S. at 41-42.
219 317 U.S. at 28-29.
220 In re Yamashita, 327 U.S. 1 (1946).
221 327 U.S. at 81.
Martial Law and Domestic Disorder.—President Washington himself took command of state militia called into federal service to quell the Whiskey Rebellion, but there were not too many occasions subsequently in which federal troops or state militia called into federal service were required. \(^{223}\) Since World War II, however, the President, by virtue of his own powers and the authority vested in him by Congress, \(^{224}\) has utilized federal troops on nine occasions, five of them involving resistance to desegregation decrees in the South. \(^{225}\) In 1957, Governor Faubus employed the Arkansas National Guard to resist court-ordered desegregation in Little Rock, and President Eisenhower dispatched federal soldiers and brought the Guard under federal authority. \(^{226}\) In 1962, President Kennedy dispatched federal troops to Oxford, Mississippi, when federal marshals were unable to control with rioting that broke out upon the admission of an African American student to the University of Mississippi. \(^{227}\) In June and September of 1964, President Johnson sent troops into Alabama to enforce court decrees opening schools to blacks. \(^{228}\) And in 1965, the President used federal troops and federalized local Guardsmen to protect participants in a civil rights march. The President justified his action on the ground that there was a substantial likelihood of domestic violence because state authorities were refusing to protect the marchers. \(^{229}\)


\(^{225}\) The other instances were in domestic disturbances at the request of state Governors.


ART. II—EXECUTIVE DEPARTMENT

Sec. 2—Powers, Duties of the President

Cl. 1—Commander-In-Chiefship

PRESIDENTIAL ADVISERS

The Cabinet

The authority in Article II, § 2, cl. 1 to require the written opinion of the heads of executive departments is the meager residue from a persistent effort in the Federal Convention to impose a council on the President.\(^{230}\) The idea ultimately failed, partly because of the diversity of ideas concerning the council’s make-up. One member wished it to consist of “members of the two houses,” another wished it to comprise two representatives from each of three sections, “with a rotation and duration of office similar to those of the Senate.” The proposal with the strongest backing was that it should consist of the heads of departments and the Chief Justice, who should preside when the President was absent. Of this proposal the only part to survive was the above cited provision. The consultative relation here contemplated is an entirely one-sided affair, is to be conducted with each principal officer separately and in writing, and is to relate only to the duties of their respective offices.\(^{231}\) The Cabinet, as we know it today, that is to say, the Cabinet meeting, was brought about solely on the initiative of the first President,\(^{232}\) and may be dispensed with on presidential initiative at any time, being totally unknown to the Constitution. Several Presidents have in fact reduced the Cabinet meeting to little more than a ceremony with social trimmings.\(^{233}\)

PARDONS AND REPRIEVES

The Legal Nature of a Pardon

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: “As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed,


\(^{231}\) E. Corwin, supra at 82.

\(^{232}\) L. WHITE, THE FEDERALISTS—A STUDY IN ADMINISTRATIVE HISTORY ch. 4 (1948).

\(^{233}\) E. Corwin, supra at 19, 61, 79-85, 211, 295-99, 312, 320-23, 490-93.
from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.” Marshall continued to hold that to be noticed judicially this deed must be pleaded, like any private instrument.\footnote{United States v. Wilson, 32 U.S. (7 Pet.) 150, 160-61 (1833).}

In the case of \textit{Burdick v. United States},\footnote{235 236 U.S. 79, 86 (1915).} Marshall’s doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him, was proffered by President Wilson “a full and unconditional pardon for all offenses against the United States,” which he might have committed or participated in in connection with the matter he had been questioned about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. “The grace of a pardon,” remarked Justice McKenna sententiously, “may be only a pretense ... involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected ....”\footnote{236 237 U.S. at 90-91.} Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice.\footnote{Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1872).} In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. “A pardon in our days,” it said, “is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”\footnote{Biddle v. Perovich, 274 U.S. 480, 486 (1927).} Whether these words sound the death knell of the accept-
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ance doctrine is perhaps doubtful. 239 They seem clearly to indicate that by substituting a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is authorized by law and does not in common understanding exceed the original penalty. 240

Scope of the Power

The power embraces all “offences against the United States,” except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures, except as to money covered into the Treasury or paid an informer, 241 the power to pardon absolutely or conditionally, and the power to commute sentences, which, as seen above, is effective without the convict’s consent. 242 It has been held, moreover, in face of earlier English practice, that indefinite suspension of sentence by a court of the United States is an invasion of the presidential prerogative, amounting as it does to a condonation of the offense. 243 It was early assumed that the power included the power to pardon specified classes or communities wholesale, in short, the power to amnesty, which is usually exercised by proclamation. General amnesties were issued by Washington in 1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, and 1868, and by the first Roosevelt—to Aguinaldo’s followers—in 1902. 244 Not, however, till after the Civil War was the point adjudicated, when it was decided in favor of presidential prerogative. 245

Offenses Against the United States; Contempt of Court.—

In the first place, contempt of court offenses are not offenses

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240 Biddle v. Perovich, 274 U.S. 480, 486 (1927). In Schick v. Reed, 419 U.S. 256 (1976), the Court upheld the presidential commutation of a death sentence to imprisonment for life with no possibility of parole, the foreclosure of parole being contrary to the scheme of the Code of Military Justice. "The conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute." Id. at 264.
243 Ex parte United States, 242 U.S. 27 (1916). Amendment of sentence, however, within the same term of court, by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power. United States v. Benz, 282 U.S. 304 (1931).
244 See 1 J. Richardson, supra at 173, 293; 2 id. at 543; 7 id. at 3414, 3508; 8 id. at 3853; 14 id. at 6690.
against the United States. In the second place, they are completed offenses. The President cannot pardon by anticipation, otherwise he would be invested with the power to dispense with the laws, his claim to which was the principal cause of James II’s forced abdication. Lastly, the term has been held to include criminal contempts of court. Such was the holding in Ex parte Grossman, where Chief Justice Taft, speaking for the Court, resorted once more to English conceptions as being authoritative in construing this clause of the Constitution. Said he: “The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King’s grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. [Citing cases.] These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King’s pardon to wipe out the effect of a sentence for contempt insofar as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court’s order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law.” Nor was any new or special danger to be apprehended from this view of the pardoning power. “If,” said the Chief Justice, “we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?” Indeed, he queried further, in view of the peculiarities of procedure in contempt cases, “may it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as

248 267 U.S. 87 (1925).
249 267 U.S. at 110-11.
ART. II—EXECUTIVE DEPARTMENT

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much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial? 250

Effects of a Pardon: Ex parte Garland.—The great leading case is Ex parte Garland, 251 which was decided shortly after the Civil War. By an act passed in 1865, Congress had prescribed that before any person should be permitted to practice in a federal court he must take oath asserting that he had never voluntarily borne arms against the United States, had never given aid or comfort to enemies of the United States, and so on. Garland, who had been a Confederate sympathizer and so was unable to take the oath, had however received from President Johnson the same year “a full pardon ‘for all offences by him committed, arising from participation, direct or implied, in the Rebellion,’ …” The question before the Court was whether, armed with this pardon, Garland was entitled to practice in the federal courts despite the act of Congress just mentioned. Said Justice Field for a divided Court: “The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching [thereto]; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.” 252

Justice Miller, speaking for the minority, protested that the act of Congress involved was not penal in character, but merely laid down an appropriate test of fitness to practice law. “The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counsellor at law, may be saved by the executive pardon from the penitentiary or the gallows, but he is not thereby restored to the qualifications which are essential to admission to the bar.” 253 Justice Field’s language must today be regarded as much too sweeping in light of a decision rendered in 1914 in the case of Carlesi v. New York. 254 Carlesi had been convicted several years before of committing a federal offense. In the instant case, the prisoner was being tried for a subsequent

250 267 U.S. at 121, 122.
251 71 U.S. (4 Wall.) 333, 381 (1867).
252 71 U.S. at 380.
253 71 U.S. at 396-97.
254 233 U.S. 51 (1914).
offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier federal offense. In other words, the fact of prior conviction by a federal court was considered in determining the punishment for a subsequent state offense. This conviction and sentence were upheld by the Supreme Court. While this case involved offenses against different sovereignties, the Court declared by way of dictum that its decision “must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted.”

**Limits to the Efficacy of a Pardon.**—But Justice Field’s latitudinarian view of the effect of a pardon undoubtedly still applies ordinarily where the pardon is issued before conviction. He is also correct in saying that a full pardon restores a convict to his “civil rights,” and this is so even though simple completion of the convict’s sentence would not have had that effect. One such right is the right to testify in court, and in *Boyd v. United States*, the Court held that the disability to testify being a consequence, according to principles of the common law, of the judgment of conviction, the pardon obliterated that effect. But a pardon cannot “make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment a sale of the offender’s property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the

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255 233 U.S. at 59.
256 142 U.S. 450 (1892).
Sec. 2—Powers, Duties of the President  Cl. 2—Treaties and Appointment of Officers

United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law.” 257

**Congress and Amnesty**

Congress cannot limit the effects of a presidential amnesty. Thus the act of July 12, 1870, making proof of loyalty necessary to recover property abandoned and sold by the Government during the Civil War, notwithstanding any executive proclamation, pardon, amnesty, or other act of condonation or oblivion, was pronounced void. Said Chief Justice Chase for the majority: “[T]he legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the Court to be instrumental to that end.” 258 On the other hand, Congress itself, under the necessary and proper clause, may enact amnesty laws remitting penalties incurred under the national statutes. 259

Clause 2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

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259 *The Laura*, 114 U.S. 411 (1885).
THE TREATY-MAKING POWER

President and Senate

The plan which the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that “the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court.” Not until September 7, ten days before the Convention’s final adjournment, was the President made a participant in these powers. The constitutional clause evidently assumes that the President and Senate will be associated throughout the entire process of making a treaty, although Jay, writing in *The Federalist*, foresaw that the initiative must often be seized by the President without benefit of senatorial counsel. Yet, so late as 1818 Rufus King, Senator from New York, who had been a member of the Convention, declared on the floor of the Senate: “In these concerns the Senate are the Constitutional and the only responsible counsellors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient.”

Negotiation, a Presidential Monopoly.—Actually, the negotiation of treaties had long since been taken over by the President; the Senate’s role in relation to treaties is today essentially legislative in character. “He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it,” declared Justice Sutherland for the Court in 1936. The Senate must, moreover, content itself with such information as the President chooses to furnish it. In performing the function that remains to it, however, it has several options. It may consent unconditionally to a proposed treaty, it may refuse its consent, or it may stipulate conditions in the form of amendments to the treaty, of reservations to the act of ratification, or of statements of understanding or other declarations, the formal difference between...

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261 Id. at 538-39.
262 No. 64 (J. Cooke ed., 1961), 435-436.
263 31 Annals of Congress 106 (1818).
264 Washington sought to use the Senate as a council, but the effort proved futile, principally because the Senate balked. For the details see E. Corwin, supra, at 207-217.
266 E. Corwin, supra, at 428-429.
the first two and the third being that amendments and reservations, if accepted by the President must be communicated to the other parties to the treaty, and, at least with respect to amendments and often reservations as well, require reopening negotiations and changes, whereas the other actions may have more problematic results. The act of ratification for the United States is the President’s act, but it may not be forthcoming unless the Senate has consented to it by the required two-thirds of the Senators present, which signifies two-thirds of a quorum, otherwise the consent rendered would not be that of the Senate as organized under the Constitution to do business. Conversely, the President may, if dissatisfied with amendments which have been affixed by the Senate to a proposed treaty or with the conditions stipulated by it to ratification, decide to abandon the negotiation, which he is entirely free to do.

**Treaties as Law of the Land**

Treaty commitments of the United States are of two kinds. In the language of Chief Justice Marshall in 1829: “A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is intraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.”

“In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court.”

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269 For instance, see S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 53 (2d ed. 1916); CRS Study, supra, 109-120.

century later, in the *Head Money Cases*: “A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties of it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.”

**Origin of the Conception.**—How did this distinctive feature of the Constitution come about, by virtue of which the treaty-making authority is enabled to stamp upon its promises the quality of municipal law, thereby rendering them enforceable by the courts without further action? The short answer is that Article VI, paragraph 2, makes treaties the supreme law of the land on the same footing with acts of Congress. The clause was a direct result of one of the major weaknesses of the Articles of Confederation. Although the Articles entrusted the treaty-making power to Congress, fulfillment of Congress’ promises was dependent on the state legislatures. Particularly with regard to provisions of the Treaty of Peace of 1783, in which Congress stipulated to protect the property rights of British creditors of American citizens and of the former Loyalists, the promises were not only ignored but were deliberately flouted by many legislatures. Upon repeated British protests, John Jay, the Secretary for Foreign Affairs, suggested to Congress that it request state legislatures to repeal all legislation repugnant to the Treaty of Peace and to authorize their courts to carry the treaty into effect. Although seven States did comply to some extent, the impotency of Congress to effectuate its treaty guarantees was obvious to the Framers who devised Article VI, paragraph 2, to take care of the situation.
Treaties and the States.—As it so happened, the first case in which the Supreme Court dealt with the question of the effect of treaties on state laws involved the same issue that had prompted the drafting of Article VI, paragraph 2. During the Revolutionary War, the Virginia legislature provided that the Commonwealth’s paper money, which was depreciating rapidly, was to be legal currency for the payment of debts and to confound creditors who would not accept the currency provided that Virginia citizens could pay into the state treasury debts owed by them to subjects of Great Britain, which money was to be used to prosecute the war, and that the auditor would give the debtor a certificate of payment which would discharge the debtor of all future obligations to the creditor. The Virginia scheme directly contradicted the assurances in the peace treaty that no bars to collection by British creditors would be raised, and in *Ware v. Hylton* the Court struck down the state law as violative of the treaty that Article VI, paragraph 2, made superior. Said Justice Chase: “A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way. If the constitution of a State ... must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made, by the authority of the United States shall be superior to the Constitution and laws of any individual State; and their will alone is to decide.”

In *Hopkirk v. Bell*, the Court further held that this same treaty provision prevented the operation of a Virginia statute of limitation to bar collection of antecedent debts. In numerous subsequent cases, the Court invariably ruled that treaty provisions superseded inconsistent state laws governing the right of aliens to inherit real estate. Such a case was *Hauenstein v. Lynham*, in...
which the Court upheld the right of a citizen of the Swiss Republic, under the treaty of 1850 with that country, to recover the estate of a relative dying intestate in Virginia, to sell the same, and to export the proceeds of the sale.\footnote{284}

Certain more recent cases stem from California legislation, most of it directed against Japanese immigrants. A statute which excluded aliens ineligible to American citizenship from owning real estate was upheld in 1923 on the ground that the treaty in question did not secure the rights claimed.\footnote{285} But in \textit{Oyama v. California},\footnote{286} a majority of the Court indicated a strongly held opinion that this legislation conflicted with the equal protection clause of the Fourteenth Amendment, a view which has since received the endorsement of the California Supreme Court by a narrow majority.\footnote{287} Meantime, California was informed that the rights of Ger-

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\footnote{284} See also \textit{Geofroy v. Riggs}, 133 U.S. 258 (1890); \textit{Sullivan v. Kidd}, 254 U.S. 433 (1921); \textit{Nielsen v. Johnson}, 279 U.S. 47 (1929); \textit{Kolovrat v. Oregon}, 366 U.S. 187 (1961). But a right under treaty to acquire and dispose of property does not except aliens from the operation of a state statute prohibiting conveyances of homestead property by any instrument not executed by both husband and wife. \textit{Todok v. Union State Bank}, 281 U.S. 449 (1930). Nor was a treaty stipulation guaranteeing to the citizens of each country, in the territory of the other, equality with the natives of rights and privileges in respect to protection and security of person and property, violated by a state statute which denied to a non-resident alien wife of a person killed within the State, the right to sue for wrongful death. Such right was afforded to native resident relatives. \textit{Maiorano v. Baltimore & Ohio R.R.}, 213 U.S. 268 (1909). The treaty in question having been amended in view of this decision, the question arose whether the new provision covered the case of death without fault or negligence in which, by the Pennsylvania Workmen's Compensation Act, compensation was expressly limited to resident parents; the Supreme Court held that it did not. \textit{Liberato v. Royer}, 270 U.S. 535 (1926).

\footnote{285} \textit{Terrace v. Thompson}, 263 U.S. 197 (1923). \textit{Oyama v. California}, see also \textit{Takahashi v. Fish Comm'n}, 334 U.S. 410 (1948), in which a California statute prohibiting the issuance of fishing licenses to persons ineligible to citizenship was disallowed, both on the basis of the Fourteenth Amendment and on the ground that the statute invaded a field of power reserved to the National Government, namely, the determination of the conditions on which aliens may be admitted, naturalized, and permitted to reside in the United States. For the latter proposition, \textit{Hines v. Davidowitz}, 312 U.S. 52, 66 (1941), was relied upon.

\footnote{287} This occurred in the much advertised case of \textit{Sei Fujii v. State}, 38 Cal. 2d 718, 242 P. 2d 617 (1952). A lower California court had held that the legislation involved was void under the United Nations Charter, but the California Supreme Court was unanimous in rejecting this view. The Charter provisions invoked in this connection [Arts. 1, 55 and 56], said Chief Justice Gibson, "[w]e are satisfied ... were not intended to supersede domestic legislation." That is, the Charter provisions were not self-executing. Restatement, Foreign Relations, supra, § 701, Reporters' Note 5, pp. 155-56.}
man nationals, under the Treaty of December 8, 1923, between the United States and the Reich, to whom real property in the United States had descended or been devised, to dispose of it, had survived the recent war and certain war legislation, and accordingly prevailed over conflicting state legislation. 288

**Treaties and Congress.**—In the Convention, a proposal to require the adoption of treaties through enactment of a law before they should be binding was rejected. 289 But the years since have seen numerous controversies with regard to the duties and obligations of Congress, the necessity for congressional action, and the effects of statutes, in connection with the treaty power. For purposes of this section, the question is whether entry into and ratification of a treaty is sufficient in all cases to make the treaty provisions the “law of the land” or whether there are some types of treaty provisions which only a subsequent act of Congress can put into effect? The language quoted above 290 from *Foster v. Neilson* 291 early established that not all treaties are self-executing, for as Marshall there said, a treaty is “to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.” 292

Leaving aside the question when a treaty is and is not self-executing, 293 the issue of the necessity of congressional implementation and the obligation to implement has frequently roiled congressional debates. The matter arose initially in 1796 in connection with the Jay Treaty, 294 certain provisions of which required appropriations to carry them into effect. In view of the third clause of Article I, § 9, which says that “no money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . .”, it seems to have been universally conceded that Congress must be applied to if the treaty provisions were to be executed. 295 A bill was introduced into the House to appropriate the needed funds and its

290 Supra, “Treaties as Law of the Land”.
292 Cf. Whitney v. Robertson, 124 U.S. 190, 194 (1888): “When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . . If the treaty contains stipulations which are self-executing that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.” S. Crandall, supra, chs. 11-15.
293 See infra, “When Is a Treaty Self-Executing”.
294 8 Stat. 116 (1794).
295 The story is told in numerous sources. E.g., S. Crandall, supra, at 165-171. For Washington’s message refusing to submit papers relating to the treaty to the House, see J. Richardson, supra at 123.
supporters, within and without Congress, offered the contention that inasmuch as the treaty was now the law of the land the legislative branch was bound to enact the bill without further ado; opponents led by Madison and Gallatin contended that the House had complete discretion whether or not to carry into effect treaty provisions. 296 At the conclusion of the debate, the House voted not only the money but a resolution offered by Madison stating that it did not claim any agency in the treaty-making process, "but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good." 297 This early precedent with regard to appropriations has apparently been uniformly adhered to. 298

Similarly, with regard to treaties which modify and change commercial tariff arrangements, the practice has been that the House always insisted on and the Senate acquiesced in legislation to carry into effect the provisions of such treaties. 299 The earliest congressional dispute came over an 1815 Convention with Great Britain, 300 which provided for reciprocal reduction of duties. President Madison thereupon recommended to Congress such legislation as the convention might require for effectuation. The Senate and some members of the House were of the view that no implementing legislation was necessary because of a statute, which already permitted the President to reduce duties on goods of nations that did not discriminate against United States goods; the House majority felt otherwise and compromise legislation was finally enacted acceptable to both points of view. 301 But subsequent cases have seen

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296 Debate in the House ran for more than a month. It was excerpted from the ANNALS separately published as DEBATES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, DURING THE FIRST SESSION OF THE FOURTH CONGRESS UPON THE CONSTITUTIONAL POWERS OF THE HOUSE WITH RESPECT TO TREATIES (1796). A source of much valuable information on the views of the Framers and those who came after them on the treaty power, the debates are analyzed in detail in E. BYRD, TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 35-59 (1960).

297 5 ANNALS OF CONGRESS 771, 782 (1796). A resolution similar in language was adopted by the House in 1871. CONG. GLOBE, 42d Congress, 1st sess. (1871), 835.


299 S. Crandall, supra, at 184-189.

300 8 STAT. 228.

301 3 STAT. 255 (1816). See S. Crandall, supra, at 184-188.
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Powers, Duties of the President

302 Id. at 188-195; 1 W. Willoughby, supra, at 555-560.
303 S. Crandall, supra, at 189-190.
305 At the conclusion of the 1815 debate, the Senate conferees noted in their report that some treaties might need legislative implementation, which Congress was bound to provide, but did not indicate what in their opinion made some treaties self-executing and others not. 29 ANNALS OF CONGRESS 160 (1816). The House conferees observed that they thought, and that in their opinion the Senate conferees agreed, that legislative implementation was necessary to carry into effect all treaties which contained “stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory. . . .” Id. at 1019. Much the same language was included in a later report, H. Rep. No. 37, 40th Congress, 2d Sess. (1868). Controversy with respect to the sufficiency of Senate ratification of the Panama Canal treaties to dispose of United States property therein to Panama was extensive. A divided Court of Appeals for the District of Columbia reached the question and held that Senate approval of the treaty alone was sufficient. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), cert. denied, 436 U. S. 907 (1978).
the treaty commitments of the United States do not diminish Congress’ constitutional powers. To be sure, legislative repeal of a treaty as law of the land may amount to a violation of it as an international contract in the judgment of the other party to it. In such case, as the Court has said: “Its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.”

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Treaties Versus Prior Acts of Congress.—The cases are numerous in which the Court has enforced statutory provisions which were recognized by it as superseding prior treaty engagements. Chief Justice Marshall early asserted that the converse would be true as well, that a treaty which is self-executing is the law of the land and prevails over an earlier inconsistent statute, a proposition repeated many times in dicta. But there is dispute whether in fact a treaty has ever been held to have repealed or superseded an inconsistent statute. Willoughby, for example, says: “In fact, however, there have been few (the writer is not certain that there has been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized,

307 Head Money Cases, 112 U.S. 580, 598-599 (1884). The repealability of treaties by act of Congress was first asserted in an opinion of the Attorney General in 1854. 6 Ops. Atty. Gen. 291. The year following the doctrine was adopted judicially in a lengthy and cogently argued opinion of Justice Curtis, speaking for a United States circuit court in Taylor v. Morton, 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass 1855). See also The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883); Botiller v. Dominguez, 130 U.S. 238 (1889); The Chinese Exclusion Case, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888); Fong Yue Ting v. United States, 149 U.S. 698, 721 (1893). “Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate.” La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899). Cf. Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165-166 (1868), wherein it is stated *obiter* that “Congress is bound to regard the public treaties, and it had no power . . . to nullify [Indian] titles confirmed many years before.”

308 Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314-315 (1829). In a later case, it was determined in a different situation that by its terms the treaty in issue, which had been assumed to be executory in the earlier case, was self-executing. United States v. Perchman, 32 U.S. (7 Pet.) 51 (1833).

but such treaty action has not operated to repeal or annul the existing law upon the subject.”

The one instance that may be an exception is Cook v. United States. There, a divided Court held that a 1924 treaty with Great Britain, allowing the inspection of English vessels for contraband liquor and seizure if any was found only if such vessels were within the distance from the coast that could be traversed in one hour by the vessel suspecting of endeavoring to violate the prohibition laws, had superseded the authority conferred by a section of the Tariff Act of 1922 for Coast Guard officers to inspect and seize any vessel within four leagues—12 miles—of the coast under like circumstances. The difficulty with the case is that the Tariff Act provision had been reenacted in 1930, so that a simple application of the rule of the later governing should have caused a different result. It may be suspected that the low estate to which Prohibition had fallen and a desire to avoid a diplomatic controversy should the seizure at issue have been upheld were more than slightly influential in the Court’s decision.

When Is a Treaty Self-Executing.—Several references have been made above to a distinction between treaties as self-executing and as merely executory. But what is it about a treaty that makes it the law of the land and which gives a private citizen the right to rely on it in a court of law? As early as 1801, the Supreme Court took notice of a treaty, and finding it applicable to the situation before it, gave judgment for the petitioner based on it. In Foster v. Neilson, Chief Justice Marshall explained that a treaty is to be regarded in courts “as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision.” It appears thus that the Court has had in mind two characteristics of treaties which keep them from being self-executing. First, “when the terms of the stipulation import a con-

310 1 W. Willoughby, supra, at 555.
311 Other cases, which are cited in some sources, appear distinguishable. United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801), applied a treaty entered into subsequent to enactment of a statute abrogating all treaties then in effect between the United States and France, so that it is inaccurate to refer to the treaty as superseding a prior statute. In United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876), the treaty with an Indian tribe in which the tribe ceded certain territory, later included in a State, provided that a federal law restricting the sale of liquor on the reservation would continue in effect in the territory ceded; the Court found the stipulation an appropriate subject for settlement by treaty and the provision binding. And see Charlton v. Kelly, 229 U.S. 447 (1913).
312 288 U.S. 102 (1933).
313 42 Stat. 858, 979, § 581.
315 United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801).
tract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court.”

Second, the nature of the stipulation may require legislative execution. That is, with regard to the issue discussed above, whether the delegated powers of Congress impose any limitation on the treaty power, it may be that a treaty provision will be incapable of execution without legislative action. As one authority says: “Practically this distinction depends upon whether or not the courts and the executive are able to enforce the provision without enabling legislation. Fundamentally it depends upon whether the obligation is imposed on private individuals or on public authorities...”

“Treaty provisions which define the rights and obligations of private individuals and lay down general principles for the guidance of military, naval or administrative officials in relation thereto are usually considered self-executing. Thus treaty provisions assuring aliens equal civil rights with citizens, defining the limits of national jurisdiction, and prescribing rules of prize, war and neutrality, have been so considered...”

“On the other hand certain treaty obligations are addressed solely to public authorities, of which may be mentioned those requiring the payment of money, the cession of territory, the guarantee of territory or independence, the conclusion of subsequent treaties on described subjects, the participation in international organizations, the collection and supplying of information, and direction of postal, telegraphic or other services, the construction of buildings, bridges, lighthouses, etc.” It may well be that these two characteristics merge with each other at many points and the

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317 Id.
318 Generally, the qualifications may have been inserted in treaties out of a belief in their constitutional necessity or because of some policy reason. In regard to the former, it has always apparently been the practice to insert in treaties affecting the revenue laws of the United States a proviso that they should not be deemed effective until the necessary laws to carry them into operation should be enacted by Congress. 1 W. Willoughby, supra, at 558. Perhaps of the same nature was a qualification that cession of certain property in the Canal Zone should be dependent upon action by Congress inserted in Article V of the 1955 Treaty with Panama. TIAS 3297, 6 U.S.T. 2273, 2278. In regard to the latter, it may be noted that Article V of the Webster-Ashburton Treaty, 8 Stat. 572, 575 (1842), providing for the transfer to Canada of land in Maine and Massachusetts was conditioned upon assent by the two States and payment to them of compensation. S. Crandall, supra, at 222-224.
319 Q. Wright, supra, at 207-208. See also L. Henkin, Foreign Affairs and the Constitution 156-162 (1972).
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language of the Court is not always helpful in distinguishing them.320

*Treaties and the Necessary and Proper Clause.—*What power, or powers, does Congress exercise when it enacts legislation for the purpose of carrying treaties of the United States into effect? When the subject matter of the treaty falls within the ambit of Congress’ enumerated powers, then it is these powers which it exercises in carrying such treaty into effect. But if the treaty deals with a subject which falls within the national jurisdiction because of its international character, then recourse is had to the necessary and proper clause. Thus, of itself, Congress would have had no power to confer judicial powers upon foreign consuls in the United States, but the treaty-power can do this and has done it repeatedly and Congress has supplemented these treaties by appropriate legislation.321 Congress could not confer judicial power upon American consuls abroad to be there exercised over American citizens, but the treaty-power can and has, and Congress has passed legislation perfecting such agreements, and such legislation has been upheld.322

Again, Congress of itself could not provide for the extradition of fugitives from justice, but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect.323 And Congress could not ordinarily penalize private acts of violence within a State, but it can punish such acts if they deprive aliens of their rights under a treaty.324 Referring to such legislation, the Court has said: “The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of Article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with foreign power.”325 In a word, the treaty-power cannot

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322 See In re Ross, 140 U.S. 453 (1891), where the treaty provisions involved are given. The supplementary legislation, later reenacted at Rev. Stat. 4083-4091, was repealed by the Joint Res. of August 1, 1956, 70 Stat. 774. The validity of the Ross case was subsequently questioned. See Reid v. Covert, 354 U.S. 1, 12, 64, 75 (1957).
324 Baldwin v. Franks, 120 U.S. 678, 683 (1887).
325 Neely v. Henkel, 180 U.S. 109, 121 (1901). A different theory is offered by Justice Story in his opinion for the court in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), in the following words: “Treaties made between the United States and
purport to amend the Constitution by adding to the list of Congress’ enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures which independently of a treaty Congress could not pass; the only question that can be raised as to such measures is whether they are “necessary and proper” measures for the carrying of the treaty in question into operation.

The foremost example of this interpretation is Missouri v. Holland. There, the United States and Great Britain had entered into a treaty for the protection of migratory birds, and Congress had enacted legislation pursuant to the treaty to effectuate it. The State objected that such regulation was reserved to the States by the Tenth Amendment and that the statute infringed on this reservation, pointing to lower court decisions voiding an earlier act not based on a treaty. Noting that treaties “are declared the supreme law of the land,” Justice Holmes for the Court said: “If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.” “It is obvious,” he continued, “that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, ‘a power which must belong to and somewhere reside in every civilized government’ is not to be found.” Since the treaty and thus the statute

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Footnotes:

325 United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915). The Court did not purport to decide whether those cases were correctly decided. Missouri v. Holland, 252 U.S. 416, 433 (1920). Today, there seems no doubt that Congress’ power under the commerce clause would be deemed more than adequate, but at that time a majority of the Court had a very restrictive view of the commerce power. Cf. Hammer v. Dagenhart, 247 U.S. 251 (1918).

326 252 U.S. 416 (1920).


328 40 Stat. 755 (1918).


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Constitutional Limitations on the Treaty Power

A question growing out of the discussion above is whether the treaty power is bounded by constitutional limitations. By the supremacy clause, both statutes and treaties “are declared ... to be the supreme law of the land, and no superior efficacy is given to either over the other.”\textsuperscript{332} As statutes may be held void because they contravene the Constitution, it should follow that treaties may be held void, the Constitution being superior to both. And indeed the Court has numerous times so stated.\textsuperscript{333} It does not appear that the Court has ever held a treaty unconstitutional,\textsuperscript{334} although there are examples in which decision was seemingly based on a reading compelled by constitutional considerations.\textsuperscript{335} In fact, there would be little argument with regard to the general point were it not for certain dicta in Justice Holmes’ opinion in \textit{Missouri v. Holland}.\textsuperscript{336} “Acts of Congress,” he said, “are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.” Although he immediately followed this passage with a cautionary “[w]e do not mean to imply that there are no qualifications to the treaty-making power ...,”\textsuperscript{337} the Justice’s lan...

Controversy over the Holmes language apparently led Justice Black in Reid v. Covert to deny that the difference in language of the supremacy clause with regard to statutes and with regard to treaties was relevant to the status of treaties as inferior to the Constitution. "There is nothing in this language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V." 340

Establishment of the general principle, however, is but the beginning; there is no readily agreed-upon standard for determining what the limitations are. The most persistently urged proposition in limitation has been that the treaty power must not invade the reserved powers of the States. In view of the sweeping language of

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340 354 U.S. 1 (1957) (plurality opinion).

the supremacy clause, it is hardly surprising that this argument has not prevailed. 341 Nevertheless, the issue, in the context of Congress' power under the necessary and proper clause to effectuate a treaty dealing with a subject arguably within the domain of the States, was presented as recently as 1920, when the Court upheld a treaty and implementing statute providing for the protection of migratory birds. 342 "The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." 343 The gist of the holding followed. "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat there-in. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed." 344

The doctrine which seems deducible from this case and others is "that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded." 345 It is not, in other words, the treaty power which enlarges either the federal power or the congressional power, but the

341 Waren v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Fairfax's Devises v. Hunter's Lessee, 11 U.S. (7 Cr.) 603 (1813); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817); Hauenstein v. Lynham, 100 U.S. 483 (1880). Jefferson, in his list of exceptions to the treaty power, thought the Constitution "must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way," Jefferson's Manual of Parliamentary Practice, § 594, reprinted in The Rules and Manual of the House of Representatives, H. Doc. 102-405, 102d Congress, 2d Sess. (1993), 298-299. But this view has always been the minority one. Q. Wright, supra, at 92 n. 97. The nearest the Court ever came to supporting this argument appears to be Frederickson v. Louisiana, 64 U.S. (23 How.) 445, 448 (1860).


343 252 U.S. at 433.

344 252 U.S. at 435.

345 1 W. Willoughby, supra, at 569. And see L. Henkin, supra, at 143-148; Restatement, Foreign Relations, § 302, Comment d, & Reporters' Note 3, pp. 154-157.
international character of the interest concerned which might be acted upon.

Dicta in some of the cases lend support to the argument that the treaty power is limited by the delegation of powers among the branches of the National Government and especially by the delegated powers of Congress, although it is not clear what the limitation means. If it is meant that no international agreement could be constitutionally entered into by the United States within the sphere of such powers, the practice from the beginning has been to the contrary; if it is meant that treaty provisions dealing with matters delegated to Congress must, in order to become the law of the land, receive the assent of Congress through implementing legislation, it states not a limitation on the power of making treaties as international conventions but rather a necessary procedure before certain conventions are cognizable by the courts in the enforcement of rights under them.

It has also been suggested that the prohibitions against governmental action contained in the Constitution, the Bill of Rights particularly, limit the exercise of the treaty power. No doubt this is true, though again there are no cases which so hold.

One other limitation of sorts may be contained in the language of certain court decisions which seem to say that only matters of “international concern” may be the subject of treaty negotiations. While this may appear to be a limitation, it does not take account of the elasticity of the concept of “international concern” by which the subject matter of treaties has constantly expanded over the years. At best, any attempted resolution of the issue of limitations must be an uneasy one.

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347 Q. Wright, supra, at 101-103. See also, L. Henkin, supra, at 148-151.


349 “[I]t must be assumed that the framers of the Constitution intended that [the treaty power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty....” Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872). With the exceptions noted, “it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.” Geofroy v. Riggs, 133 U.S. 258, 267 (1890). “The treatymaking power of the United States does extend to all proper subjects of negotiation between our government and other nations.” Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

350 Cf. L. Henkin, supra, at 151-56.

351 Other reservations which have been expressed may be briefly noted. It has been contended that the territory of a State could not be ceded without such State’s
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In brief, the fact that all the foreign relations power is vested in the National Government and that no formal restriction is imposed on the treaty-making power in the international context leaves little room for the notion of a limited treaty-making power with regard to the reserved rights of the States or in regard to the choice of matters concerning which the Federal Government may treat with other nations; protected individual rights appear to be sheltered by specific constitutional guarantees from the domestic effects of treaties, and the separation of powers at the federal level may require legislative action to give municipal effect to international agreements.

Interpretation and Termination of Treaties as International Compacts

The repeal by Congress of the “self-executing” clauses of a treaty as “law of the land” does not of itself terminate the treaty as an international contract, although it may very well provoke the other party to the treaty to do so. Hence, the questions arise where the Constitution lodges this power and where it lodges the power to interpret the contractual provisions of treaties. The first case of outright abrogation of a treaty by the United States occurred in 1798, when Congress by the Act of July 7 of that year, pronounced the United States freed and exonerated from the stipulations of the Treaties of 1778 with France. This act was followed two days later by one authorizing limited hostilities against the same country; in the case of Bas v. Tingy, the Supreme Court treated the act of abrogation as simply one of a bundle of acts declaring “public war” upon the French Republic.


A further contention is that while foreign territory can be annexed to the United States by the treaty power, it could not be incorporated with the United States except with the consent of Congress. Downes v. Bidwell, 182 U.S. 244, 310-344 (1901) (four Justices dissenting). This argument appears to be a variation of the one in regard to the correct procedure to give domestic effect to treaties.

Another argument grew out the XII Hague Convention of 1907, proposing an International Prize Court with appellate jurisdiction from national courts in prize cases. President Taft objected that no treaty could transfer to a tribunal not known to the Constitution any part of the judicial power of the United States and a compromise was arranged. Q. Wright, supra, at 117-118; H. REP. No. 1569, 68th Congress, 2d Sess. (1925).

353 1 Stat. 578 (1798).
354 U.S. (4 Dall.) 37 (1800). See also Gray v. United States, 21 Ct. Cl. 340 (1886), with respect to claims arising out of this situation.
Sec. 2—Powers, Duties of the President  Cl. 2—Treaties and Appointment of Officers

Termination of Treaties by Notice.—Typically, a treaty provides for its termination by notice of one of the parties, usually after a prescribed time from the date of notice. Of course, treaties may also be terminated by agreement of the parties, or by breach by one of the parties, or by some other means. But it is in the instance of termination by notice that the issue has frequently been raised: where in the Government of the United States does the Constitution lodge the power to unmakes treaties? Reasonable arguments may be made locating the power in the President alone, in the President and Senate, or in the Congress. Presidents generally have asserted the foreign relations power reposed in them under Article II and the inherent powers argument made in Curtiss-Wright. Because the Constitution requires the consent of the Senate for making a treaty, one can logically argue that its consent is as well required for terminating it. Finally, because treaties are, like statutes, the supreme law of the land, it may well be argued that, again like statutes, they may be undone only through law-making by the entire Congress; additionally, since Congress may be required to implement treaties and may displace them through legislation, this argument is reinforced.

Definitive resolution of this argument appears only remotely possible. Historical practice provides support for all three arguments and the judicial branch seems unlikely to essay any answer.

While abrogation of the French treaty, mentioned above, is apparently the only example of termination by Congress through a public law, many instances may be cited of congressional actions mandating terminations by notice of the President or changing the legal environment so that the President is required to terminate. The initial precedent in the instance of termination by notice pursuant to congressional action appears to have occurred in 1846, when by joint resolution Congress authorized the President at his discretion to notify the British government of the abrogation of the

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356 Compare the different views of the 1846 action in Treaty Termination: Hearings Before the Senate Committee on Foreign Relations, 96th Congress, 1st Sess. (1979), 160-162 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), and in Taiwan: Hearings Before the Senate Committee on Foreign Relations, 96th Congress, 1st Sess. (1979), 300 (memorandum of Senator Goldwater).
Convention of August 6, 1827, relative to the joint occupation of the Oregon Territory. As the President himself had requested the resolution, the episode is often cited to support the theory that international conventions to which the United States is a party, even those terminable on notice, are terminable only through action of Congress. Subsequently, Congress has often passed resolutions denouncing treaties or treaty provisions, which by their own terms were terminable on notice, and Presidents have usually, though not invariably, carried out such resolutions. By the La Follette-Furuseth Seaman’s Act, President Wilson was directed, “within ninety days after the passage of the act, to give notice to foreign governments that so much of any treaties as might be in conflict with the provisions of the act would terminate on the expiration of the periods of notice provided for in such treaties,” and the required notice was given. When, however, by section 34 of the Jones Merchant Marine Act of 1920, the same President was authorized and directed within ninety days to give notice to the other parties to certain treaties, with which the Act was not in conflict but which might restrict Congress in the future from enacting discriminatory tonnage duties, President Wilson refused to comply, asserting that he “did not deem the direction contained in section 34 … an exercise of any constitutional power possessed by Congress.” The same attitude toward section 34 was continued by Presidents Harding and Coolidge.

Very few precedents exist in which the President terminated a treaty after obtaining the approval of the Senate alone. The first occurred in 1854-1855, when President Pierce requested and re-

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357 S. Crandall, supra, at 458-459.
358 Id. at 459-62; Q. Wright, supra, at 258.
359 38 Stat. 1164 (1915).
361 The Jones Act and the Denunciation of Treaties, 15 AM. J. INT’L. L. 33 (1921). In 1879, Congress passed a resolution requiring the President to abrogate a treaty with China, but President Hayes vetoed it, partly on the ground that Congress as an entity had no role to play in ending treaties, only the President with the advice and consent of the Senate. 9 J. Richardson, supra at 4466, 4470-4471. For the views of President Taft on the matter in context, see W. TAFT, THE PRESIDENCY, ITS DUTIES, ITS POWERS, ITS LIMITATIONS 112-113 (1916).
362 Since this time, very few instances appear in which Congress has requested or directed termination by notice, but they have resulted in compliance. E.g., 65 Stat. 72 (1951) (directing termination of most-favored-nation provisions with certain Communist countries in commercial treaties); 70 Stat. 773 (1956) (requesting renunciation of treaty rights of extraterritoriality in Morocco). The most recent example appears to be § 315 of the Anti-Apartheid Act of 1986, which required the Secretary of State to terminate immediately, in accordance with its terms, the tax treaty and protocol with South Africa that had been concluded on December 13, 1946. P. L. 99-440, 100 Stat. 3515, 22 U.S.C. § 5063.
Examples of treaty terminations in which the President acted alone are much disputed with respect both to facts and to the underlying legal circumstances. 365 Apparently, President Lincoln was the first to give notice of termination in the absence of prior congressional authorization or direction, and Congress shortly thereafter by joint resolution ratified his action. 366 The first such action by the President, with no such subsequent congressional action, appears to be that of President McKinley in 1899, in terminating an 1850 treaty with Switzerland, but the action may be explainable as the treaty being inconsistent with a subsequently enacted law. 367 Other such renunciations by the President acting on his own have been similarly explained and similarly the explanations have been controverted. While the Department of State, in setting forth legal justification for President Carter’s notice of termination of the treaty with Taiwan, cited many examples of the President acting alone, many of these are ambiguous and may be explained away by, i.e., conflicts with later statutes, changed circumstances, or the like. 368

No such ambiguity accompanied President Carter’s action on the Taiwan treaty, 369 and a somewhat lengthy Senate debate was provoked. In the end, the Senate on a preliminary vote approved a “sense of the Senate” resolution claiming for itself a consenting

363 J. Richardson, supra at 279, 334.
368 Note that the President terminated the treaty in the face of an expression of the sense of Congress that prior consultation between President and Congress should occur. 92 Stat. 730, 746 (1978).
role in the termination of treaties, but no final vote was ever taken and the Senate thus did not place itself in conflict with the President.\textsuperscript{370} However, several Members of Congress went to court to contest the termination, apparently the first time a judicial resolution of the question had been sought. A divided Court of Appeals, on the merits, held that presidential action was sufficient by itself to terminate treaties, but the Supreme Court, no majority agreeing on a common ground, vacated that decision and instructed the trial court to dismiss the suit.\textsuperscript{371} While no opinion of the Court bars future litigation, it appears that the political question doctrine or some other rule of judicial restraint will leave such disputes to the contending forces of the political branches.\textsuperscript{372}

**Determination Whether a Treaty Has Lapsed.**—There is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opinion in *Charlton v. Kelly*\textsuperscript{373} is pertinent: "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach.... That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case.... The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land as affording authority for the warrant of extradition."\textsuperscript{374} So also it is primarily for the political depart-

\textsuperscript{370} Originally, S. Res. 15 had disapproved presidential action alone, but it was amended and reported by the Foreign Relations Committee to recognize at least 14 bases of presidential termination. S. Rep. No. 119, 96th Congress, 1st Sess. (1979). In turn, this resolution was amended to state the described sense of the Senate view, but the matter was never brought to final action. See 125 CONG. REC. 13672, 13696, 13711, 15209, 15859 (1979).

\textsuperscript{371} Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (en banc), vacated and remanded, 444 U.S. 996 (1979). Four Justices found the case nonjusticiable because of the political question doctrine, id. at 1002, but one other Justice in the majority and one in dissent rejected this analysis. Id. at 998 (Justice Powell), 1006 (Justice Brennan). The remaining three Justices were silent on the doctrine.


\textsuperscript{373} 229 U.S. 447 (1913).

\textsuperscript{374} 229 U.S. at 473-76.
ments to determine whether certain provisions of a treaty have survived a war in which the other contracting state ceased to exist as a member of the international community. 375

*Status of a Treaty a Political Question.—* It is clear that many questions which arise concerning a treaty are of a political nature and will not be decided by the courts. In the words of Justice Curtis in *Taylor v. Morton:* 376 It is not “a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise.... These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws and it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere, in our system of government.” Chief Justice Marshall’s language in *Foster v. Neilson* 377 is to the same effect.

**Indian Treaties**

In the early cases of *Cherokee Nation v. Georgia,* 378 and *Worcester v. Georgia,* 379 the Court, speaking by Chief Justice Marshall, held, first, that the Cherokee Nation was not a sovereign state within the meaning of that clause of the Constitution which extends the judicial power of the United States to controversies “between a State or the citizens thereof and foreign states, citizens or subjects.” Second, it held: “The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, had adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words ‘treaty’ and ‘nation’ are words of our own language, selected in our

diplomatic and legislative proceedings, by ourselves, having each a
definite and well understood meaning. We have applied them to In-
dians, as we have applied them to the other nations of the earth.
They are applied to all in the same sense."  

Later cases established that the power to make treaties with
the Indian tribes was coextensive with the power to make treaties
with foreign nations, 381 that the States were incompetent to inter-
fere with rights created by such treaties, 382 that as long as the
United States recognized the national character of a tribe, its mem-
bers were under the protection of treaties and of the laws of Con-
gress and their property immune from taxation by a State, 383 that
a stipulation in an Indian treaty that laws forbidding the intro-
duction, of liquors into Indian territory was operative without legisla-
tion, and binding on the courts although the territory was within
an organized county of a State, 384 and that an act of Congress con-
trary to a prior Indian treaty repealed it. 385

**Present Status of Indian Treaties.**—Today, the subject of
Indian treaties is a closed account in the constitutional law ledger.
By a rider inserted in the Indian Appropriation Act of March 3,
1871, it was provided “That hereafter no Indian nation or tribe
within the territory of the United States shall be acknowledged or
recognized as an independent nation, tribe, or power with whom
the United States may contract by treaty: Provided, further, that
nothing herein contained shall be construed to invalidate or impair
the obligation of any treaty heretofore lawfully made and ratified
with any such Indian nation or tribe.” 386 Subsequently, the power
of Congress to withdraw or modify tribal rights previously granted
by treaty has been invariably upheld. 387 Statutes modifying rights
of members in tribal lands, 388 granting a right of way for a railroad
through lands ceded by treaty to an Indian tribe, 389 or extending
the application of revenue laws respecting liquor and tobacco over
Indian territories, despite an earlier treaty exemption, 390 have
been sustained.

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380 31 U.S. at 558.
381 Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872); United States v. Forty-
Three Gallons of Whiskey, 93 U.S. 188, 192 (1876); Dick v. United States, 208 U.S.
340, 355-56 (1908).
383 The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1867).
385 The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). See also Ward v. Race
Horse, 163 U.S. 504, 511 (1896); Thomas v. Gay, 169 U.S. 264, 270 (1898).
When, on the other hand, definite property rights have been conferred upon individual Native Americans, whether by treaty or under an act of Congress, they are protected by the Constitution to the same extent and in the same way as the private rights of other residents or citizens of the United States. Hence it was held that certain Indian allottees under an agreement according to which, in part consideration of their relinquishment of all their claim to tribal property, they were to receive in severalty allotments of lands which were to be nontaxable for a specified period, acquired vested rights of exemption from State taxation which were protected by the Fifth Amendment against abrogation by Congress. 391

A regular staple of each Term's docket of the Court is one or two cases calling for an interpretation of the rights of Native Americans under some treaty arrangement vis-a-vis the Federal Government or the States. Thus, though no treaties have been negotiated for decades and none presumably ever will again, litigation concerning old treaties seemingly will go on.

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The capacity of the United States to enter into agreements with other nations is not exhausted in the treaty-making power. The Constitution recognizes a distinction between “treaties” and “agreements” or “compacts” but does not indicate what the difference is. 392 The differences, which once may have been clearer, have been seriously blurred in practice within recent decades. Once a stepchild in the family in which treaties were the preferred offspring, the executive agreement has surpassed in number and perhaps in international influence the treaty formally signed, submitted for ratification to the Senate, and proclaimed upon ratification.

During the first half-century of its independence, the United States was party to sixty treaties but to only twenty-seven published executive agreements. By the beginning of World War II, there had been concluded approximately 800 treaties and 1,200 executive agreements. In the period 1940-1989, the Nation entered


into 759 treaties and into 13,016 published executive agreements. Cumulatively, in 1989, the United States was a party to 890 treaties and 5,117 executive agreements. To phrase it comparatively, in the first 50 years of its history, the United States concluded twice as many treaties as executive agreements. In the 50-year period from 1839 to 1889, a few more executive agreements than treaties were entered into. From 1889 to 1939, almost twice as many executive agreements as treaties were concluded. Between 1939 and 1993, executive agreements comprised more than 90% of the international agreements concluded. 393

One must, of course, interpret the raw figures carefully. Only a very small minority of all the executive agreements entered into were based solely on the powers of the President as Commander-in-Chief and organ of foreign relations; the remainder were authorized in advance by Congress by statute or by treaty provisions ratified by the Senate. 394 Thus, consideration of the constitutional significance of executive agreements must begin with a differentiation among the kinds of agreements which are classed under this single heading. 395

Executive Agreements by Authorization of Congress

Congress early authorized officers of the executive branch to enter into negotiations and to conclude agreements with foreign governments, authorizing the borrowing of money from foreign

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393 CRS Study, xxxiv-xxxv, supra, 13-16. Not all such agreements, of course, are published, either because of national-security/secrecy considerations or because the subject matter is trivial. In a 1953 hearing exchange, Secretary of State Dulles estimated that about 10,000 executive agreements had been entered into in connection with the NATO treaty. “Every time we open a new privy, we have to have an executive agreement.” Hearing on S.J. Res. 1 and S.J. Res. 43: Before a Subcommittee of the Senate Judiciary Committee, 83d Congress, 1st Sess. (1953), 877.

394 One authority concluded that of the executive agreements entered into between 1938 and 1957, only 5.9 percent were based exclusively on the President’s constitutional authority. McLaughlin, The Scope of the Treaty Power in the United States—II, 43 MINN. L. REV. 651, 721 (1959). Another, somewhat overlapping study found that in the period 1946-1972, 88.3% of executive agreements were based at least in part on statutory authority; 6.2% were based on treaties, and 5.5% were based solely on executive authority. International Agreements: An Analysis of Executive Regulations and Practices, Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (Comm. Print) (1977), 22 (prepared by CRS).

395 “The distinction between so-called ‘executive agreements’ and ‘treaties’ is purely a constitutional one and has no international significance.” Harvard Research in International Law, Draft Convention on the Law of Treaties, 29 AMER. J. INT. L. 697 (Supp.) (1935). See E. Byrd, supra at 148-151. Many scholars have aggressively promoted the use of executive agreements, in contrast to treaties, as a means of enhancing the role of the United States, especially the role of the President, in the international system. See McDougal & Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (Pts. I & II), 54 YALE L. J. 181, 534 (1945).
countries and appropriating money to pay off the government of Algiers to prevent pirate attacks on United States shipping. Perhaps the first formal authorization in advance of an executive agreement was enactment of a statute that permitted the Postmaster General to “make arrangements with the Postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post offices.” Congress has also approved, usually by resolution, other executive agreements, such as the annexing of Texas and Hawaii and the acquisition of Samoa. A prolific source of executive agreements has been the authorization of reciprocal arrangements between the United States and other countries for the securing of protection for patents, copyrights, and trademarks.

Reciprocal Trade Agreements.—The most copious source of executive agreements has been legislation which provided authority for entering into reciprocal trade agreements with other nations. Such agreements in the form of treaties providing for the reciprocal reduction of duties subject to implementation by Congress were frequently entered into, but beginning with the Tariff Act of 1890, Congress began to insert provisions authorizing the Executive to bargain over reciprocity with no necessity of subsequent legislative action. The authority was widened in successive acts. Then, in the Reciprocal Trade Agreements Act of 1934, Congress authorized the President to enter into agreements with other nations for reductions of tariffs and other impediments to international trade and to put the reductions into effect through proclamation.

The Constitutionality of Trade Agreements.—In Field v. Clark, legislation conferring authority on the President to conclude trade agreements was sustained against the objection that it...

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397 W. McClure, International Executive Agreements 41 (1941).
398 Id. at 38-40. The statute was 1 Stat. 232, 239, 26 (1792).
399 Id. at 62-70.
400 Id. at 78-81; S. Crandall, supra at 127-31; see CRS Study, supra at 52-55.
401 Id. at 121-27; W. McClure, supra at 83-92, 173-89.
402 Id. at 8, 59-60.
403 § 3, 26 Stat. 567, 612.
407 143 U.S. 649 (1892).
attempted an unconstitutional delegation "of both legislative and treaty-making powers." The Court met the first objection with an extensive review of similar legislation from the inauguration of government under the Constitution. The second objection it met with a curt rejection: "What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power. The Court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President." 408

Although two Justices disagreed, the question has never been revived. However, in B. Altman & Co. v. United States, 409 decided twenty years later, a collateral question was passed upon. This was whether an act of Congress which gave the federal circuit courts of appeal jurisdiction of cases in which "the validity or construction of any treaty . . . was drawn in question" embraced a case involving a trade agreement which had been made under the sanction of the Tariff Act of 1897. Said the Court: "While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless, it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court." 410

**The Lend-Lease Act.**—The most extensive delegation of authority ever made by Congress to the President to enter into executive agreements occurred within the field of the cognate powers of the two departments, the field of foreign relations, and took place at a time when war appeared to be in the offing and was in fact only a few months away. The legislation referred to is the Lend-

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408 143 U.S. at 694. See also Dames & Moore v. Regan, 453 U.S. 654 (1981), in which the Court sustained a series of implementing actions by the President pursuant to executive agreements with Iran in order to settle the hostage crisis. The Court found that Congress had delegated to the President certain economic powers underlying the agreements and that his suspension of claims powers had been implicitly ratified over time by Congress' failure to set aside the asserted power. Also see Weinberger v. Rossi, 456 U.S. 25, 29-30 n.6 (1982).

409 224 U.S. 583 (1912).

410 224 U.S. at 601.
Lease Act of March 11, 1941,\(^{411}\) by which the President was empowered for over two years—and subsequently for additional periods whenever he deemed it in the interest of the national defense to do so—to authorize “the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government,” to manufacture in the government arsenals, factories, and shipyards, or “otherwise procure,” to the extent that available funds made possible, “defense articles”—later amended to include foodstuffs and industrial products—and “sell, transfer title to, exchange, lease, lend, or otherwise dispose of,” the same to the “government of any country whose defense the President deems vital to the defense of the United States,” and on any terms that he “deems satisfactory.” Under this authorization the United States entered into Mutual Aid Agreements whereby the Government furnished its allies in World War II forty billions of dollars worth of munitions of war and other supplies.

**International Organizations.**—Overlapping of the treaty-making power through congressional-executive cooperation in international agreements is also demonstrated by the use of resolutions approving the United States joining of international organizations\(^ {412}\) and participating in international conventions.\(^ {413}\)

**Executive Agreements Authorized by Treaties**

**Arbitration Agreements.**—In 1904 and 1905, Secretary of State John Hay negotiated a series of treaties providing for the general arbitration of international disputes. Article II of the treaty with Great Britain, for example, provided as follows: “In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute and the scope of the powers of the Arbitrators, and fixing the periods for the formation of the Arbitral Tribunal and the several stages of the procedure.”\(^ {414}\) The Senate approved the British treaty by the constitutional majority having, however, first amended it by substituting the word “treaty” for “agreement.” President Theodore Roosevelt, characterizing the “ratification” as equivalent to rejection, sent the treaties to repose in the archives. “As a matter of historical practice,” Dr. McClure comments, “the compromis under which disputes have been arbitrated include both treaties and executive agree-

\(^{411}\) 55 Stat. 31.

\(^{412}\) E.g., 48 Stat. 1182 (1934), authorizing the President to accept membership for the United States in the International Labor Organization.

\(^{413}\) See E. Corwin, supra at 216.

\(^{414}\) W. McClure, supra at 13-14.
ments in goodly numbers,” a statement supported by both Willoughby and Moore.

**Agreements Under the United Nations Charter.**—Article 43 of the United Nations Charter provides: “1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.”

This time the Senate did not boggle over the word “agreement.”

The United Nations Participation Act of December 20, 1945, implements these provisions as follows: “The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.”

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415 Id. at 14.
416 1 W. Willoughby, supra at 543.
418 Id. at 158.
Status of Forces Agreements.—Status of Forces Agreements, negotiated pursuant to authorizations contained in treaties between the United States and foreign nations in the territory of which American troops and their dependents are stationed, afford the United States a qualified privilege, which may be waived, of trying by court martial soldiers and their dependents charged with commission of offenses normally within the exclusive criminal jurisdiction of the foreign signatory power. When the United States, in conformity with the waiver clause in such an Agreement, consented to the trial in a Japanese court of a soldier charged with causing the death of a Japanese woman on a firing range in that country, the Court could “find no constitutional barrier” to such action. However, at least five of the Supreme Court Justices were persuaded to reject at length the contention that such Agreements could sustain, as necessary and proper for their effectuation, implementing legislation subsequently found by the Court to contravene constitutional guaranties set forth in the Bill of Rights.

Executive Agreements on the Sole Constitutional Authority of the President

Many types of executive agreements comprise the ordinary daily grist of the diplomatic mill. Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Story’s words, “the mere private rights of sovereignty.” Crandall lists scores of such agreements entered into with other governments by the authorization of the President. Such agreements were ordinarily directed to particular and comparatively trivial disputes and by the settlement they effect of these cease ipso facto to be operative. Also, there are such time-honored diplomatic devices as the “protocol” which marks a stage in the negotiation of a treaty, and the modus vivendi, which is designed to serve as a temporary substitute for one. Executive agreements become of constitutional significance when they constitute a determinative factor of future foreign policy and hence of the country’s destiny. In consequence particularly of our participation in World War II and our immersion in the conditions of international tension which prevailed both before and after the war, Presidents have entered into agreements

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420 Reid v. Covert, 354 U.S. 1, 16-17 (1957) (plurality opinion); id. at 66 (Justice Harlan concurring).
422 S. Crandall, supra, ch. 8; see also W. McClure, supra, chs. 1, 2.
with other governments some of which have approximated temporary alliances. It cannot be justly said, however, that in so doing they have acted without considerable support from precedent.

An early instance of executive treaty-making was the agreement by which President Monroe in 1817 brought about a delimitation of armaments on the Great Lakes. The arrangement was effected by an exchange of notes, which nearly a year later were laid before the Senate with a query as to whether it was within the President’s power, or whether advice and consent of the Senate was required. The Senate approved the agreement by the required two-thirds vote, and it was forthwith proclaimed by the President without there having been a formal exchange of ratifications. Of a kindred type, and owing much to the President’s capacity as Commander-in-Chief, was a series of agreements entered into with Mexico between 1882 and 1896 according each country the right to pursue marauding Indians across the common border. Commenting on such an agreement, the Court remarked, a bit uncertainly: “While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters [from foreign vessels] in the absence of positive legislation to that effect.” Justice Gray and three other Justices were of the opinion that such action by the President must rest upon express treaty or statute.

Notable expansion of presidential power in this field first became manifest in the administration of President McKinley. At the outset of war with Spain, the President proclaimed that the United States would consider itself bound for the duration by the last three principles of the Declaration of Paris, a course which, as Professor Wright observes, “would doubtless go far toward establishing these three principles as international law obligatory upon the United States in future wars.” Hostilities with Spain were brought to an end in August, 1898, by an armistice the conditions of which largely determined the succeeding treaty of peace, just

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423 Id. at 49-50.
424 Id. at 81-82.
426 Id. at 467. The first of these conventions, signed July 29, 1882, had asserted its constitutionality in very positive terms. Q. Wright, supra at 239 (quoting Watts v. United States, 1 Wash. Terr. 288, 294 (1870)).
427 Id. at 245.
428 S. Crandall, supra at 103-04.
as did the Armistice of November 11, 1918, determine in great measure the conditions of the final peace with Germany in 1918. It was also President McKinley who in 1900, relying on his own sole authority as Commander-in-Chief, contributed a land force of 5,000 men and a naval force to cooperate with similar contingents from other Powers to rescue the legations in Peking from the Boxers; a year later, again without consulting either Congress or the Senate, he accepted for the United States the Boxer Indemnity Protocol between China and the intervening Powers.\textsuperscript{429} Commenting on the Peking protocol, Willoughby quotes with approval the following remark: “This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character \ldots purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Peking, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot.”\textsuperscript{430}

It was during this period, too, that John Hay, as McKinley’s Secretary of State, initiated his “Open Door” policy, by notes to Great Britain, Germany, and Russia, which were soon followed by similar notes to France, Italy and Japan. These in substance asked the recipients to declare formally that they would not seek to enlarge their respective interests in China at the expense of any of the others; and all responded favorably.\textsuperscript{431} Then, in 1905, the first Roosevelt, seeking to arrive at a diplomatic understanding with Japan, instigated an exchange of opinions between Secretary of War Taft, then in the Far East, and Count Katsura, amounting to a secret treaty, by which the Roosevelt administration assented to the establishment by Japan of a military protectorate in Korea.\textsuperscript{432} Three years later, Secretary of State Root and the Japanese ambassador at Washington entered into the Root-Takahira Agreement to uphold the \textit{status quo} in the Pacific and maintain the principle of equal opportunity for commerce and industry in China.\textsuperscript{433} Mean-while, in 1907, by a “Gentleman’s Agreement,” the Mikado’s government had agreed to curb the emigration of Japanese subjects to the

\textsuperscript{429} Id. at 104.
\textsuperscript{430} 1 W. Willoughby, supra at 539.
\textsuperscript{431} W. McClure, supra at 98.
\textsuperscript{432} Id. at 96-97.
\textsuperscript{433} Id. at 98-99.
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United States, thereby relieving the Washington government from the necessity of taking action that would have cost Japan loss of face. The final result of this series of executive agreements touching American relations in and with the Far East was the product of President Wilson’s diplomacy. This was the Lansing-Ishii Agreement, embodied in an exchange of letters dated November 2, 1917, by which the United States recognized Japan’s “special interests” in China, and Japan assented to the principle of the Open Door in that country. 434

The Litvinov Agreement.—The executive agreement attained its modern development as an instrument of foreign policy under President Franklin D. Roosevelt, at times threatening to replace the treaty-making power, not formally but in effect, as a determinative element in the field of foreign policy. The President’s first important utilization of the executive agreement device took the form of an exchange of notes on November 16, 1933, with Maxim M. Litvinov, the USSR Commissar for Foreign Affairs, whereby American recognition was extended to the Soviet Union and certain pledges made by each official. 435

The Hull-Lothian Agreement.—With the fall of France in June, 1940, President Roosevelt entered into two executive agreements the total effect of which was to transform the role of the United States from one of strict neutrality toward the European war to one of semi-belligerency. The first agreement was with Canada and provided for the creation of a Permanent Joint Board on Defense which would “consider in the broad sense the defense of the north half of the Western Hemisphere.” 436 Second, and more important than the first, was the Hull-Lothian Agreement of September 2, 1940, under which, in return for the lease for ninety-nine years of certain sites for naval bases in the British West Atlantic, the United States handed over to the British Government fifty over-age destroyers which had been reconditioned and recommissioned. 437 And on April 9, 1941, the State Department, in consideration of the just-completed German occupation of Denmark, entered into an executive agreement with the Danish minister in

434 Id. at 99-100.
435 Id. at 140-44.
436 Id. at 391.
437 Id. at 391-93. Attorney General Jackson’s defense of the presidential power to enter into the arrangement placed great reliance on the President’s “inherent” powers under the Commander-in-Chief clause and as sole organ of foreign relations but ultimately found adequate statutory authority to take the steps deemed desirable. 39 Ops. Atty. Gen. 484 (1940).
Washington, whereby the United States acquired the right to occupy Greenland for purposes of defense.  

The Post-War Years.—Post-war diplomacy of the United States was greatly influenced by the executive agreements entered into at Cairo, Teheran, Yalta, and Potsdam. For a period, the formal treaty—the signing of the United Nations Charter and the entry into the multinational defense pacts, like NATO, SEATO, CENTRO, and the like—reestablished itself, but soon the executive agreement, as an adjunct of treaty arrangement or solely through presidential initiative, again became the principal instrument of United States foreign policy, so that it became apparent in the 1960s that the Nation was committed in one way or another to assisting over half the countries of the world protect themselves. Congressional disquietitude did not result in anything more substantial than passage of a “sense of the Senate” resolution expressing a desire that “national commitments” be made more solemnly in the future than in the past.

The Domestic Obligation of Executive Agreements

When the President enters into an executive agreement, what sort of obligation is thereby imposed upon the United States? That international obligations of potentially serious consequences may be imposed is obvious and that such obligations may linger for long periods of time is equally obvious. But the question is more directly pointed to the domestic obligations imposed by such agreements; are treaties and executive agreements interchangeable insofar as domestic effect is concerned? Executive agreements entered into pursuant to congressional authorization and probably

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438 4 Dept. State Bull. 443 (1941).
440 For a congressional attempt to evaluate the extent of such commitments, see United States Security Agreements and Commitments Abroad: Hearings Before a Subcommittee of the Senate Foreign Relations Committee, 91st Congress, 1st Sess. (1969), 10 pts.; see also U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Foreign Relations Committee, 90th Congress, 1st Sess. (1967).
441 See also S. Rep. No. 797, 90th Congress, 1st Sess. (1967). See the discussion of these years in CRS study, supra at 169-202.
442 In 1918, Secretary of State Lansing assured the Senate Foreign Relations Committee that the Lansing-Ishii Agreement had no binding force on the United States, that it was simply a declaration of American policy so long as the President and State Department might choose to continue it. 1 W. Willoughby, supra at 547. In fact, it took the Washington Conference of 1921, two formal treaties, and an exchange of notes to eradicate it, while the “Gentlemen’s Agreement” was finally ended after 17 years only by an act of Congress. W. McClure, supra at 97, 100.
443 See E. Byrd, supra at 151-57.
through treaty obligations present little doctrinal problem; those arrangements by which the President purports to bind the Nation solely on the basis of his constitutional powers, however, do raise serious questions.

Until recently, it was the view of most judges and scholars that this type of executive agreement did not become the “law of the land” pursuant to the supremacy clause because the treaty format was not adhered to. A different view seemed to underlie the Supreme Court decision in *B. Altman & Co. v. United States*, in which it was concluded that a jurisdictional statute reference to “treaty” encompassed an executive agreement. The idea flowered in *United States v. Belmont*, where the Court, in an opinion by Justice Sutherland, following on his *Curtiss-Wright* opinion, gave domestic effect to the Litvinov Agreement. At issue was whether a district court of the United States was correct in dismissing an action by the United States, as assignee of the Soviet Union, for certain moneys which had once been the property of a Russian metal corporation the assets of which had been appropriated by the Soviet government. The lower court had erred, the Court ruled. The President’s act in recognizing the Soviet government, and the accompanying agreements, constituted, said the Justice, an international compact which the President, “as the sole organ” of international relations for the United States, was authorized to enter upon without consulting the Senate. Nor did state laws and policies make any difference in such a situation, for while the supremacy of treaties is established by the Constitution in express terms, yet the same rule holds “in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States.”

In *United States v. Pink*, decided five years later, the same course of reasoning was reiterated with added emphasis. The question here involved was whether the United States was entitled under the Executive Agreement of 1933 to recover the assets of the New York branch of a Russian insurance company. The company argued that the decrees of confiscation of the Soviet Government

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444 E.g., United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. Willoughby, supra at 589. The State Department held the same view. 5 G. Hackworth, Digest of International Law 426 (1944).
445 224 U.S. 583 (1912).
446 301 U.S. 324 (1937).
448 299 U.S. at 330-32.
did not apply to its property in New York and could not consistently with the Constitution of the United States and that of New York. The Court, speaking by Justice Douglas, brushed these arguments aside. An official declaration of the Russian government itself settled the question of the extraterritorial operation of the Russian decree of nationalization and was binding on American courts. The power to remove such obstacles to full recognition as settlement of claims of our nationals was “a modest implied power of the President who is the ‘sole organ of the Federal Government in the field of international relations’... It was the judgment of the political department that full recognition of the Soviet Government required the settlement of outstanding problems including the claims of our nationals.... We would usurp the executive function if we held that the decision was not final and conclusive on the courts.”

“It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.... But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.... Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum ... must give way before the superior Federal policy evidenced by a treaty or international compact or agreement....”

“The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would ‘imperil the amicable relations between governments and vex the peace of nations.’ ... It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government has diligently endeavored to establish....”

“No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitu-
tional sphere, seeks enforcement of its foreign policy in the courts.”

No Supreme Court decision subsequent to Belmont and Pink is available for consideration. Whether the cases in fact turned on the particular fact that the executive agreement in question was incidental to the President’s right to recognize a foreign state, despite the language which equates treaties and executive agreements for purposes of domestic law, cannot be known. Certainly, executive agreements entered into solely on the authority of the President’s constitutional powers are not the law of the land because of the language of the Supremacy Clause, and the absence of any congressional participation denies them the political requirements they may well need to attain this position. Nonetheless, so long as Belmont and Pink remain unqualified, it must be considered that executive agreements do have a significant status in domestic law.

This status was another element in the movement for a constitutional amendment in the 1960s to limit the President’s powers in this field, a movement that ultimately failed.

THE EXECUTIVE ESTABLISHMENT

Office

“An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.”

Ambassadors and Other Public Ministers.—The term “ambassadors and other public ministers,” comprehends “all officers having diplomatic functions, whatever their title or designation.”

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450 315 U.S. at 229-34. Chief Justice Stone and Justice Roberts dissented.
451 The decision in Dames & Moore v. Regan, 453 U.S. 654 (1981), is rich in learning on many topics involving executive agreements, but the Court’s conclusion that Congress had either authorized various presidential actions or had long acquiesced in others leaves the case standing for little on our particular issue of this section.
452 But see United States v. Guy W. Capps, Inc., 204 F. 2d 655 (4th Cir. 1953), wherein Chief Judge Parker held that an executive agreement entered into by the President without congressional authorization or ratification could not displace domestic law inconsistent with such agreement. The Supreme Court affirmed on other grounds and declined to consider this matter. 348 U.S. 296 (1955).
453 There were numerous variations in language, but typical was § 3 of S.J. Res. 1, as reported by the Senate Judiciary Committee, 83d Congress, 1st Sess. (1953), which provided: “Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.” The limitation relevant on this point was in § 2, which provided: “A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.”
454 United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).
It was originally assumed that such offices were established by the Constitution itself, by reference to the Law of Nations, with the consequence that appointments might be made to them whenever the appointing authority—the President and Senate—deemed desirable. During the first sixty-five years of the Government, Congress passed no act purporting to create any diplomatic rank, the entire question of grades being left with the President. Indeed, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation, even of ministers of a specified rank at this or that place, but the provision for the diplomatic corps consisted of so much money “for the expenses of foreign intercourse,” to be expended at the discretion of the President. In Madison’s second term, the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provisions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents.

In 1814, however, when President Madison appointed, during a recess of the Senate, the Commissioners who negotiated the Treaty of Ghent, the theory on which the above legislation was based was drawn into question. Inasmuch, it was argued, as these offices had never been established by law, no vacancy existed to which the President could constitutionally make a recess appointment. To this argument, it was answered that the Constitution recognizes “two descriptions of offices altogether different in their nature, authorized by the constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other public Ministers, and Consuls. The first descriptions organize the Government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon the law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules. As an independent power, the United States have relations with all other independent powers; and the management of those relations is vested in the Executive.”

456It was so assumed by Senator William Maclay. The Journal of William Maclay 109-10 (E. Maclay ed., 1890).

45726 Annals of Congress 694-722 (1814) (quotation appearing at 699); 4 Letters and Other Writings of James Madison 350-353 (1865).
By the opening section of the act of March 1, 1855, it was provided that “from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary,” with a specified annual compensation for each, “to the following countries…” In the body of the act was also this provision: “The President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the Government at the time of their appointment…” The question of the interpretation of the act having been referred to Attorney General Cushing, he ruled that its total effect, aside from its salary provisions, was recommendatory only. It was “to say, that if, and whenever, the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister plenipotentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more.”

This line of reasoning is only partially descriptive of the facts. The Foreign Service Act of 1946, pertaining to the organization of the foreign service, diplomatic as well as consular, contains detailed provisions as to grades, salaries, promotions, and, in part, as to duties. Under the terms thereof the President, by and with the advice and consent of the Senate, appoints ambassadors, ministers, foreign service officers, and consuls, but in practice the vast proportion of the selections are made in conformance to recommendations of a Board of the Foreign Service.

**Presidential Diplomatic Agents.**—What the President may have lost in consequence of the intervention of Congress in this field of diplomatic appointments, he has made good through his early conceded right to employ, in the discharge of his diplomatic function, so-called “special,” “personal,” or “secret” agents without consulting the Senate. When President Jackson’s right to resort to this practice was challenged in the Senate in 1831, it was defended by Edward Livingston, Senator from Louisiana, to such good purpose that Jackson made him Secretary of State. “The practice of appointing secret agents,” said Livingston, “is coeval with our existence as a nation, and goes beyond our acknowledgement as such by other powers. All those great men who have figured in the history of our diplomacy, began their career, and performed some of their most important services in the capacity of secret agents, with

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full powers. Franklin, Adams, Lee, were only commissioners; and in negotiating a treaty with the Emperor of Morocco, the selection of the secret agent was left to the Ministers appointed to make the treaty; and, accordingly, in the year 1785, Mr. Adams and Mr. Jefferson appointed Thomas Barclay, who went to Morocco and made a treaty, which was ratified by the Ministers at Paris."

"These instances show that, even prior to the establishment of the Federal Government, secret plenipotentiaries were known, as well in the practice of our own country as in the general law of nations: and that these secret agents were not on a level with messengers, letter carriers, or spies, to whom it has been found necessary in argument to assimilate them. On the 30th March, 1795, in the recess of the Senate, by letters patent under the great broad seal of the United States, and the signature of their President, (that President being George Washington,) countersigned by the Secretary of State, David Humphreys was appointed commissioner plenipotentiary for negotiating a treaty of peace with Algiers. By instructions from the President, he was afterwards authorized to employ Joseph Donaldson as agent in that business. In May, of the same year, he did appoint Donaldson, who went to Algiers, and in September of the same year concluded a treaty with the Dey and Divan, which was confirmed by Humphreys, at Lisbon, on the 28th November in the same year, and afterwards ratified by the Senate, and an act passed both Houses on 6th May, 1796, appropriating a large sum, twenty-five thousand dollars annually, for carrying it into effect."

The precedent afforded by Humphreys' appointment without reference to the Senate has since been multiplied many times, as witness the mission of A. Dudley Mann to Hanover and other German states in 1846, of the same gentleman to Hungary in 1849, of Nicholas Trist to Mexico in 1848, of Commodore Perry to Japan in 1852, of J. H. Blount to Hawaii in 1893. The last named case is perhaps the most extreme of all. Blount, who was appointed while the Senate was in session but without its advice and consent, was given "paramount authority" over the American resident minister at Hawaii and was further empowered to employ the military and naval forces of the United States, if necessary to protect American lives and interests. His mission raised a vigorous storm of protest in the Senate, but the majority report of the committee which was created to investigate the constitutional question vindicated the President in the following terms: "A question has been made

as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions, without dissent on the part of Congress or the people of the United States.... These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, ....” 463 The continued vitality of the practice is attested by such names as Colonel House, the late Norman H. Davis, who filled the role of “ambassador at large” for a succession of administrations of both parties, Professor Philip Jessup, Mr. Averell Harriman, and other “ambassadors at large” of the Truman Administration, and Professor Henry Kissinger of the Nixon Administration.

How is the practice to be squared with the express words of the Constitution? Apparently, by stressing the fact that such appointments or designations are ordinarily merely temporary and for special tasks, and hence do not fulfill the tests of “office” in the strict sense. In the same way the not infrequent practice of Presidents of appointing Members of Congress as commissioners to negotiate treaties and agreements with foreign governments may be regularized, notwithstanding the provision of Article I, § 6, clause 2 of the Constitution, which provides that “no Senator or Representative shall ... be appointed to any civil Office under the Authority of the United States, which shall have been created,” during his term; and no officer of the United States, “shall be a Member of either House during his Continuance in Office.” 464 The Treaty of Peace with Spain, the treaty to settle the Bering Sea controversy, the treaty establishing the boundary line between Canada and Alaska, were negotiated by commissions containing Senators and Representatives.

Appointments and Congressional Regulation of Offices

That the Constitution distinguishes between the creation of an office and appointment thereto for the generality of national offices has never been questioned. The former is by law and takes place by virtue of Congress’ power to pass all laws necessary and proper

463 S. Rep. No. 227, 53d Congress, 2d Sess. (1894), 25. At the outset of our entrance into World War I President Wilson dispatched a mission to “Petrograd,” as it was then called, without nominating the Members of it to the Senate. It was headed by Mr. Elihu Root, with "the rank of ambassador," while some of his associates bore "the rank of envoy extraordinary."

464 See 2 G. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 48-51 (1903).
for carrying into execution the powers which the Constitution con-
fers upon the government of the United States and its departments
and officers. As an incident to the establishment of an office, Congress has also the power to determine the qualifications of the
officer and in so doing necessarily limits the range of choice of the
appointing power. First and last, it has laid down a great variety
of qualifications, depending on citizenship, residence, professional
attainments, occupational experience, age, race, property, sound
habits, and so on. It has required that appointees be representative
of a political party, of an industry, of a geographic region, or of a
particular branch of the Government. It has confined the Presi-
dent’s selection to a small number of persons to be named by others.
Indeed, it has contrived at times to designate a definite eligi-
bility, thereby virtually usurping the appointing power. De-

465 However, “Congress’ power . . . is inevitably bounded by the express language
of Article II, cl. 2, and unless the method it provides comports with the latter, the
holders of those offices will not be ‘Officers of the United States.’” Buckley v. Valeo,
(1991)). The designation or appointment of military judges, who are “officers of
the United States,” does not violate the appointments clause. The judges are selected
by the Judge Advocate General of their respective branch of the Armed Forces.
These military judges, however, were already commissioned officers who had been
appointed by the President with the advice and consent of the Senate, so that their
designation simply and permissibly was an assignment to them of additional duties
that did not need a second formal appointment. Weiss v. United States, 510 U.S.
163 (1994). However, the appointment of civilian judges to the Coast Guard Court
of Military Review was impermissible and their actions were not salvageable under

466 See Myers v. United States, 272 U.S. 52, 264-274 (1926) (Justice Brandeis
dissenting). Chief Justice Taft in the opinion of the Court in Myers readily recog-
nized the legislative power of Congress to establish offices, determine their functions
and jurisdiction, fix the terms of office, and prescribe reasonable and relevant quali-
fications and rules of eligibility of appointees, always provided “that the qualifica-
tions do not so limit selection and so trench upon executive choice as to be in effect
legislative designation.” Id. at 128-29. For reiteration of Congress’ general powers,
see Buckley v. Valeo, 424 U.S. 1, 134-35 (1976); Morrison v. Olson, 487 U.S. 654,

467 See data in E. Corwin, supra at 363-65. Congress has repeatedly designated
individuals, sometimes by name, more frequently by reference to a particular office,
for the performance of specified acts or for posts of a nongovernmental character;
e.g., to paint a picture (Johnathan Trumbull), to lay out a town, to act as Regents
of Smithsonian Institution, to be managers of Howard Institute, to select a site for
a post office or a prison, to restore the manuscript of the Declaration of Independ-
ence, to erect a monument at Yorktown, to erect a statue of Hamilton, and so on
and so forth. Note, Power of Appointment to Public Office under the Federal Con-
stitution, 42 Harv. L. Rev. 426, 430-31 (1929). In his message of April 13, 1822,
President Monroe stated the thesis that, “as a general principle, . . . Congress have
no right under the Constitution to impose any restraint by law on the power grant-
ed to the President so as to prevent his making a free selection of proper persons
for these [newly created] offices from the whole body of his fellow-citizens.” 2 J.
Richardson supra at 698, 701. The statement is ambiguous, but its apparent inten-
tion is to claim for the President unrestricted power in determining who are proper
persons to fill newly created offices. See the distinction drawn in Myers v. United
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whose heads may be given appointing power? Concurrently, of course, although it may seem odd, the question of what is a “Court[] of Law” for purposes of the appointments clause is unsettled. See Freytag v. CIR, 501 U.S. 868 (1991) (Court divides 5-to-4 whether an Article I court is a court of law under the clause).


The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.” The Court, in Edmond v. United States, reviewed its pronouncements regarding the definition of “inferior officer” and, disregarding some implications of its prior decisions, seemingly settled, unanimously, on a pragmatic characterization. Thus, the importance of the responsibilities assigned an officer, the fact that duties were limited, that jurisdiction was narrow, and that tenure was limited, are only factors but are not definitive. Generally speaking, the term ‘inferior officer’ connotes a relationship with some higher ranking officer or officers below the President: Whether one is an ‘inferior’ officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution

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470 Concurrently, of course, although it may seem odd, the question of what is a “Court[] of Law” for purposes of the appointments clause is unsettled. See Freytag v. CIR, 501 U.S. 868 (1991) (Court divides 5-to-4 whether an Article I court is a court of law under the clause).


474 520 U.S. at 661-62.
might have used the phrase 'lesser officer.' Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.”

Thus, officers who are not “inferior Officers” are principal officers who must be appointed by the President with the advice and consent of the Senate in order to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval. Further, the Framers intended to limit the “diffusion” of the appointing power with respect to inferior officers in order to promote accountability. “The Framers understood … that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people…. The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers’ conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the executive Branch is a department would multiply the number of actors eligible to appoint.”

Yet, even agreed on the principle, the Freytag Court split 5-to-4 on the reason for the permissibility of the Chief Judge of the Tax Court to appoint special trial judges. The entire Court agreed that the Tax Court had to be either a “department” or a “court of law” in order for the authority to be exercised by the Chief Judge, and it unanimously agreed that the statutory provision was constitu-

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475 520 U.S. at 662-63. The case concerned whether the Secretary of Transportation, a presidential appointee with the advice and consent of the Senate, could appoint judges of the Coast Guard Court of Military Appeals; necessarily, the judges had to be “inferior” officers. In related cases, the Court held that designation or appointment of military judges, who are “officers of the United States,” does not violate the appointments clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and possibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review by the same method was impermissible; they had either to be appointed by an officer who could exercise appointment-clause authority or by the President, and their actions were not salvageable under the de facto officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).


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But there agreement ended. The majority was of the opinion that the Tax Court could not be a department, but it was unclear what those Justices thought a department comprehended. Seemingly, it started from the premise that departments were those parts of the executive establishment called departments and headed by a cabinet officer. Yet, the Court continued immediately to say: “Confining the term ‘Heads of Departments’ in the Appointments Clause to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power just as the [IRS] Commissioner’s interpretation, in contrast, would diffuse it. The Cabinet-level departments are limited in number and easily identified. The heads are subject to the exercise of political oversight and share the President’s accountability to the people”. The use of the word “like” in this passage suggests that it is not just Cabinet-headed departments that are departments but also entities that are similar to them in some way, and its reservation of the validity of investing appointing power in the heads of some unnamed entities, as well as its observation that the term “Heads of Departments” does not embrace “inferior commissioners and bureau officers” all contribute to an amorphous conception of the term. In the end, the Court sustained the challenged provision by holding that the Tax Court as an Article I court was a “Court of Law” within the meaning of the appointments clause. The other four Justices concluded that the Tax Court, as an independent establishment in the executive branch, was a “department” for purposes of the appointments clause. In their view, in the context of text and practice, the term meant, not Cabinet-level departments, but “all independent executive establishments,” so that “Heads of Departments” includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch.”

The Freytag decision must be considered a tentative rather than a settled construction. The close division of the Court

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478 501 U.S. at 886 (citing Germaine and Burnap, the opinion clause, Article II, §2, and the 25th Amendment, which, in its § 4, referred to “executive departments” in a manner that reached only cabinet-level entities). But compare id. at 915-22 (Justice Scalia concurring).
479 501 U.S. at 886 (emphasis supplied).
480 501 U.S. at 886-88. Compare id. at 915-19 (Justice Scalia concurring).
481 501 U.S. at 888-92. This holding was vigorously controverted by the other four Justices. Id. at 901-14 (Justice Scalia concurring).
482 Freytag decision must be considered a tentative rather than a settled construction. 501 U.S. at 918, 919 (Justice Scalia concurring).
483 As the text suggested, Freytag seemed to be a tentative decision, and Edmond v. United States, 520 U.S. 651 (1997), a unanimous decision written by Justice Scalia, whose concuring opinion in Freytag challenged the Court’s analysis, may easily be read as retreating considerably from it.
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means that new Court appointments, some of which have already occurred, could change the construction.

As noted, the appointments clause also authorizes Congress to vest the power in "Courts of Law." Must the power to appoint when lodged in courts be limited to those officers acting in the judicial branch, as the Court first suggested? No, the Court has said more recently. In Ex parte Siebold, the Court sustained Congress' decision to vest in courts the appointment of federal election supervisors, charged with preventing fraud and rights violations in congressional elections in the South, and disavowed any thought that interbranch appointments could not be authorized under the clause. A special judicial division was authorized to appoint independent counsels to investigate and, if necessary, prosecute charges of corruption in the executive, and the Court, in near unanimity, sustained the law, denying that interbranch appointments, in and of themselves, and leaving aside more precise separation-of-powers claims, were improper under the clause.

Congressional Regulation of Conduct in Office.—Congress has very broad powers in regulating the conduct in office of officers and employees of the United States, and this authority extends to regulation of political activities. By an act passed in 1876, it prohibited "all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, . . . from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes." The validity of this measure having been sustained, the substance of it, with some elaborations, was incorporated in the Civil Service Act of 1883. The Lloyd-La Follette Act in 1912 began the process of protecting civil servants from unwarranted or abusive removal by codifying "just cause" standards previously embodied in presidential orders, defin-

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484 In re Hennen, 38 U.S. (13 Pet.) 230 (1839). The suggestion was that inferior officers are intended to be subordinate to those in whom their appointment is vested. Id. at 257-58; United States v. Germaine, 99 U.S. 508, 509 (1879).
487 19 Stat. 143, 169 (1876).
489 22 Stat. 403 (the Pendleton Act). On this law and subsequent enactments that created the civil service as a professional cadre of bureaucrats insulated from politics, see Developments in the Law - Public Employment, 97 HARV. L. REV. 1611, 1619-1676 (1984).
ing “just causes” as those that would promote the “efficiency of the service.” Substantial changes in the civil service system were instituted by the Civil Service Reform Act of 1978, which abolished the Civil Service Commission, and divided its responsibilities, its management and administrative duties to the Office of Personnel Management and its review and protective functions to the Merit Systems Protection Board.

By the Hatch Act, all persons in the executive branch of the Government, or any department or agency thereof, except the President and Vice President and certain “policy determining” officers, were forbidden to “take an active part in political management or political campaigns,” although they were still permitted to “express their opinions on all political subjects and candidates.” In United Public Workers v. Mitchell, these provisions were upheld as “reasonable” against objections based on the First, Fifth, Ninth, and Tenth Amendments.

The Loyalty Issue.—By section 9A of the Hatch Act of 1939, federal employees were disqualified from accepting or holding any position in the Government or the District of Columbia if they belonged to an organization that they knew advocated the overthrow of our constitutional form of government. The 79th Congress followed up this provision with a rider to its appropriation acts forbidding the use of any appropriated funds to pay the salary of any person who advocated, or belonged to an organization which advocated the overthrow of the Government by force, or of any person who engaged in a strike or who belonged to an organization which

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490 Act of Aug. 24, 1912, § 6, 37 Stat. 539, 555, codified as amended at 5 U.S.C. § 7513. The protection was circumscribed by the limited enforcement mechanisms under the Civil Service Commission, which were gradually strengthened. See Developments, supra, 97 Harv. L. Rev., 1630-31.


493 330 U.S. 75 (1947). See also Civil Serv. Corp. v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973), in which the constitutional attack was renewed, in large part based on the Court’s expanding jurisprudence of First Amendment speech, but the Act was again sustained. A “little Hatch Act” of a State, applying to its employees, was sustained in Broadrick v. Oklahoma, 413 U.S. 601 (1973).

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asserted the right to strike against the Government. These provisos ultimately wound up in permanent law requiring all government employees to take oaths disclaiming either disloyalty or strikes as a device for dealing with the Government as an employer. Along with the loyalty-security programs initiated by President Truman and carried forward by President Eisenhower, these measures reflected the Cold War era and the fear of subversion and espionage following the disclosures of several such instances here and abroad.

**Financial Disclosure and Limitations.**—By the Ethics in Government Act of 1978, Congress required high-level federal personnel to make detailed, annual disclosures of their personal financial affairs. The aims of the legislation are to enhance public confidence in government, to demonstrate the high level of integrity of government employees, to deter and detect conflicts of interest, to discourage individuals with questionable sources of income from entering government, and to facilitate public appraisal of government employees’ performance in light of their personal financial interests. Despite the assertions of some that employee privacy interests are needlessly invaded by the breadth of disclosures, to date judicial challenges have been unsuccessful, absent even a Supreme Court review. One provision, however, generated much opposition, and was invalidated. Under § 501(b) of the Ethics in

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501 See Developments, supra, 97 HARV. L. REV., 1660-1669.
502 Id. at 1661 (citing S. Rep. 170, 95th Cong. 2d sess. (1978), 21-22.
503 Id. at 1664-69. The Ethics Act also expanded restrictions on postemployment by imposing bans on employment, varying from a brief period to an out-and-out lifetime ban in certain cases. Id. at 1669-76. The 1989 revision enlarged and expanded on these provisions. 103 Stat. 1716-1724, amending 18 U.S.C. § 207.
Government Act, 504 there is imposed a ban on Members of Congress or any officer or employee of the Government, regardless of salary level, taking any “honorarium,” which is defined as “a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual’s official duties or the payment is made because of the individual’s status with the Government) . . . .” 505 The statute, even interpreted in accordance with the standards applicable to speech restrictions on government employees, has been held to be overbroad and not sufficiently tailored to serve the governmental interest to be promoted by it. 506

**Legislation Increasing Duties of an Officer.**—Finally, Congress may “increase the powers and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.” Such legislation does not constitute an attempt by Congress to seize the appointing power. 507

**Stages of Appointment Process**

**Nomination.**—The Constitution appears to distinguish three stages in appointments by the President with the advice and consent of the Senate. The first is the “nomination” of the candidate by the President alone; the second is the assent of the Senate to the candidate’s “appointment;” and the third is the final appointment and commissioning of the appointee, by the President. 508

**Senate Approval.**—The fact that the power of nomination belongs to the President alone prevents the Senate from attaching conditions to its approval of an appointment, such as it may do to its approval of a treaty. In the words of an early opinion of the Attorney General: “The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President’s nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and

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505 5 U.S.C.App. § 505(3).
507 Shoemaker v. United States, 147 U.S. 282, 301 (1893). The Court noted that the additional duties at issue were “germane” to the offices. Id.
508 Marbury v. Madison, 5 U.S. (1 Cr.) 137, 155-156 (1803) (Chief Justice Marshall). Marshall’s statement that the appointment “is the act of the President,” conflicts with the more generally held and sensible view that when an appointment is made with its consent, the Senate shares the appointing power. 3 J. Story, Commentaries on the Constitution of the United States 1525 (1833); In re Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).
limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration.” This view is borne out by early opinion, as well as by the record of practice under the Constitution.

**When Senate Consent Is Complete.**—Early in January, 1931, the Senate requested President Hoover to return its resolution notifying him that it advised and consented to certain nominations to the Federal Power Commission. In support of its action the Senate invoked a long-standing rule permitting a motion to reconsider a resolution confirming a nomination within “the next two days of actual executive session of the Senate” and the recall of the notification to the President of the confirmation. The nominees involved having meantime taken the oath of office and entered upon the discharge of their duties, the President responded with a refusal, saying: “I cannot admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.” The Senate thereupon voted to reconsider the nominations in question, again approving two of the nominees, but rejecting the third, against whom it instructed the District Attorney of the District of Columbia to institute quo warranto proceedings in the Supreme Court of the District. In *United States v. Smith*, the Supreme Court overruled the proceedings on the ground that the Senate had never before attempted to apply its rule in the case of an appointee who had already been installed in office on the faith of the Senate’s initial consent and notification to the President. In 1939, President Roosevelt rejected a similar demand by the Senate, an action that went unchallenged.

**The Removal Power**

**The Myers Case.**—Save for the provision which it makes for a power of impeachment of “civil officers of the United States,” the Constitution contains no reference to a power to remove from office, and until its decision in *Myers v. United States*, on October 25, 1926, the Supreme Court had contrived to sidestep every occasion for a decisive pronouncement regarding the removal power, its extent, and location. The point immediately at issue in the *Myers* case was the effectiveness of an order of the Postmaster General,

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509 3 Ops. Atty. Gen. 188 (1837).
511 286 U.S. 6 (1932).
512 E. Corwin, supra at 77.
513 272 U.S. 52 (1926).
acting by direction of the President, to remove from office a first-
class postmaster, in the face of the following provision of an act of
Congress passed in 1876: "Postmasters of the first, second, and
third classes shall be appointed and may be removed by the Presi-
dent by and with the advice and consent of the Senate, and shall
hold their offices for four years unless sooner removed or sus-
pended according to law." 514

A divided Court, speaking through Chief Justice Taft, held the
order of removal valid and the statutory provision just quoted void.
The Chief Justice's main reliance was on the so-called "decision of
1789," the reference being to Congress' course that year in insert-
ing in the act establishing the Department of State a proviso which
was meant to imply recognition that the Secretary would be remov-
able by the President at will. The proviso was especially urged by
Madison, who invoked in support of it the opening words of Article
II and the President's duty to "take care that the laws be faithfully
executed." Succeeding passages of the Chief Justice's opinion erect-
ed on this basis a highly selective account of doctrine and practice
regarding the removal power down to the Civil War, which was
held to yield the following results: "That article II grants to the
President the executive power of the Government, i.e., the general
administrative control of those executing the laws, including the
power of appointment and removal of executive officers—a conclu-
sion confirmed by his obligation to take care that the laws be faith-
fully executed; that article II excludes the exercise of legislative
power by Congress to provide for appointments and removals, ex-
cept only as granted therein to Congress in the matter of inferior
offices; that Congress is only given power to provide for appoint-
ments and removals of inferior officers after it has vested, and on
condition that it does vest, their appointment in other authority
than the President with the Senate's consent; that the provisions
of the second section of Article II, which blend action by the legisla-
tive branch, or by part of it, in the work of the executive, are limi-
tations to be strictly construed and not to be extended by implication;
that the President's power of removal is further established
as an incident to his specifically enumerated function of appoint-
ment by and with the advice of the Senate, but that such incident
does not by implication extend to removals the Senate's power of
checking appointments; and finally that to hold otherwise would
make it impossible for the President, in case of political or other
differences with the Senate or Congress, to take care that the laws
be faithfully executed." 515

514 19 Stat. 78, 80.
515 272 U.S. at 163-64.
The holding in the *Myers* case boils down to the proposition that the Constitution endows the President with an illimitable power to remove all officers in whose appointment he has participated with the exception of judges of the United States. The motivation of the holding was not, it may be assumed, any ambition on the Chief Justice’s part to set history aright—or awry. Rather, it was the concern that he voiced in the following passage in his opinion: “There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.” Thus spoke the former President Taft, and the result of his prepossession was a rule which, as was immediately pointed out, exposed the so-called “independent agencies,” the Interstate Commerce Commission, the Federal Trade Commission, and the like, to presidential domination. Unfortunately, the Chief Justice,

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516 The reticence of the Constitution respecting removal left room for four possibilities: first, the one suggested by the common law doctrine of “estate in office,” from which the conclusion followed that the impeachment power was the only power of removal intended by the Constitution; second, that the power of removal was an incident of the power of appointment and hence belonged, at any rate in the absence of legal or other provision to the contrary, to the appointing authority; third, that Congress could, by virtue of its power “to make all laws which shall be necessary and proper,” etc., determine the location of the removal power; fourth, that the President by virtue of his “executive power” and his duty “to take care that the laws be faithfully executed,” possesses the power of removal over all officers of the United States except judges. In the course of the debate on the act to establish a Department of Foreign Affairs (later changed to Department of State) all of these views were put forward, with the final result that a clause was incorporated in the measure that implied, as pointed out above, that the head of the department would be removable by the President at his discretion. Contemporaneously, and indeed until after the Civil War, this action by Congress, in other words “the decision of 1789,” was interpreted as establishing “a practical construction of the Constitution” with respect to executive officers appointed without stated terms. However, in the dominant opinion of those best authorized to speak on the subject, the “correct interpretation” of the Constitution was that the power of removal was always an incident of the power of appointment, and that therefore in the case of officers appointed by the President with the advice and consent of the Senate the removal power was exercisable by the President only with the advice and consent of the Senate. For an extensive review of the issue at the time of Myers, see Corwin, *The President's Removal Power Under the Constitution*, in 4 Selected Essays on Constitutional Law 1467 (1938).

517 272 U.S. at 134. Note the parallelism of the arguments from separation-of-powers and the President’s ability to enforce the laws in the decision rendered on Congress’ effort to obtain a role in the actual appointment of executive officers in Buckley v. Valeo, 424 U.S. 1, 109-43 (1976), and in many of the subsequent separation-of-powers decisions.
while professing to follow Madison’s leadership, had omitted to weigh properly the very important observation which the latter had made at the time regarding the office of Comptroller of the Treasury. “The Committee,” said Madison, “has gone through the bill without making any provision respecting the tenure by which the comptroller is to hold his office. I think it is a point worthy of consideration, and shall, therefore, submit a few observations upon it. It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are of a judiciary quality as well as the executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government.”

In Humphrey’s Executor v. United States, the Court seized upon “the nature of the office” concept and applied it as a corrective to the overbroad Myers holding.

The Humphrey Case.—The material element of Humphrey’s Executor was that Humphrey, a member of the Federal Trade Commission, was on October 7, 1933, notified by President Roosevelt that he was “removed” from office, the reason being their divergent views of public policy. In due course, Humphrey sued for salary. Distinguishing the Myers case, Justice Sutherland, speaking for the unanimous Court, said: “A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers case finds support in the theory that such an office is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is.... It goes no farther; much less does it include an officer who occupies no place in the executive department and

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518 ANNALS OF CONGRESS 611-612 (1789).
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who exercises no part of the executive power vested by the Constitution in the President.”

“The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute. . . . Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. . . . We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named, [the Interstate Commerce Commission, the Federal Trade Commission, the Court of Claims]. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will. . . .”

“The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.”

The Wiener Case.—Curtailment of the President’s power of removal, so liberally delineated in the Myers decision, was not to end with the Humphrey case. Unresolved by the latter was the question whether the President, absent a provision expressly delimiting his authority in the statute creating an agency endowed

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520 295 U.S. at 627-29, 631-32. Justice Sutherland’s statement, quoted above, that a Federal Trade Commissioner “occupies no place in the executive department” was not necessary to the decision of the case, was altogether out of line with the same Justice’s reasoning in Springer v. Philippine Islands, 277 U.S. 189, 201-202 (1928), and seems later to have caused the author of it much perplexity. See R. Cushman, The Independent Regulatory Commission 447-48 (1941). As Professor Cushman adds: “Every officer and agency created by Congress to carry laws into effect is an arm of Congress. . . . The term may be a synonym; it is not an argument.” Id. at 451.
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with quasi-judicial functions, remained competent to remove members serving thereon. To this query the Court supplied a negative answer in *Wiener v. United States*. 521 Emphasizing therein that the duties of the War Claims Commission were wholly adjudicatory and its determinations, final and exempt from review by any other official or judicial body, the Court unanimously concluded that inasmuch as the President was unable to supervise its activities, he lacked the power, independently of statutory authorization, to remove a commissioner serving thereon whose term expired with the life of that agency.

**The Watergate Controversy.**—A dispute arose regarding the discharge of the Special Prosecutor appointed to investigate and prosecute violations of law in the Watergate matter. Congress vested in the Attorney General the power to conduct the criminal litigation of the Federal Government, 522 and it further authorized him to appoint subordinate officers to assist him in the discharge of his duties. 523 Pursuant to presidential direction, the Attorney General designated a Watergate Special Prosecutor with broad power to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the President, members of the White House staff, or presidential appointees. He was to remain in office until a date mutually agreed upon between the Attorney General and himself, and the regulations provided that the Special Prosecutor “will not be removed from his duties except for extraordinary improprieties on his part.” 524 On October 20, following the resignations of the Attorney General and the Deputy Attorney General, the Solicitor General as Acting Attorney General formally dismissed the Special Prosecutor 525 and three days later rescinded the regulation establishing the office. 526 In subsequent litigation, a federal district court held that the firing by the Acting Attorney General had violated the regulations, which were in force at the time and which had to be fol-

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524 38 Fed. Reg. 14688 (1973). The Special Prosecutor’s status and duties were the subject of negotiation between the Administration and the Senate Judiciary Committee. Nomination of Elliot L. Richardson to be Attorney General: Hearings Before the Senate Judiciary Committee, 93d Congress, 1st Sess. (1973), 143 *passim*.
525 The formal documents effectuating the result are set out in 9 Weekly Comp. Pres. Doc. 1271-1272 (1973).
The tension that had long been noticed between *Myers* and *Humphrey's Executor*, at least in terms of the language used in those cases but also to some extent in their holdings, appears to have been ameliorated by two decisions, which purport to reconcile the cases but, more important, purport to establish, in the latter case, a mode of analysis for resolving separation-of-powers disputes respecting the removal of persons appointed under the Appointments Clause. This is not to say that the language and analytical approach of Synar are not in conflict with that of Morrison; it is to say that the results are consistent and the analytical basis of the latter case does resolve the ambiguity present in some of the reservations in Synar.
In *Bowsher v. Synar*, the Court held that when Congress itself retains the power to remove an official it could not vest him with the exercise of executive power. Invalidated in *Synar* were provisions of the 1985 “Gramm-Rudman-Hollings” Deficit Control Act vesting in the Comptroller General authority to prepare a detailed report on projected federal revenue and expenditures and to determine mandatory across-the-board cuts in federal expenditures necessary to reduce the projected budget deficit by statutory targets. By a 1921 statute, the Comptroller General was removable by joint congressional resolution for, *inter alia*, “inefficiency,” “neglect of duty,” or “malfeasance.” “These terms are very broad,” the Court noted, and “could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will.” Consequently, the Court determined, “the removal powers over the Comptroller General’s office dictate that he will be subservient to Congress.”

Relying expressly upon *Myers*, the Court concluded that “Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.” But *Humphrey’s Executor* was also cited with approval, and to the contention that invalidation of this law would cast doubt on the status of the independent agencies the Court rejoined that the statutory measure of the independence of those agencies was the assurance of “for cause” removal by the President rather than congressional involvement as in the instance of the Comptroller General. This reconciliation of *Myers* and *Humphrey’s Executor* was made clear and express in *Morrison v. Olson*.

That case sustained the independent counsel statute. Under that law, the independent counsel, appointed by a special court upon application by the Attorney General, may be removed by the Attorney General “only for good cause, physical disability, mental

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533 478 U.S. at 729, 730. “By placing the responsibility for execution of the ... Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function.” Id. at 734. Because the Act contained contingency procedures for implementing the budget reductions in the event that the primary mechanism was invalidated, the Court rejected the suggestion that it should invalidate the 1921 removal provision rather than the Deficit Act’s conferment of executive power in the Comptroller General. To do so would frustrate congressional intention and significantly alter the Comptroller General’s office. Id. at 734-36.
534 478 U.S. at 726.
535 478 U.S. at 725 n. 4.
incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.” Inasmuch as the counsel was clearly exercising “purely” executive duties, in the sense that term was used in Myers, it was urged that Myers governed and required the invalidation of the statute. But, said the Court, Myers stood only for the proposition that Congress could not involve itself in the removal of executive officers. Its broad dicta that the President must be able to remove at will officers performing “purely” executive functions had not survived Humphrey’s Executor. It was true, the Court admitted, that, in the latter case, it had distinguished between “purely” executive officers and officers who exercise “quasi-legislative” and “quasi-judicial” powers in marking the line between officials who may be presidentially removed at will and officials who can be protected through some form of good cause removal limits. “[B]ut our present considered view is that the determination of whether the Constitution allows Congress to impose a ‘good cause’-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as ‘purely executive.’ The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II. Myers was undoubtedly correct in its holding, and in its broader suggestion that there are some ‘purely executive’ officials who must be removable by the President at will if he is to be able to accomplish his constitutional role. At the other end of the spectrum from Myers, the characterization of the agencies in Humphrey’s Executor and Wiener as ‘quasi-legislative’ or ‘quasi-judicial’ in large part reflected our judgment that it was not essential to the President’s proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.”

The Court discerned no compelling reason to find the good cause limit to interfere with the President’s performance of his duties. The independent counsel did exercise executive, law-enforce-

538 487 U.S. at 685-93.
ment functions, but the jurisdiction and tenure of each counsel were limited in scope and policymaking, or significant administrative authority was lacking. On the other hand, the removal authority did afford the President through the Attorney General power to ensure the “faithful execution” of the laws by assuring that the counsel is competently performing the statutory duties of the office.

It is now thus reaffirmed that Congress may not involve itself in the removal of officials performing executive functions. It is also established that, in creating offices in the executive branch and in creating independent agencies, Congress has considerable discretion in statutorily limiting the power to remove of the President or another appointing authority. It is evident on the face of the opinion that the discretion is not unbounded, that there are offices which may be essential to the President’s performance of his constitutionally assigned powers and duties, so that limits on removal would be impermissible. There are no bright lines marking off one office from the other, but decision requires close analysis.539

As a result of these cases, the long-running controversy with respect to the legitimacy of the independent agencies appears to have been settled,540 although it appears likely that the controversies with respect to congressional-presidential assertions of power in executive agency matters are only beginning.

**Other Phases of Presidential Removal Power**—Congress may “limit and restrict the power of removal as it deems best for the public interest” in the case of inferior officers.541 However, in the absence of specific legislative provision to the contrary, the President may remove at his discretion an inferior officer whose term is limited by statute,542 or one appointed with the consent of the Senate.543 He may remove an officer of the army or navy at any time by nominating to the Senate the officer’s successor, pro-

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539 But notice the analysis followed by three Justices in Public Citizen v. Department of Justice, 491 U.S. 440, 467, 482-89 (1989) (concurring), and consider the possible meaning of the recurrence to formalist reasoning in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, (1989). And see Justice Scalia’s utilization of the “take care” clause in pronouncing limits on Congress’ constitutional power to confer citizen standing in Lujan v. Defenders of Wildlife, 505 U.S. 555, 576-78 (1992), although it is not clear that he had a majority of the Court with him.

540 Indeed, the Court explicitly analogized the civil enforcement powers of the independent agencies to the prosecutorial powers wielded by the independent counsel. Morrison v. Olson, 487 U.S. 654, 692 n.31 (1988).


542 Parsons v. United States, 167 U.S. 324 (1897).

543 Shurtleff v. United States, 189 U.S. 311 (1903).
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provided the Senate approves the nomination.\footnote{Blake v. United States, 103 U.S. 227 (1881); Quackenbush v. United States, 177 U.S. 20 (1900); Wallace v. United States, 257 U.S. 541 (1922).} In 1940, the President was sustained in removing Dr. E. A. Morgan from the chairmanship of TVA for refusal to produce evidence in substantiation of charges which he had levied at his fellow directors.\footnote{Morgan v. TVA, 28 F. Supp. 732 (E.D. Tenn. 1939), aff’d, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941).} Although no such cause of removal by the President was stated in the act creating TVA, the President’s action, being reasonably required to promote the smooth functioning of TVA, was within his duty to “take care that the laws be faithfully executed.” So interpreted, the removal did not violate the principle of administrative independence.

The Presidential Aegis: Demands for Papers

Presidents have more than once had occasion to stand in a protective relation to their subordinates, assuming their defense in litigation brought against them\footnote{E.g., 6 Ops. Atty. Gen. 220 (1853); In re Neagle, 135 U.S. 1 (1890).} or pressing litigation in their behalf,\footnote{United States v. Lovett, 328 U.S. 303 (1946).} refusing a congressional call for papers which might be used, in their absence from the seat of government, to their disadvantage,\footnote{E.g., 2 J. Richardson, supra at 847.} challenging the constitutional validity of legislation deemed detrimental to their interests.\footnote{United States v. Lovett, 328 U.S. 303, 313 (1946).} Presidents throughout our history have attempted to spread their own official immunity to their subordinates by resisting actions of the courts or of congressional committees to require subordinates to divulge communications from or to the President that Presidents choose to regard as confidential. Only recently, however, has the focus of the controversy shifted from protection of presidential or executive interests to protection of the President himself, and the locus of the dispute shifted to the courts.

Following years in which claims of executive privilege were resolved in primarily interbranch disputes on the basis of the political strengths of the parties, the issue finally became subject to judicial elaboration. The doctrine of executive privilege was at once recognized as existing and having a constitutional foundation while at the same time it was definitely bounded in its assertion by the principle of judicial review. Because of these cases, because of the intensified congressional-presidential dispute, and especially because of the introduction of the issue into an impeachment proceeding, a somewhat lengthy treatment of the doctrine is called for.
Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President, either in effectuation of its investigatory powers to oversee the conduct of officials of the Executive Branch or in effectuation of its power to impeach the President, Vice President, or civil officers of the Government. Private parties may seek information in the possession of the President either in civil litigation with the Government or in a criminal proceeding brought by government prosecutors. Generally, the categories of executive privilege have been the same whether it is Congress or a private individual seeking the information, but it is possible that the congressional assertion of need may over-balance the presidential claim to a greater degree than that of a private individual. The judicial precedents are so meager yet that it is not possible so to state, however.

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the Executive Branch any such privilege, but it has been claimed that the privilege derives from the constitutional provision of separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency imposed by the Constitution. Historically, assertion of the doctrine has been largely confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discussions. For a good statement of the basis of the doctrine, the areas in which it is asserted, and historical examples, see Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st Sess. (1971), 420-43, (then-Assistant Attorney General Rehnquist). Former Attorney General Rogers, in stating the position of the Eisenhower Administration, identified five categories of executive privilege: (1) military and diplomatic secrets and foreign affairs, (2) information made confidential by statute, (3) information relating to pending litigation, and investigative files and reports, (4) information relating to internal government affairs privileged from disclosure in the public interest, and (5) records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates, and informal working papers. The Power of the President To Withhold Information from the Congress, Memorandum of the Attorney General, Senate Judiciary Subcommittee on Constitutional Rights, 85th Congress, 2d Sess. (Comm. Print) (1958), reprinted as Rogers, Constitutional Law: The Papers of the Executive Branch, 44 A.B.A.J. 941 (1958). In the most expansive version of the doctrine, Attorney General Kleindeinst argued that the President could assert the privilege as to any employee of the Federal Government to keep secret any information at all. Executive Privilege, Secrecy in Government, Freedom of Information: Hearings Before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st Sess. (1973), I:18 passim. For a strong argument that the doctrine lacks any constitutional or other legal basis, see R. Berger, Executive Privilege:
tion, the litigation involved, of course, the claim of confidentiality of conversations between the President and his aides.

**Private Access to Government Information.**—Private parties may seek to obtain information from the Government either to assist in defense to criminal charges brought by the Government or in civil cases to use in either a plaintiff's or defendant's capacity in suits with the Government or between private parties. In criminal cases, a defendant is guaranteed compulsory process to obtain witnesses by the Sixth Amendment and by the due process clause is guaranteed access to relevant exculpatory information in the possession of the prosecution. Generally speaking, when the prosecution is confronted with a judicial order to turn over information to a defendant that it does not wish to make available, the prosecution has the option of dropping the prosecution and thus avoiding disclosure, but that alternative may not always be available; in the Watergate prosecution, only by revoking the authority of the Special Prosecutor and bringing the cases back into the confines of the Department of Justice could this possibility have been realized.

The civil type of case is illustrated in *United States v. Reynolds*, a tort claim brought against the United States for compensation for the deaths of civilians in the crash of an Air Force plane testing secret electronics equipment. Plaintiffs sought discovery of the Air Force's investigation report on the accident, and the Government resisted on a claim of privilege as to the nondisclos-

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551 There are also, of course, instances of claimed access for other purposes, for which the Freedom of Information Act, 80 Stat. 383 (1966), 5 U.S.C. § 552, provides generally for public access to governmental documents. In 522(b), however, nine types of information are exempted from coverage, several of which relate to the types as to which executive privilege has been asserted, such as matter classified pursuant to executive order, interagency or intra-agency memoranda or letters, and law enforcement investigatory files. See, e.g., EPA v. Mink, 410 U.S. 73 (1973); FTC v. Grolier, Inc., 462 U.S. 19 (1983); CIA v. Sims, 471 U.S. 159 (1985); John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

552 See Brady v. Maryland, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. The earliest judicial dispute involving what later became known as executive privilege arose in United States v. Burr, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), in which defendant sought certain exculpatory material from President Jefferson. Dispute continues with regard to the extent of presidential compliance, but it appears that the President was in substantial compliance with outstanding orders if not in full compliance.


554 Thus, defendant in United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974), was held entitled to access to material in the custody of the President where-in the President's decision to dismiss the prosecution would probably have been unavailing.

555 345 U.S. 1 (1953).
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sure of military secrets. The Court accepted the Government’s claim, holding that courts must determine whether under the circumstances the claim of privilege was appropriate without going so far as to force disclosure of the thing the privilege is designed to protect. The showing of necessity of the private litigant for the information should govern in each case how far the trial court should probe; where the necessity is strong, the court should require a strong showing of the appropriateness of the privilege claim but once satisfied of the appropriateness no matter how compelling the need the privilege prevails. 556

Prosecutorial and Grand Jury Access to Presidential Documents.—Rarely will there be situations when federal prosecutors or grand juries seek information under the control of the President, since he has ultimate direction of federal prosecuting agencies, but the Watergate Special Prosecutor, being in a unique legal situation, was held able to take the President to court to enforce subpoenas for tape recordings of presidential conversations and other documents relating to the commission of criminal actions. 557 While holding that the subpoenas were valid and should be obeyed, the Supreme Court recognized the constitutional status of executive privilege, insofar as the assertion of that privilege relates to presidential conversations and indirectly to other areas as well.

Presidential communications, the Court said, have “a presumptive privilege.” “The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.” The operation of government is furthered by the protection accorded communications between high govern-


ment officials and those who advise and assist them in the performance of their duties. “A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” The separation of powers basis derives from the conferral upon each of the branches of the Federal Government of powers to be exercised by each of them in great measure independent of the other branches. The confidentiality of presidential conversations flows then from the effectuation of enumerated powers.\footnote{\textsuperscript{558}}

However, the Court continued, the privilege is not absolute. The federal courts have the power to construe and delineate claims arising under express and implied powers. Deference is owed the constitutional decisions of the other branches, but it is the function of the courts to exercise the judicial power, “to say what the law is.” The Judicial Branch has the obligation to do justice in criminal prosecutions, which involves the employment of an adversary system of criminal justice in which all the probative facts, save those clearly privileged, are to be made available. Thus, while the President’s claim of privilege is entitled to deference, the courts must balance two sets of interests when the claim depends solely on a broad, undifferentiated claim of confidentiality.

“In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.”

“On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President’s acknowledged need

for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. ...”

“We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.”

Obviously, this decision leaves much unresolved. It does recognize the constitutional status of executive privilege as a doctrine. It does affirm the power of the courts to resolve disputes over claims of the privilege. But it leaves unsettled just how much power the courts have to review claims of privilege to protect what are claimed to be military, diplomatic, or sensitive national security secrets. It does not indicate what the status of the claim of confidentiality of conversations is when it is raised in civil cases; nor does it touch upon denial of information to Congress.

Neither does the Court’s decision in Nixon v. Administrator of General Services elucidate any of these or other questions that may be raised to any great degree. In upholding the Presidential Recordings and Materials Preservation Act, which directed the Government to take custody of former President Nixon’s records to be screened, catalogued, and processed by professional archivists in GSA, the Court viewed the assertion of privilege as directed only to the facial validity of the requirement of screening by executive branch professionals and not at all related to the possible public disclosure of some of the records. The decision does go beyond the first decision’s recognition of the overbalancing force of the necessity for disclosure in criminal trials to find “comparable” “adequate justifications” for congressional enactment of the law, including the preservation of the materials for legitimate historical and governmental purposes, the rationalization of preservation and access to public needs as well as each President’s wishes, the preservation of the materials as a source for facilitating a full airing of the

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559 418 U.S. 683, 711-13. Essentially the same decision had been arrived at in the context of subpoenas of tapes and documentary evidence for use before a grand jury in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

560 433 U.S. 425, 446-55 (1977). See id. at 504, 545 (Chief Justice Burger and Justice Rehnquist dissenting). The decision does resolve one outstanding question: assertion of the privilege is not limited to incumbent Presidents. Id. at 447-49. Subsequently, a court held that former-President Nixon had had such a property expectancy in his papers that he was entitled to compensation for their seizure under the Act. Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992).
events leading to the former President’s resignation for public and congressional understanding, and preservation for the light shed upon issues in civil or criminal litigation. While interestingly instructive, the decision may be so attuned to the narrow factual circumstances that led to the Act’s passage as to leave the case of little value as precedent.

**Congressional Access to Executive Branch Information.**—

Presidents and Congresses have engaged in protracted disputes over provision of information from the former to the latter, but the basic thing to know is that most congressional requests for information are complied with. The disputes, however, have been colorful and varied. The basic premise of the concept of executive privilege, as it is applied to resist requests for information from Congress as from private parties with or without the assistance of the courts, is found in the doctrine of separation of powers, the prerogative of each coequal branch to operate within its own sphere independent of control or direction of the other branches. In this context, the President then asserts that phase of the claim of privilege relevant to the moment, such as confidentiality of communications, protection of diplomatic and military secrets, or preservation of investigative records. Counterposed against this assertion of presidential privilege is the power of Congress to obtain information upon which to legislate, to oversee the carrying out of its legislation, to check and root out corruption and wrongdoing in the Executive Branch, involving both the legislating and appropriating function of Congress, and in the final analysis to impeach the President, the Vice President, and all civil officers of the Federal Government.

Until quite recently, all disputes between the President and Congress with regard to requests for information were settled in the political arena, with the result that few if any lasting precedents were created and only disputed claims were left to future argument. The Senate Select Committee on Presidential Campaign Activities, however, elected to seek a declaratory judgment in the courts with respect to the President’s obligations to obey its subpoenas. The Committee lost its case, but the courts based their rulings upon prudential considerations rather than upon questions of basic power, inasmuch as by the time the case was considered impeachment proceedings were pending in the House of Representa-

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The House Judiciary Committee subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement, the Committee adopted as one of its Articles of Impeachment the refusal of the President to honor its subpoenas. Congress has considered bills by which Congress would authorize congressional committees to go to court to enforce their subpoenas; the bills did not purport to define executive privilege, although some indicate a standard by which the federal court is to determine whether the material sought is lawfully being withheld from Congress. The controversy gives little indication at the present time of abating, and it may be assumed that whenever the Executive and Congress are controlled by different political parties there will be persistent conflicts. One may similarly assume that the alteration of this situation would only reduce but not remove the disagreements.

Clause 3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

RECESS APPOINTMENTS

Setting out from the proposition that the very nature of the executive power requires that it shall always be “in capacity for action,” Attorneys General early came to interpret the word “happen” in the phrase “all vacancies that may happen” to mean “happen to exist,” and long continued practice securely establishes this construction. It results that whenever a vacancy may have occurred in the first instance, or for whatever reason, if it still continues after the Senate has ceased to sit and so cannot be consulted, the President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.


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But a Senate “recess” does not include holidays, or very brief temporary adjournments, while by an act of Congress, if the vacancy existed when the Senate was in session, the ad interim appointee, subject to certain exemptions, may receive no salary until he has been confirmed by the Senate.

Judicial Appointments

Federal judges clearly fall within the terms of the recess-appointments clause. But, unlike with other offices, a problem exists. Article III judges are appointed “during good behavior,” subject only to removal through impeachment. A judge, however, who is given a recess appointment may be “removed” by the Senate’s failure to advise and consent to his appointment; moreover, on the bench, prior to Senate confirmation, she may be subject to influence not felt by other judges. Nonetheless, a constitutional attack upon the status of a federal district judge, given a recess appointment and then withdrawn as a nominee, was rejected by a federal court.

Ad Interim Designations

To be distinguished from the power to make recess appointments is the power of the President to make temporary or ad interim designations of officials to perform the duties of other absent officials. Usually such a situation is provided for in advance by a

565 See the following Ops. Atty. Gen.: 1:631 (1823); 2:525 (1832); 3:673 (1841); 4:523 (1846); 10:356 (1862); 11:179 (1865); 12:32 (1866); 12:455 (1868); 14:563 (1875); 15:207 (1877); 16:523 (1880); 18:28 (1884); 19:261 (1889); 26:234 (1907); 30:314 (1914); 33:20 (1921). In 4 Ops. Atty. Gen. 361, 363 (1845), the general doctrine was held not to apply to a yet unfilled office which was created during the previous session of Congress, but this distinction was rejected in the following Ops. Atty. Gen.: 12:455 (1868); 18:28 (1884); and 19:261 (1889). In harmony with the opinions is United States v. Allocco, 305 F.2d 704 (2d Cir. 1962). For the early practice with reference to recess appointments, see 2 G. Haynes, The Senate of the United States 772-78 (1938).

566 23 Ops. Atty. Gen. 599 (1901); 22 Ops. Atty. Gen. 82 (1898). How long a “recess” must be to be actually a recess, a question here as in the pocket veto area, is uncertain. 3 O. L. C. 311, 314 (1979). A “recess,” however, may be merely “constructive,” as when a regular session succeeds immediately upon a special session. It was this kind of situation that gave rise to the once famous Crum incident. See 3 W. Willoughby, supra at 1508-1509.

567 5 U.S.C. § 5503. The provision has been on the books, in somewhat stricter form, since 12 Stat. 646 (1863).

568 United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986). The opinions in the court of appeals provide a wealth of data on the historical practice of giving recess appointments to judges, including the developments in the Eisenhower Administration, when three Justices, Warren, Brennan, and Stewart, were so appointed and later confirmed after participation on the Court. The Senate in 1960 adopted a “sense-of-the-Senate” resolution suggesting the practice was not a good idea. 106 Cong. Rec. 18130-18145 (1960).
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statute which designates the inferior officer who is to act in place of his immediate superior. But in the lack of such provision, both theory and practice concede the President the power to make the designation.\textsuperscript{569}

\textbf{SECTION 3.} He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

\textbf{LEGISLATIVE ROLE OF THE PRESIDENT}

The clause directing the President to report to the Congress on the state of the union imposes a duty rather than confers a power, and is the formal basis of the President’s legislative leadership. The President’s legislative role has attained great proportions since 1900. This development, however, represents the play of political and social forces rather than any pronounced change in constitutional interpretation. Especially is it the result of the rise of parties and the accompanying recognition of the President as party leader, of the appearance of the National Nominating Convention and the Party Platform, and of the introduction of the Spoils System, an ever present help to Presidents in times of troubled relations with Congress.\textsuperscript{570} It is true that certain pre-Civil War Presidents, mostly of Whig extraction, professed to entertain nice scruples on the score of “usurping” legislative powers,\textsuperscript{571} but still earlier ones, Washington, Jefferson, and Jackson among them, took a very different line, albeit less boldly and persistently than their later imi-
tators. Today, there is no subject on which the President may not appropriately communicate to Congress, in as precise terms as he chooses, his conception of its duty. Conversely, the President is not obliged by this clause to impart information which, in his judgment, should in the public interest be withheld. The President has frequently summoned both Houses into “extra” or “special sessions” for legislative purposes, and the Senate alone for the consideration of nominations and treaties. His power to adjourn the Houses has never been exercised.

THE CONDUCT OF FOREIGN RELATIONS

The Right of Reception: Scope of the Power

“Ambassadors and other public ministers” embraces not only “all possible diplomatic agents which any foreign power may accredit to the United States,” but also, as a practical construction of the Constitution, all foreign consular agents, who therefore may not exercise their functions in the United States without an exequatur from the President. The power to “receive” ambassadors, et cetera, includes, moreover, the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws. Furthermore, this power makes the President the sole mouthpiece of the nation in its dealing with other nations.

The Presidential Monopoly

Wrote Jefferson in 1790: “The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.” So when Citizen Genet, envoy to the United States from the first French Republic, sought an exequatur for a consul whose commission was addressed to the Congress of the United States, Jefferson informed him that “as the President was the only channel of communication between the United States and foreign nations, it was from him alone ‘that foreign nations or their agents are to learn what is or has been the will of the nation’; that whatever he

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572 See sources cited supra.
573 Warren, Presidential Declarations of Independence, 10 B.U.L. Rev. 1 (1930); 3 W. Willoughby, supra at 1488-1492.
575 5 J. Moore, International Law Digest 15-19 (1906).
576 Id. at 4:473-548; 5:19-32.
577 Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions, April 24, 1790, 5 Writings of Thomas Jefferson 161, 162 (P. Ford ed., 1895).
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communicated as such, they had a right and were bound to consider "as the expression of the nation"; and that no foreign agent could be 'allowed to question it,' or 'to interpose between him and any other branch of government, under the pretext of either's transgressing their functions.' Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. 'I inform you of the fact,' he said, 'by authority from the President.' Mr. Jefferson returned the consul's commission and declared that the President would issue no _exequatur_ to a consul except upon a commission correctly addressed."  

_The Logan Act._—When in 1798 a Philadelphia Quaker named Logan went to Paris on his own to undertake a negotiation with the French Government with a view to averting war between France and the United States, his enterprise stimulated Congress to pass "An Act to Prevent Usurpation of Executive Functions," which, "more honored in the breach than the observance," still survives on the statute books. The year following, John Marshall, then a Member of the House of Representatives, defended President John Adams for delivering a fugitive from justice to Great Britain under the 27th article of the Jay Treaty, instead of leaving the business to the courts. He said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him." Ninety-nine years later, a Senate Foreign Relations Committee took occasion to reiterate Marshall's doctrine with elaboration.

_A Formal or a Formative Power._—In his attack, instigated by Jefferson, upon Washington's Proclamation of Neutrality in

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578  J. Moore, supra at 680-81.
579  This measure is now contained in 18 U.S.C. § 953.
580  See Memorandum on the History and Scope of the Law Prohibiting Correspondence with a Foreign Government, S. Doc. No. 696, 64th Congress, 2d Sess. (1917). The author was Mr. Charles Warren, then Assistant Attorney General. Further details concerning the observance of the "Logan Act" are given in E. Corwin, supra at 183-84, 430-31.
581  10 Annals of Congress 596, 613-14 (1800). Marshall's statement is often cited, _e.g._, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 319 (1936), as if he were claiming sole or inherent executive power in foreign relations, but Marshall carefully propounded the view that Congress could provide the rules underlying the President's duty to extradite. When, in 1848, Congress did enact such a statute, the Court sustained it. Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893).
582  S. Doc. No. 56, 54th Congress, 2d Sess. (1897).
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1793 at the outbreak of war between France and Great Britain, Madison advanced the argument that all large questions of foreign policy fell within the ambit of Congress, by virtue of its power “to declare war,” and in support of this proposition he disparaged the presidential function of reception: “I shall not undertake to examine, what would be the precise extent and effect of this function in various cases which fancy may suggest, or which time may produce. It will be more proper to observe, in general, and every candid reader will second the observation, that little, if anything, more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the constitution, it would be highly improper to magnify the function into an important prerogative, even when no rights of other departments could be affected by it.”

The President’s Diplomatic Role.—Hamilton, although he had expressed substantially the same view in The Federalist regarding the power of reception, adopted a very different conception of it in defense of Washington’s proclamation. Writing under the pseudonym, “Pacificus,” he said: “The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is acknowledged, the treaties between the nations, so far at least as regards public rights, are of course suspended. This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations. To apply it to the case of France, if there had been a treaty of alliance, offensive and defensive, between the United States and that country, the unqualified acknowledgment of the new government would have put the United States in a condition to become as an associate in the war with France, and would have laid the legislature under

583 1 Letters and Other Writings of James Madison 611 (1865).
584 No. 69 (J. Cooke ed. 1961), 468.
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an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war. This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision. The division of the executive power in the Constitution, creates a concurrent authority in the cases to which it relates."

Jefferson’s Real Position.—Nor did Jefferson himself officially support Madison’s point of view, as the following extract from his “minutes of a Conversation,” which took place July 10, 1793, between himself and Citizen Genet, show: “He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. ‘But,’ said he, ‘at least, Congress are bound to see that the treaties are observed.’ I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. ‘If he decides against the treaty, to whom is a nation to appeal?’ I told him the Constitution had made the President the last appeal. He made me a bow, and said, that indeed he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea.”

The Power of Recognition

In his endeavor in 1793 to minimize the importance of the President’s power of reception, Madison denied that it involved cognizance of the question, whether those exercising the government of the accrediting State had the right along with the possession. He said: “This belongs to the nation, and to the nation alone, on whom the government operates.… It is evident, therefore, that if the executive has a right to reject a public minister, it must be founded on some other consideration than a change in the government, or the newness of the government; and consequently a right to refuse to acknowledge a new government cannot be implied by the right

585 Letter of Pacificus, No. 1, 7 Works of Alexander Hamilton 76, 82-83 (J. Hamilton ed., 1851).
586 4 J. Moore, supra at 680-81.
to refuse a public minister. It is not denied that there may be cases in which a respect to the general principles of liberty, the essential rights of the people, or the overruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism. Such are in fact discussed and admitted by the most approved authorities. But they are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the executive of the United States; and certainly not to be brought by any torture of words, within the right to receive ambassadors.” 587

Hamilton, with the case of Genet before him, had taken the contrary position, which history has ratified. In consequence of his power to receive and dispatch diplomatic agents, but more especially the former, the President possesses the power to recognize new states, communities claiming the status of belligerency, and changes of government in established states; also, by the same token, the power to decline recognition, and thereby decline diplomatic relations with such new states or governments. The affirmative precedents down to 1906 are succinctly summarized by John Bassett Moore in his famous Digest, as follows: “In the preceding review of the recognition, respectively, of the new states, new governments, and belligerency, there has been made in each case a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility.” 588

The Case of Cuba.—The question of Congress’ right also to recognize new states was prominently raised in connection with Cuba’s successful struggle for independence. Beset by numerous legislative proposals of a more or less mandatory character, urging recognition upon the President, the Senate Foreign Relations Committee, in 1897, made an elaborate investigation of the whole subject and came to the following conclusions as to this power: “The ‘recognition’ of independence or belligerency of a foreign power,

588 1 J. Moore, supra, 243-44. See Restatement, Foreign Relations §§ 204, 205.
technically speaking, is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the Government thus recognized, or by receiving a public minister therefrom. The latter is the usual and proper course. Diplomatic relations with a new power are properly, and customarily inaugurated at the request of that power, expressed through an envoy sent for the purpose. The reception of this envoy, as pointed out, is the act of the President alone. The next step, that of sending a public minister to the nation thus recognized, is primarily the act of the President. The Senate can take no part in it at all, until the President has sent in a nomination. Then it acts in its executive capacity, and, customarily, in ‘executive session.’ The legislative branch of the Government can exercise no influence over this step except, very indirectly, by withholding appropriations. . . . Nor can the legislative branch of the Government hold any communications with foreign nations. The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties.”

“Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. . . . Congress can help the Cuban insurgents by legislation in many ways, but it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct . . . [is] shown by the opinions of jurists and statesmen of the past.”

Congress was able ultimately to bundle a clause recognizing the independence of Cuba, as distinguished from its government, into the declaration of war of April 11, 1898, against Spain. For the most part, the sponsors of the clause defended it by the following line of reasoning. Diplomacy, they said, was now at an end, and the President himself had appealed to Congress to provide a solution for the Cuban situation. In response, Congress was about to exercise its constitutional power of declaring war, and it has consequently the right to state the purpose of the war which it was about to declare. The recognition of the Union of Soviet Socialist Republics in 1933 was an exclusively presidential act.

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590 Said Senator Nelson of Minnesota: “The President has asked us to give him the right to make war to expel the Spaniards from Cuba. He has asked us to put that power in his hands; and when we are asked to grant that power—the highest power given under the Constitution—we have the right, the intrinsic right, vested in us by the Constitution, to say how and under what conditions and with what allies that war-making power shall be exercised.” 31 Cong. Rec. 3984 (1898).
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The Power of Nonrecognition.—The potentialities of nonrecognition were conspicuously illustrated by President Woodrow Wilson when he refused, early in 1913, to recognize Provisional President Huerta as the de facto government of Mexico, thereby contributing materially to Huerta’s downfall the year following. At the same time, Wilson announced a general policy of nonrecognition in the case of any government founded on acts of violence, and while he observed this rule with considerable discretion, he consistently refused to recognize the Union of Soviet Socialist Republics, and his successors prior to President Franklin D. Roosevelt did the same. The refusal of the Hoover administration to recognize the independence of the Japanese puppet state of Manchukuo early in 1932 was based on kindred grounds. Similarly, the nonrecognition of the Chinese Communist Government from the Truman Administration to President Nixon’s de facto recognition through a visit in 1972—not long after the People’s Republic of China was admitted to the United Nations and Taiwan excluded—proved to be an important part of American foreign policy during the Cold War. 591

Congressional Implementation of Presidential Policies

No President was ever more jealous of his prerogative in the realm of foreign relations than Woodrow Wilson. When, however, strong pressure was brought to bear upon him by Great Britain respecting his Mexican Policy, he was constrained to go before Congress and ask for a modification of the Panama Tolls Act of 1911, which had also aroused British ire. Addressing Congress, he said, “I ask this of you in support of the foreign policy of the Administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure.” 592

The fact is, of course, that Congress has enormous powers, the support of which is indispensable to any foreign policy. In the long run, Congress is the body that lays and collects taxes for the common defense, that creates armies and maintains navies, although it does not direct them, that pledges the public credit, that declares war, that defines offenses against the law of nations, that regulates foreign commerce; and it has the further power “to make all laws which shall be necessary and proper”—that is, which it deems to be such—for carrying into execution not only its own powers but

591 President Carter’s termination of the Mutual Defense Treaty with Taiwan, which precipitated a constitutional and political debate, was perhaps an example of nonrecognition or more appropriately derecognition. On recognition and nonrecognition policies in the post-World War II era, see Restatement, Foreign Relations, §§ 202, 203.

592 1 Messages and Papers of Woodrow Wilson 58 (A. Shaw ed., 1924).
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all the powers “of the government of the United States and of any department or officer thereof.” Moreover, its laws made “in pursuance” of these powers are “supreme law of the land,” and the President is bound constitutionally to “take care that” they “be faithfully executed.” In point of fact, congressional legislation has operated to augment presidential powers in the foreign field much more frequently than it has to curtail them. The Lend-Lease Act of March 11, 1941 is the classic example, although it only brought to culmination a whole series of enactments with which Congress had aided and abetted the administration’s foreign policy in the years between 1934 and 1941. Disillusionment with presidential policies in the context of the Vietnamese conflict led Congress to legislate restrictions, not only with respect to the discretion of the President to use troops abroad in the absence of a declaration of war, but also limiting his economic and political powers through curbs on his authority to declare national emergencies. The lesson of history, however, appears to be that congressional efforts to regain what is deemed to have been lost to the President are intermittent, whereas the presidential exercise of power in today’s world is unremitting.

The Doctrine of Political Questions

It is not within the province of the courts to inquire into the policy underlying action taken by the “political departments”—Congress and the President—in the exercise of their conceded powers. This commonplace maxim is, however, sometimes given an enlarged application, so as to embrace questions as to the existence of facts and even questions of law, which the Court would normally regard as falling within its jurisdiction. Such questions are termed

593 55 Stat. 31 (1941).
594 E. Corwin, supra at 184-93, 423-25, 435-36.
596 “We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Justice Jackson concurring). For an account of how the President usually prevails, see H. Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affairs (1990).
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“political questions,” and are especially common in the field of foreign relations. The leading case is *Foster v. Neilson*, 597 where the matter in dispute was the validity of a grant made by the Spanish Government in 1804 of land lying to the east of the Mississippi River, and in which there was also raised the question whether the region between the Perdido and Mississippi Rivers belonged in 1804 to Spain or the United States.

Chief Justice Marshall’s opinion of the Court held that the Court was bound by the action of the political departments, the President and Congress, in claiming the land for the United States. He said: “If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature.” 598 The doctrine thus clearly stated is further exemplified, with particular reference to presidential action, by *Williams v. Suffolk Ins. Co.* 599 In this case the underwriters of a vessel which had been confiscated by the Argentine Government for catching seals off the Falkland Islands, contrary to that Government’s orders, sought to escape liability by showing that the Argentinian Government was the sovereign over these islands and that, accordingly, the vessel had been condemned for willful disregard of legitimate authority. The Court decided against the company on the ground that the President had taken the position that the Falkland Islands were not a part of Argentina. “[C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union.”

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598 27 U.S. at 308.
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“If this were not the rule, cases might often arise, in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character.” Thus, the right to determine the boundaries of the country is a political function, as is also the right to determine what country is sovereign of a particular region, to determine whether a community is entitled under international law to be considered a belligerent or an independent state, to determine whether the other party has duly ratified a treaty, to determine who is the de jure or de facto ruler of a country, to determine whether a particular person is a duly accredited diplomatic agent to the United States, to determine how long a military occupation shall continue in fulfillment of the terms of a treaty, to determine whether a treaty is in effect or not, although doubtless an extinguished treaty could be constitutionally renewed by tacit consent.

Recent Statements of the Doctrine.—The assumption underlying the refusal of courts to intervene in such cases is well stated in the case of Chicago & S. Airlines v. Waterman S.S. Corp. Here, the Court refused to review orders of the Civil Aeronautics Board granting or denying applications by citizen carriers to engage in overseas and foreign air transportation, which by the terms of the Civil Aeronautics Act were subject to approval by the President and therefore impliedly beyond those provisions of the act authorizing judicial review of board orders. Elaborating on the necessity of judicial abstinence in the conduct of foreign relations, Justice Jackson declared for the Court: “The President, both as Commander in Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify ac-
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tions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.\textsuperscript{610}

To the same effect are the Court's holding and opinion in \textit{Ludecke v. Watkins},\textsuperscript{611} where the question at issue was the power of the President to order the deportation under the Alien Enemy Act of 1798 of a German alien enemy after the cessation of hostilities with Germany. Said Justice Frankfurter for the Court: "War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops... The Court would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the dis-


\textsuperscript{611}335 U.S. 160 (1948).
integration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subject for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility.” 612

A Court review of the political question doctrine is found in Baker v. Carr. 613 There, Justice Brennan noted and elaborated the factors which go into making a question political and inappropriate for judicial decision. 614 On the matter at hand, he said: “There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government’s views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management

612 335 U.S. at 167, 170. Four Justices dissented, by Justice Black, who said: “The Court . . . holds, as I understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the Attorney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any manner affect the Attorney General’s deportation order . . . . I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Congress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported.” Id. at 174-75. See also Woods v. Miller Co., 333 U.S. 138 (1948), where the continuation of rent control under the Housing and Rent Act of 1947, enacted after the termination of hostilities, was unanimously held to be a valid exercise of the war power, but the constitutional question raised was asserted to be a proper one for the Court. Said Justice Jackson, in a concurring opinion: “Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.” Id. at 146-47.

613 369 U.S. 186 (1962).
614 369 U.S. at 217.
by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." However, the Court came within one vote of creating a broad application of the political question doctrine in foreign relations disputes, at least in the context of a dispute between Congress and the President with respect to a proper allocation of constitutional powers. In any event, the Court, in adjudicating on the merits disputes in which the foreign relations powers are called into question, follows a policy of such deference to executive and congressional expertise that the result may not be dissimilar to a broad application of the political question doctrine.

THE PRESIDENT AS LAW ENFORCER

Powers Derived From This Duty

The Constitution does not say that the President shall execute the laws, but that “he shall take care that the laws be faithfully executed,” i.e., by others, who are commonly, but not always with strict accuracy, termed his subordinates. What powers are implied from this duty? In this connection, five categories of executive power should be distinguished: first, there is that executive power which the Constitution confers directly upon the President by the opening clause of article II and, in more specific terms, by succeeding clauses of the same article; secondly, there is the sum total of the powers which acts of Congress at any particular time confer upon the President; thirdly, there is the sum total of discretionary powers derived from the authority to be observed in the execution of the laws, e.g., such authority as the appointment of judicial officers may imply.

615 369 U.S. at 211-12. A case involving “a purely legal question of statutory interpretation” is not a political question simply because the issues have significant political and foreign relations overtones. Japan Whaling Ass’n v. American Cetacean Society, 478 U.S. 221, 229-230 (1986) (Fisherman’s Protective Act does not completely remove Secretary of Commerce’s discretion in certifying that foreign nationals are “diminishing the effectiveness of” an international agreement by taking whales in violation of quotas set pursuant to the agreement).

616 Goldwater v. Carter, 444 U.S. 996, 1002-06 (Justices Rehnquist, Stewart, and Stevens and Chief Justice Burger). The doctrine was applied in just such a dispute in Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977).

powers which acts of Congress at any particular time confer upon heads of departments and other executive ("administrative") agencies of the National Government; fourthly, there is the power which stems from the duty to enforce the criminal statutes of the United States; finally, there are so-called "ministerial duties" which admit of no discretion as to the occasion or the manner of their discharge. Three principal questions arise: first, how does the President exercise the powers which the Constitution or the statutes confer upon him; second, in what relation does he stand by virtue of the "take care" clause to the powers of other executive or administrative agencies; third, in what relation does he stand to the enforcement of the criminal laws of the United States? 

Whereas the British monarch is constitutionally under the necessity of acting always through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In the words of an opinion by Attorney General Cushing in 1855: "It may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States.... So he, and he alone, is the supreme commander in chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President." Moreover, the obligation to act personally may be sometimes enlarged by statute, as, for example, by the act organizing the President with other designated officials into "an Establishment by name of the Smithsonian Institute." Here, says the Attorney General, "the President's name of office is designatio personae." He was also of opinion that expenditures from the "secret service" fund, in order to be valid, must be vouched for by the President personally. On like grounds the Supreme Court once held void a decree of a court martial, because, though it has been confirmed by the Secretary of War, it was not specifically stated to have received the sanction of the President as

618 Notice that in Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992), the Court purported to draw from the "take care" clause the principle that Congress could not authorize citizens with only generalized grievances to sue to compel governmental compliance with the law, inasmuch as permitting that would be "to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" Id. at 577.


620 Cf. 2 Stat. 78. The provision has long since dropped out of the statute book.
required by the 65th Article of War. \footnote{Runkle v. United States, 122 U.S. 543 (1887).} This case has, however, been virtually overruled, and at any rate such cases are exceptional. \footnote{Cf. In re Chapman, 166 U.S. 661, 670-671 (1897), where it was held that presumptions in favor of official action "preclude collateral attack on the sentences of courts-martial." See also United States v. Fletcher, 148 U.S. 84, 88-89 (1893); Bishop v. United States, 197 U.S. 334, 341-342 (1905), both of which in effect repudiate Runkle.}

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be exercised by him through the head of the appropriate department, whose acts, if performed within the law, thus become the President's acts. \footnote{Williams v. United States \footnote{Involved an act of Congress which prohibited the advance of public money in any case whatever to disbursing officers of the United States, except under special direction by the President. The Supreme Court held that the act did not require the personal performance by the President of this duty. Such a practice, said the Court, if it were possible, would absorb the duties of the various departments of the government in the personal acts of one chief executive officer, and he fraught with mischief to the public service. The President's duty in general requires his superintendence of the administration; yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. As a matter of administrative practice, in fact, most orders and instructions emanating from the heads of the departments, even though in pursuance of powers conferred by statute on the President, do not even refer to the President.}

\footnote{The President, in the exercise of his executive power under the Constitution, "speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." The heads of the departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 513 (1839); See also United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842); Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843); United States v. Jones, 59 U.S. (18 How.) 92, 95 (1856); The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874); United States v. Farden, 99 U.S. 10 (1879); Wolsey v. Chapman, 101 U.S. 755 (1880).}

\footnote{42 U.S. (1 How.) 290 (1843).}

\footnote{3 Stat. 723 (1823), now covered in 31 U.S.C. § 3324.}

\footnote{42 U.S. (1 How.) at 297-98.}

\footnote{38 Ops. Atty. Gen. 457, 458 (1936). And, of course, if the President exercises his duty through subordinates, he must appoint them or appoint the officers who appoint them, Buckley v. Valeo, 424 U.S. 1, 109-143 (1976), and he must have the power to discharge those officers in the Executive Branch, Myers v. United States, 272 U.S. 52 (1926), although the Court has now greatly qualified \textit{Myers} to permit...}
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Impoundment of Appropriated Funds

In his Third Annual Message to Congress, President Jefferson established the first faint outline of what years later became a major controversy. Reporting that $50,000 in funds which Congress had appropriated for fifteen gunboats on the Mississippi remained unexpended, the President stated that a “favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of the law unnecessary…” But he was not refusing to expend the money, only delaying action to obtain improved gunboats; a year later, he told Congress that the money was being spent and gunboats were being obtained.\footnote{History and law is much discussed in Executive Impoundment of Appropriated Funds: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971); Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973). The most thorough study of the legal and constitutional issues, informed through historical analysis, is Abascal & Kramer, Presidential Impoundment Part I: Historical Genesis and Constitutional Framework, 62 Geo. L. J. 1549 (1974); Abascal & Kramer, Presidential Impoundment Part II: Judicial and Legislative Response, 63, id. at 149 (1974). See generally L. Fisher, Presidential Spending Power (1975).} A few other instances of deferrals or refusals to spend occurred in the Nineteenth and early Twentieth Centuries, but it was only with the Administration of President Franklin Roosevelt that a President refused to spend moneys for the purposes appropriated. Succeeding Presidents expanded upon these precedents, and in the Nixon Administration a well-formulated plan of impoundments was executed in order to reduce public spending and to negate programs established by congressional legislation.\footnote{There is no satisfactory definition of impoundment. Legislation enacted by Congress uses the phrase “deferral of budget authority” which is defined to include: “(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.” 2 U.S.C. § 682(1).}

Impoundment\footnote{1 J. Richardson, supra at 348, 360.} was defended by Administration spokesmen as being a power derived from the President’s executive powers and particularly from his obligation to see to the faithful execution of the laws, i.e., his discretion in the manner of execution. The President, the argument went, is responsible for deciding when two conflicting goals of Congress can be harmonized and when one must give way, when, for example, congressional desire to spend certain moneys must yield to congressional wishes to see price and wage congressional limits on the removal of some officers. Morrison v. Olson, 487 U.S. 654 (1988).}
stability. In some respects, impoundment was said or implied to flow from certain inherent executive powers that repose in any President. Finally, statutory support was sought; certain laws were said to confer discretion to withhold spending, and it was argued that congressional spending programs are discretionary rather than mandatory.\footnote{Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973), 358 (then-Deputy Attorney General Sneed).}

On the other hand, it was argued that Congress’ powers under Article I, § 8, were fully adequate to support its decision to authorize certain programs, to determine the amount of funds to be spent on them, and to mandate the Executive to execute the laws. Permitting the President to impound appropriated funds allowed him the power of item veto, which he does not have, and denied Congress the opportunity to override his veto of bills enacted by Congress. In particular, the power of Congress to compel the President to spend appropriated moneys was said to derive from Congress’ power “to make all Laws which shall be necessary and proper for carrying into Execution” the enumerated powers of Congress and “all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.”\footnote{Id. at 1-6 (Senator Ervin). Of course, it was long ago established that Congress could direct the expenditure of at least some moneys from the Treasury, even over the opposition of the President. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).}

The President’s decision to impound large amounts of appropriated funds led to two approaches to curtail the power. First, many persons and organizations, with a reasonable expectation of receipt of the impounded funds upon their release, brought large numbers of suits; with a few exceptions, these suits resulted in decisions denying the President either constitutional or statutory power to decline to spend or obligate funds, and the Supreme Court, presented with only statutory arguments by the Administration, held that no discretion existed under the particular statute to withhold allotments of funds to the States.\footnote{Train v. City of New York, 420 U.S. 35 (1975); Train v. Campaign Clean Water, 420 U.S. 136 (1975). See also State Highway Comm’n of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974) (the latter case finding statutory discretion not to spend).} Second, Congress in the course of revising its own manner of appropriating funds in accordance with budgetary responsibility provided for mandatory reporting of impoundments to Congress, for congressional disapproval
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of impoundments, and for court actions by the Comptroller General to compel spending or obligation of funds.\(^{634}\)

Generally speaking, the law recognized two types of impoundments: “routine” or “programmatic” reservations of budget authority to provide for the inevitable contingencies that arise in administering congressionally-funded programs and “policy” decisions that are ordinarily intended to advance the broader fiscal or other policy objectives of the executive branch contrary to congressional wishes in appropriating funds in the first place.

Routine reservations were to come under the terms of a revised Anti-Deficiency Act.\(^{635}\) Prior to its amendment, this law had permitted the President to “apportion” funds “to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available.” President Nixon had relied on this “other developments” language as authorization to impound, for what in essence were policy reasons.\(^{636}\) Congress deleted the controverted clause and retained the other language to authorize reservations to maintain funds for contingencies and to effect savings made possible in carrying out the program; it added a clause permitting reserves “as specifically provided by law.”\(^{637}\)

“Policy” impoundments were to be reported to Congress by the President as permanent rescissions and, perhaps, as temporary deferrals.\(^{638}\) Rescissions are merely recommendations or proposals of the President and must be authorized by a bill or joint resolution, or, after 45 days from the presidential message, the funds must be made available for obligation.\(^{639}\) Temporary deferrals of budget authority for less than a full fiscal year, as provided in the 1974 law, were to be effective unless either the House of Representatives or the Senate passed a resolution of disapproval.\(^{640}\) With the decision

\(^{636}\) L. Fisher, supra at 154-57.
\(^{637}\) 31 U.S.C. § 1512(c)(1) (present version). Congressional intent was to prohibit the use of apportionment as an instrument of policymaking. 120 CONG. REC. 7658 (1974) (Senator Muskie); id. at 20472-20473 (Senators Ervin and McClellan).
\(^{639}\) 2 U.S.C. § 683.
\(^{640}\) § 1013, 88 Stat. 334. Because the Act was a compromise between the House of Representatives and the Senate, numerous questions were left unresolved; one
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in *INS v. Chadha*, voiding as unconstitutional the one-House legislative veto, it was evident that the veto provision in the deferral section of the Impoundment Control Act was no longer viable. An Administration effort to utilize the section, minus the veto device, was thwarted by court action, in which, applying established severability analysis, the court held that Congress would not have enacted the deferral provision in the absence of power to police its exercise through the veto. Thus, the entire deferral section was inoperative. Congress, in 1987, enacted a more restricted authority, limited to deferrals only for those purposes set out in the Anti-Deficiency Act.

With passage of the Act, the constitutional issues faded into the background; Presidents regularly reported rescission proposals, and Congress responded by enacting its own rescissions, usually topping the Presidents’. The entire field was, of course, confounded by the application of the other part of the 1974 law, the Budget Act, which restructured how budgets were received and acted on in Congress, and by the Balanced Budget and Emergency Deficit Control Act of 1985. This latter law was designed as a deficit-reduction forcing mechanism, so that unless President and Congress cooperate each year to reduce the deficit by prescribed amounts, a “sequestration” order would reduce funds down to a mandated figure. Dissatisfaction with the amount of deficit reduction continues to stimulate discussion of other means, such as “expedited” rescission and the line-item veto, many of which may raise some constitutional issues.

**Power and Duty of the President in Relation to Subordinate Executive Officers**

If the law casts a duty upon a head of department *eo nomine*, does the President thereupon become entitled by virtue of his duty to “take care that the laws be faithfully executed,” to substitute his own judgment for that of the principal officer regarding the discharge of such duty? In the debate in the House in 1789 on the location of the removal power, Madison argued that it ought to be attributed to the President alone because it was “the intention
of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible for the executive department,” and this responsibility, he held, carried with it the power to “inspect and control” the conduct of subordinate executive officers. “Vest,” said he, “the power [of removal] in the Senate jointly with the President, and you abolish at once the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good.”

But this was said with respect to the office of the Secretary of State, and when shortly afterward the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different attitude, conceding in effect that this office was to be an arm of certain of Congress’ own powers and should therefore be protected against the removal power. And in Marbury v. Madison, Chief Justice Marshall traced a parallel distinction between the duties of the Secretary of State under the original act which had created a “Department of Foreign Affairs” and those which had been added by the later act changing the designation of the department to its present one. The former were, he pointed out, entirely in the “political field,” and hence for their discharge the Secretary was left responsible absolutely to the President. The latter, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. For these, therefore, the Secretary was “an officer of the law” and “amenable to the law for his conduct.”

Administrative Decentralization Versus Jacksonian Centralism.—An opinion rendered by Attorney General Wirt in 1823 asserted the proposition that the President’s duty under the “take care” clause required of him scarcely more than that he should bring a criminally negligent official to book for his derelictions, either by removing him or by setting in motion against him the processes of impeachment or of criminal prosecutions. The opinion entirely overlooked the important question of the location of the power to interpret the law, which is inevitably involved in any effort to enforce it. The diametrically opposed theory that Congress is unable to vest any head of an executive department, even within the field of Congress’ specifically delegated powers, with any legal discretion which the President is not entitled to control was first asserted in unambiguous terms in President Jack-

646 1 ANNALS OF CONG. 495, 499 (1789).
647 Id. at 611-612.
648 5 U.S. (1 Cr.) 137 (1803).
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Johnson’s Protest Message of April 15, 1834, 651 defending his removal of Duane as Secretary of the Treasury, because of the latter’s refusal to remove the deposits from the Bank of the United States. Here it is asserted “that the entire executive power is vested in the President;” that the power to remove those officers who are to aid him in the execution of the laws is an incident of that power; that the Secretary of the Treasury was such an officer; that the custody of the public property and money was an executive function exercised through the Secretary of the Treasury and his subordinates; that in the performance of these duties the Secretary was subject to the supervision and control of the President; and finally that the act establishing the Bank of the United States “did not, as it could not change the relation between the President and Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President’s supervision and control.” 652 In short, the President’s removal power, in this case unqualified, was the sanction provided by the Constitution for his power and duty to control his “subordinates” in all their official actions of public consequence.

Congressional Power Versus Presidential Duty to the Law.—The Court’s 1838 decision in Kendall v. United States ex rel. Stokes, 653 shed more light on congressional power to mandate actions by executive branch officials. The United States owed one Stokes money, and when Postmaster General Kendall, at Jackson’s instigation, refused to pay it, Congress passed a special act ordering payment. Kendall, however, still proved noncompliant, whereupon Stokes sought and obtained a mandamus in the United States circuit court for the District of Columbia, and on appeal this decision was affirmed by the Supreme Court. While Kendall, like Marbury v. Madison, involved the question of the responsibility of a head of a department for the performance of a ministerial duty, the discussion by counsel before the Court and the Court’s own opinion covered the entire subject of the relation of the President to his subordinates in the performance by them of statutory duties. The lower court had asserted that the duty of the President under the faithful execution clause gave him no other control over the officer than to see that he acts honestly, with proper motives, but no power to construe the law and see that the executive action conforms to it. Counsel for Kendall attacked this position vigorously, relying largely upon statements by Hamilton, Marshall, James Wil-

651 3 J. Richardson, supra at 1288.
652 Id. at 1304.
son, and Story having to do with the President’s power in the field of foreign relations.

The Court rejected the implication with emphasis. There are, it pointed out, "certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character." In short, the Court recognized the underlying question of the case to be whether the President’s duty to “take care that the laws be faithfully executed” made it constitutionally impossible for Congress ever to entrust the construction of its statutes to anybody but the President, and it answered this in the negative.

*Myers Versus Morrison.*—How does this issue stand today? The answer to this question, so far as there is one, is to be sought in a comparison of the Court’s decision in the *Myers* case, on the one hand, and its decision in the *Morrison* case, on the other. The first decision is still valid to support the President’s right to remove, and hence to control the decisions of, all officials through whom he exercises the great political powers which he derives from the Constitution, and also to remove many but not all officials—usually heads of departments—through whom he exercises powers conferred upon him by statute. *Morrison*, however, recasts *Myers* to be about the constitutional inability of Congress to participate in removal decisions. It permits Congress to limit the removal power of the President, and those acting for him, by imposition of a “good cause” standard, subject to a balancing test. That is, the Court now regards the critical issue not as what officials do, whether they perform “purely executive” functions or “quasi” legislative or judicial functions, though the duties and functions must be considered. Rather, the Courts must “ensure that Congress does not interfere with the President’s exercise of the ‘executive power’” and his constitutionally appointed duty under Article II to take care that the laws be faithfully executed. Thus, the Court continued, *Myers* was correct in its holding and in its suggestion that there are some executive officials who must be removable by the President if he is

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654 37 U.S. (12 Pet.) at 610.
656 Morrison v. Olson, 487 U.S. at 689-90.
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to perform his duties.\textsuperscript{657} On the other hand, Congress may believe that it is necessary to protect the tenure of some officials, and if it has good reasons not limited to invasion of presidential prerogatives, it will be sustained, provided the removal restrictions are not of such a nature as to impede the President’s ability to perform his constitutional duties.\textsuperscript{658} The officer in \textit{Morrison}, the independent counsel, had investigative and prosecutorial functions, purely executive ones, but there were good reasons for Congress to secure her tenure and no showing that the restriction “unduly trammels” presidential powers.\textsuperscript{659}

The “bright-line” rule previously observed no longer holds. Now, Congress has a great deal more leeway in regulating executive officials, but it must articulate its reasons carefully and observe the fuzzy lines set by the Court.

\textbf{Power of the President to Guide Enforcement of the Penal Law}.—This matter also came to a head in “the reign of Andrew Jackson,” preceding, and indeed foreshadowing, the Duane episode by some months. “At that epoch,” Wyman relates in his Principles of Administrative Law, “the first amendment of the doctrine of centralism in its entirety was set forth in an obscure opinion upon an unimportant matter—The Jewels of the Princess of Orange, 2 Opin. 482 (1831). These jewels . . . were stolen from the Princess by one Polari and were seized by the officers of the United States Customs in the hands of the thief. Representations were made to the President of the United States by the Minister of the Netherlands of the facts in the matter, which were followed by a request for return of the jewels. In the meantime the District Attorney was prosecuting condemnation proceedings in behalf of the United States which he showed no disposition to abandon. The President felt himself in a dilemma, whether if it was by statute the duty of the District Attorney to prosecute or not, the President could interfere and direct whether to proceed or not. The opinion was written by Taney, then Attorney General; it is full of pertinent illustrations as to the necessity in an administration of full power in the chief executive as the concomitant of his full responsibility. It concludes: If it should be said that, the District Attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it—I answer that the direction of the President is not required to communicate any new authority to the District Attorney, but to direct him in the execution of a power he is admitted to possess. The most valuable and

\begin{footnotes}
\item[657] 487 U.S. at 690-91.
\item[658] 487 U.S. at 691.
\item[659] 487 U.S. at 691-92.
\end{footnotes}
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proper measure may often be for the President to order the District Attorney to discontinue prosecution. The District Attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could only act through his subordinate officer, the District Attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continues a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law. And it is for this among other reasons that the power of removing the District Attorney resides in the President.  

The President as Law Interpreter

The power accruing to the President from his function of law interpretation preparatory to law enforcement is daily illustrated in relation to such statutes as the Anti-Trust Acts, the Taft-Hartley Act, the Internal Security Act, and many lesser statutes. Nor is this the whole story. Not only do all presidential regulations and orders based on statutes that vest power in him or on his own constitutional powers have the force of law, provided they do not transgress the Court's reading of such statutes or of the Constitution, 661 but he sometimes makes law in a more special sense. In the famous Neagle case, 662 an order of the Attorney General to a United States marshal to protect a Justice of the Supreme Court whose life has been threatened by a suitor was attributed to the President and held to be "a law of the United States" in the sense of section 753 of the Revised Statutes, and as such to afford basis for a writ of *habeas corpus* transferring the marshal, who had killed the attacker, from state to national custody. Speaking for the Court, Justice Miller inquired: "Is this duty [the duty of the President to take care that the laws be faithfully executed] limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself,  

662 In re Neagle, 135 U.S. 1 (1890).
our international relations, and all the protection implied by the nature of the government under the Constitution?" Obviously, an affirmative answer is assumed to the second branch of this inquiry, an assumption which is borne out by numerous precedents. And in *United States v. Midwest Oil Company*, it was ruled that the President had, by dint of repeated assertion of it from an early date, acquired the right to withdraw, via the Land Department, public lands, both mineral and non-mineral, from private acquisition, Congress having never repudiated the practice.

Military Power in Law Enforcement: The Posse Comitatus

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

"The President, by using the militia or the armed forces, or both ... shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law ...."  

These quoted provisions of the United States Code consolidate a course of legislation which began at the time of the Whiskey Re-
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bellion of 1792. In Martin v. Mott, which arose out of the War of 1812, it was held that the authority to decide whether the exigency had arisen belonged exclusively to the President. Even before that time, Jefferson had, in 1808, in the course of his efforts to enforce the Embargo Acts, issued a proclamation ordering “all officers having authority, civil or military, who shall be found in the vicinity” of an unruly combination, to aid and assist “by all means in their power, by force of arms or otherwise” the suppression of such combination. Forty-six years later, Attorney General Cushing advised President Pierce that in enforcing the Fugitive Slave Act of 1850, marshals of the United States had authority when opposed by unlawful combinations to summon to their aid not only bystanders and citizens generally, but armed forces within their precincts, both state militia and United States officers, soldiers, sailors, and marines, a doctrine that Pierce himself improved upon two years later by asserting, with reference to the civil war then raging in Kansas, that it lay within his obligation to take care that the laws be faithfully executed to place the forces of the United States in Kansas at the disposal of the marshal there, to be used as a portion of the posse comitatus. Lincoln’s call of April 15, 1861, for 75,000 volunteers was, on the other hand, a fresh invocation, though of course on a vastly magnified scale, of Jefferson’s conception of a posse comitatus subject to presidential call. The provisions above extracted from the United States Code ratified this conception as regards the state militias and the national forces.

Suspension of Habeas Corpus by the President

See Article I, § 9.
Preventive Martial Law

The question of executive power in the presence of civil disorder is dealt with in modern terms in Moyer v. Peabody,\textsuperscript{672} to which the Debs case\textsuperscript{673} may be regarded as an addendum. Moyer, a labor leader, brought suit against Peabody for having ordered his arrest during a labor dispute which occurred while Peabody was governor of Colorado. Speaking for a unanimous Court, one Justice being absent, Justice Holmes said: "Of course the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation. . . . The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him."

". . . In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. . . . That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground for his belief."

". . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."\textsuperscript{674}

**The Debs Case.**—The Debs case of 1895 arose out of a railway strike which had caused the President to dispatch troops to Chicago the previous year. Coincidentally with this move, the United States district attorney stationed there, acting upon orders from Washington, obtained an injunction from the United States circuit
court forbidding the strike because of its interference with the mails and with interstate commerce. The question before the Supreme Court was whether this injunction, for violation of which Debs had been jailed for contempt of court, had been granted with jurisdiction. Conceding, in effect, that there was no statutory warrant for the injunction, the Court nevertheless validated it on the ground that the Government was entitled thus to protect its property in the mails, and on a much broader ground which is stated in the following passage of Justice Brewer's opinion for the Court: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other.... While it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its granted powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."675

Present Status of the Debs Case.—Insofar as the use of injunctive relief in labor disputes is concerned, enactment of the Norris-LaGuardia Act676 placed substantial restrictions on the power of federal courts to issue injunctions in such situations. Though, in United States v. UMW,677 the Court held that the Norris-LaGuardia Act did not apply where the Government brought suit as operator of mines, language in the opinion appeared to go a good way toward repudiating the present viability of Debs, though more

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675 158 U.S., 584, 586. Some years earlier, in United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888), the Court sustained the right of the Attorney General and his assistants to institute suits simply by virtue of their general official powers. "If," the Court said, "the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief . . . the question of appealing to them must primarily be decided by the Attorney General . . . and if restrictions are to be placed upon the exercise of this authority it is for Congress to enact them." Cf. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), in which the Court rejected Attorney General Randolph's contention that he had the right ex officio to move for a writ of mandamus ordering the United States circuit court for Pennsylvania to put the Invalid Pension Act into effect.


677 330 U.S. 258 (1947). In reaching the result, Chief Justice Vinson invoked the "rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." Id. at 272.
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in terms of congressional limitations than of revised judicial opinion. It should be noted that in 1947 Congress authorized the President to seek injunctive relief in “national emergency” labor disputes, which would seem to imply absence of authority to act in situations not meeting the statutory definition.

With regard to the power of the President to seek injunctive relief in other situations without statutory authority, there is no clear precedent. In *New York Times Co. v. United States*, the Government sought to enjoin two newspapers from publishing classified material given to them by a dissident former governmental employee. Though the Supreme Court rejected the Government’s claim, five of the six majority Justices relied on First Amendment grounds, apparently assuming basic power to bring the action in the first place, and three dissenters were willing to uphold the constitutionality of the Government’s action and its basic power on the premise that the President was authorized to protect the secrecy of governmental documents. Only one Justice denied expressly that power was lacking altogether to sue.

**The President’s Duty in Cases of Domestic Violence in the States**

*See* Article IV, § 4, Guarantee of Republican Form of Government, and discussion of “Martial Law and Domestic Disorder” under Article II, § 2, cl. 1.

**The President as Executor of the Law of Nations**

Illustrative of the President’s duty to discharge the responsibilities of the United States in international law with a view to avoiding difficulties with other governments was the action of President Wilson in closing the Marconi Wireless Station at Siasconset, Massachusetts, on the outbreak of the European War in 1914, the company having refused assurance that it would comply with naval censorship regulations. Justifying this drastic invasion of private rights, Attorney General Gregory said: “The President of the
United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. . . . If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be endangered by action deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restrictions, he may act through such executive office or department as appears best adapted to effectuate the desired end. . . . I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy or any appropriate department, close down, or take charge of and operate, the plant . . . should he deem it necessary in securing obedience to his proclamation of neutrality.”

PROTECTION OF AMERICAN RIGHTS OF PERSON AND PROPERTY ABROAD

In 1854, one Lieutenant Hollins, in command of a United States warship, bombarded the town of Greytown, Nicaragua because of the refusal of local authorities to pay reparations for an attack by a mob on the United States consul. Upon his return to the United States, Hollins was sued in a federal court by Durand for the value of certain property which was alleged to have been destroyed in the bombardment. His defense was based upon the orders of the President and Secretary of the Navy and was sustained by Justice Nelson, on circuit. “As the Executive head of the nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a Department of State and a Department of the Navy.”

“Now, as it respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of

683 7 J. Moore, Digest of International Law 346-54 (1906).
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lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.685

This incident and this case were but two items in the 19th century advance of the concept that the President had the duty and the responsibility to protect American lives and property abroad through the use of armed forces if deemed necessary.686 The duty could be said to grow out of the inherent powers of the Chief Executive687 or perhaps out of his obligation to "take Care that the Laws be faithfully executed."688 Although there were efforts made at times to limit this presidential power narrowly to the protection of persons and property rather than to the promotion of broader national interests,689 no such distinction was observed in practice and so grew the concepts which have become the source of serious national controversy in the 1960s and 1970s, the power of the President to use troops abroad to observe national commitments and protect the national interest without seeking prior approval from Congress.

Congress and the President versus Foreign Expropriation

Congress has asserted itself in one area of protection of United States property abroad, making provision against uncompensated expropriation of property belonging to United States citizens and corporations. The problem of expropriation of foreign property and the compensation to be paid therefor remains an unsettled area of international law, of increasing importance because of the changes and unsettled conditions following World War II.690 It has been the position of the Executive Branch that just compensation is owed all

685 8 Fed. Cas. at 112.
686 See United States Solicitor of the Department of State, Right to Protect Citizens in Foreign Countries by Landing Forces (3d rev. ed. 1934); M. Offutt, The Protection of Citizens Abroad by the Armed Forces of the United States (1928).
688 M. Offutt, supra at 5.
689 E. Corwin, supra at 198-201.
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United States property owners dispossessed in foreign countries and the many pre-World War II disputes were carried on between the President and the Department of State and the nation involved. But commencing with the Marshall Plan in 1948, Congress has enacted programs of guaranties to American investors in specified foreign countries.691 More relevant to discussion here is that Congress has attached to United States foreign assistance programs various amendments requiring the termination of assistance and imposing other economic inducements where uncompensated expropriations have been instituted.692 And when the Supreme Court in 1964 applied the “act of state” doctrine so as not to examine the validity of a taking of property by a foreign government recognized by the United States but to defer to the decision of the foreign government,693 Congress reacted by attaching another amendment to the foreign assistance act reversing the Court’s application of the doctrine, except in certain circumstances, a reversal which was applied on remand of the case.694

PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS: THE STEEL SEIZURE CASE

To avert a nationwide strike of steel workers which he believed would jeopardize the national defense, President Truman, on April 8, 1952, issued an executive order directing the Secretary of Commerce to seize and operate most of the steel industry of the country.695 The order cited no specific statutory authorization but invoked generally the powers vested in the President by the Constitution and laws of the United States. The Secretary issued the appropriate orders to steel executives. The President promptly reported his action to Congress, conceding Congress’ power to supersede his order, but Congress did not do so, either then or a few days later when the President sent up a special message.696 On suit by the steel companies, a federal district court enjoined the seizure,697 and the Supreme Court brought the case up prior to de-
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cision by the court of appeals. Six-to-three, the Court affirmed the district court order, each member of the majority, however, contributing an individual opinion as well as joining in some degree the opinion of the Court by Justice Black. The holding and the multiple opinions represent a setback for the adherents of “inherent” executive powers, but they raise difficult conceptual and practical problems with regard to presidential powers.

The Doctrine of the Opinion of the Court

The chief points urged in the Black opinion are the following: There was no statute that expressly or impliedly authorized the President to take possession of the property involved. On the contrary, in its consideration of the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. Authority to issue such an order in the circumstances of the case was not deducible from the aggregate of the President’s executive powers under Article II of the Constitution; nor was the order maintainable as an exercise of the President’s powers as Commander-in-Chief of the Armed Forces. The power sought to be exercised was the lawmaking power, which the Constitution vests in the Congress alone. Even if it were true that other Presidents have taken possession of private business enterprises without congressional authority in order to settle labor disputes, Congress was not thereby divested of its exclusive constitutional authority to make the laws necessary and proper to carry out all powers vested by the Constitution “in the Government of the United States, or any Department or Officer thereof.”

The Doctrine Considered

The pivotal proposition of the opinion of the Court is that, inasmuch as Congress could have directed the seizure of the steel

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698 The court of appeals had stayed the district court’s injunction pending appeal. 197 F.2d 582 (D.C. Cir. 1952). The Supreme Court decision bringing the action up is at 343 U.S. 937 (1952). Justices Frankfurter and Burton dissented.
700 Indeed, the breadth of the Government’s arguments in the district court may well have contributed to the defeat, despite the much more measured contentions set out in the Supreme Court. See A. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 56-65 (1958) (argument in district court).
701 343 U.S. at 585-89.
mills, the President had no power to do so without prior congressional authorization. To this reasoning, not only the dissenters but Justice Clark would not concur, and in fact they stated baldly that the reasoning was contradicted by precedent, both judicial and presidential and congressional practice. One of the earliest pronouncements on presidential power in this area was that of Chief Justice Marshall in *Little v. Barreme*, 6 U.S. (2 Cr.) 171 (1804). There, a United States vessel under orders from the President had seized a United States merchant ship bound from a French port allegedly carrying contraband material; Congress had, however, provided for seizure only of such vessels bound to French ports. Said the Chief Justice: "It is by no means clear that the president of the United States whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that [an act of Congress] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port." 704

Other examples are at hand. In 1799, President Adams, in order to execute the extradition provisions of the Jay Treaty, issued a warrant for the arrest of one Robbins and the action was challenged in Congress on the ground that no statutory authority existed by which the President could act; John Marshall defended the action in the House of Representatives, the practice continued, and it was not until 1848 that Congress enacted a statute governing this subject. 705 Again, in 1793, President Washington issued a neutrality proclamation; the following year, Congress enacted the first neutrality statute and since then proclamations of neutrality have

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702 6 U.S. (2 Cr.) 170 (1804).
703 1 Stat. 613 (1799).
705 10 *Annals of Cong.* 596, 613-14 (1800). The argument was endorsed in *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893). The presence of a treaty, of which this provision was self-executing, is sufficient to distinguish this example from the steel seizure situation.
been based on acts of Congress. 186 Repeatedly, acts of the President have been in areas in which Congress could act as well. 187

Justice Frankfurter’s concurring opinion 188 listed 18 statutory authorizations for seizures of industrial property, all but one of which were enacted between 1916 and 1951, and summaries of seizures of industrial plants and facilities by Presidents without definite statutory warrant, eight of which occurred during World War I, justified in the presidential orders as being done pursuant to “the Constitution and laws” generally, and eleven of which occurred in World War II. 189 The first such seizure in this period had been justified by then Attorney General Jackson as being based upon an “aggregate” of presidential powers stemming from his duty to see the laws faithfully executed, his commander-in-chiefship, and his general executive powers. 190 Chief Justice Vinson’s dissent dwelt liberally upon this opinion, 191 which reliance drew a disclaimer from Justice Jackson, concurring. 192

The dissent was also fortunate in that the steel companies’ chief counsel, John W. Davis, a former Solicitor General of the United States, had filed a brief in 1914 in defense of Presidential action, which had taken precisely the view that the dissent now presented. 193 “Ours,” the brief read, “is a self-sufficient Government within its sphere. (Ex parte Siebold, 100 U.S. 371, 395; In re Debs, 158 U.S. 564, 578.) ‘Its means are adequate to its ends’ (McCulloch v. Maryland, 4 Wheat., 316, 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the Government

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706 Cf. E. Corwin, The President’s Control of Foreign Relations ch. 1 (1916).
709 343 U.S. at 611-13, 620.
710 89 CONG. REC. 3992 (1943).
711 343 U.S. at 695-96 (dissenting opinion).
712 Thus, Justice Jackson noted of the earlier seizure, that “its superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure.” 343 U.S. at 648-49 (concurring opinion). His opinion opens with the sentence: “That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety.” Id. at 634.
713 Brief for the United States at 11, 75-77, United States v. Midwest Oil Co., 236 U.S. 459 (1915).
and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the subjects concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking powers may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. He obeys and executes the laws of Congress, but because Congress is enthroned in authority over him, not because the Constitution directs him to do so."

“Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts.”

Power Denied by Congress

Justice Black’s opinion of the Court in Youngstown Sheet and Tube Co. v. Sawyer notes that Congress had refused to give the President seizure authority and had authorized other actions, which had not been taken. This statement led him to conclude merely that, since the power claimed did not stem from Congress, it had to be found in the Constitution. But four of the concurring

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714 Quoted in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 667, 689-91 (1952) (dissenting opinion).
715 343 U.S. at 585-87.
Justices made considerably more of the fact that Congress had considered seizure and had refused to authorize it. Justice Frankfurter stated: "We must ... put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given." 716 He then reviewed the proceedings of Congress that attended the enactment of the Taft-Hartley Act and concluded that "Congress has expressed its will to withhold this power [of seizure] from the President as though it had said so in so many words." 717

Justice Jackson attempted a schematic representation of presidential powers, which "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Thus, there are essentially three possibilities. "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate.... 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.... 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." 718 The seizure in question was placed in the third category "because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure." Therefore, "we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress." 719 That holding was not possible.

Justice Burton, referring to the Taft-Hartley Act, said that "the most significant feature of that Act is its omission of authority to seize," citing debate on the measure to show that the omission was a conscious decision. 720 Justice Clark placed his reliance on Little v. Barreme, 721 inasmuch as Congress had laid down specific proce-

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716 343 U.S. at 597.
717 343 U.S. at 602.
718 343 U.S. at 635-38.
719 343 U.S. at 639, 640.
720 343 U.S. at 657.
721 6 U.S. (2 Cr.) 170 (1804).
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duties for the President to follow, which he had declined to follow. 722

Despite the opinion of the Court, therefore, it seems clear that four of the six Justices in the majority were more moved by the fact that the President had acted in a manner considered and rejected by Congress in a field in which Congress was empowered to establish the rules, rules the President is to see faithfully executed, than with the fact that the President's action was a form of "lawmaking" in a field committed to the province of Congress. The opinion of the Court, therefore, and its doctrinal implications must be considered with care, inasmuch as it is doubtful that that opinion does lay down a constitutional rule. Whatever the implications of the opinions of the individual Justices for the doctrine of "inherent" presidential powers—and they are significant—the implications for the area here under consideration are cloudy and have remained so from the time of the decision. 723

PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

By the decision of the Court in Mississippi v. Johnson, 724 in 1867, the President was placed beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers, whether constitutional or statutory, political or otherwise, save perhaps for what must be a small class of powers that are purely ministerial. 725 An application for an injunction to forbid President Johnson to enforce the Reconstruction Acts, on the ground of their unconstitutionality, was answered by Attorney General Stanberg, who argued, inter alia, the absolute immunity of the President from judicial process. 726 The Court refused to permit the filing, using language construable as meaning that the President was not

722 343 U.S. at 662, 663.
723 In Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981), the Court recurred to the Youngstown analysis for resolution of the presented questions, but one must observe that it did so saying that "the parties and the lower courts . . . have all agreed that much relevant analysis is contained in" Youngstown. See also id. at 661-62, quoting Justice Jackson's Youngstown concurrence, "which both parties agree brings together as much combination of analysis and common sense as there is in this area". 724 71 U.S. (4 Wall.) 475 (1867).
725 The Court declined to express an opinion "whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." 71 U.S. at 498. See Franklin v. Massachusetts, 505 U.S. 788, 825-28 (1992) (Justice Scalia concurring). In NTEU v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), the court held that a writ of mandamus could issue to compel the President to perform a ministerial act, although it said that if any other officer were available to whom the writ could run it should be applied to him.
reach by judicial process but which more fully paraded the horrible consequences were the Court to act. First noting the limited meaning of the term “ministerial,” the Court observed that “[v]ery different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill... The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.”

“An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as ‘an absurd and excessive extravagance.’”

“It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.”

“... The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.”

“The impropriety of such interference will be clearly seen upon consideration of its possible consequences.”

“Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?”

727 71 U.S. at 499, 500-01. One must be aware that the case was decided in the context of congressional predominance following the Civil War. The Court’s restraint was pronounced when it denied an effort to file a bill of injunction to enjoin enforce-
Sec. 3—Legislative and Other Duties of the President

Rare has been the opportunity for the Court to elucidate its opinion in *Mississippi v. Johnson*, and, in the Watergate tapes case, it held the President amenable to subpoena to produce evidence for use in a criminal case without dealing, except obliquely, with its prior opinion. The President’s counsel had argued the President was immune to judicial process, claiming “that the independence of the Executive Branch within its own sphere ... insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.” However, the Court held, “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.” The primary constitutional duty of the courts “to do justice in criminal prosecutions” was a critical counterbalance to the claim of presidential immunity, and to accept the President’s argument would disturb the separation-of-powers function of achieving “a workable government” as well as “gravely impair the role of the courts under Art. III.”

Present throughout the Watergate crisis, and unresolved by it, was the question of the amenability of the President to criminal prosecution prior to conviction upon impeachment. It was argument of the same acts directed to cabinet officers. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867). Before and since, however, the device to obtain review of the President’s actions has been to bring suit against the subordinate officer charged with carrying out the President’s wishes. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Congress has not provided process against the President. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), resolving a long-running dispute, the Court held that the President is not subject to the Administrative Procedure Act and his actions, therefore, are not reviewable in suits under the Act. Inasmuch as some agency action, the acts of the Secretary of Commerce in this case, is preliminary to presidential action, the agency action is not “final” for purposes of APA review. Constitutional claims would still be brought, however. *See also*, following *Franklin*, *Dalton v. Specter*, 511 U.S. 462 (1994).

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729 418 U.S. at 706.
730 Id.
731 418 U.S. at 706-07. The issue was considered more fully by the lower courts.
732 The impeachment clause, Article I, § 3, cl. 7, provides that the party convicted upon impeachment shall nonetheless be liable to criminal proceedings. Morris in the Convention, 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500 (rev. ed. 1937), and Hamilton in The Federalist, Nos. 65, 69 (J. Cooke
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guessed that the impeachment clause necessarily required indictment and trial in a criminal proceeding to follow a successful impeachment and that a President in any event was uniquely immune from indictment, and these arguments were advanced as one ground to deny enforcement of the subpoenas running to the President.\footnote{ed. 1961, 442, 463, asserted that criminal trial would follow a successful impeachment.} Assertion of the same argument by Vice President Agnew was controverted by the Government, through the Solicitor General, but, as to the President, it was argued that for a number of constitutional and practical reasons he was not subject to ordinary criminal process.\footnote{Brief for the Respondent, United States v. Nixon, 418 U.S. 683 (1974), 95-122; Nixon v. Sirica, 487 F.2d 700, 756-58 (D.C. Cir. 1973) \textit{(en banc)} (Judge MacKinnon dissenting). The Court had accepted the President’s petition to review the propriety of the grand jury’s naming him as an unindicted coconspirator, but it dismissed that petition without reaching the question. United States v. Nixon, 418 U.S. at 687 n.2.}

Finally, most recently, the Court has definitively resolved one of the intertwined issues of presidential accountability. The President is absolutely immune in actions for civil damages for all acts within the “outer perimeter” of his official duties.\footnote{Memorandum for the United States, Application of Spiro T. Agnew, Civil No. 73-965 (D.Md., filed October 5, 1973).} The Court’s close decision was premised on the President’s “unique position in the constitutional scheme,” that is, it was derived from the Court’s inquiry of a “kind of ‘public policy’ analysis” of the “policies and principles that may be considered implicit in the nature of the President’s office in a system structured to achieve effective government under a constitutionally mandated separation of powers.”\footnote{Nixon v. Fitzgerald, 457 U.S. 731 (1982).} While the Constitution expressly afforded Members of Congress immunity in matters arising from “speech or debate,” and while it was silent with respect to presidential immunity, the Court nonetheless considered such immunity “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”\footnote{457 U.S. at 748.} Although the Court relied in part upon its previous practice of finding immunity for officers, such as judges, as to whom the Constitution is silent, although a long common-law history exists, and in part upon historical evidence, which it admitted was fragmentary and ambiguous,\footnote{457 U.S. at 749.} the Court’s principal focus was upon the fact that the President was distinguishable from all other executive officials. He is charged with a long list of “supervisory and
policy responsibilities of utmost discretion and sensitivity,” 739 and diversion of his energies by concerns with private lawsuits would “raise unique risks to the effective functioning of government.” 740 Moreover, the presidential privilege is rooted in the separation-of-powers doctrine, counseling courts to tread carefully before intruding. Some interests are important enough to require judicial action; “merely private suit[s] for damages based on a President’s official acts” do not serve this “broad public interest” necessitating the courts to act. 741 Finally, qualified immunity would not adequately protect the President, because judicial inquiry into a functional analysis of his actions would bring with it the evil immunity was to prevent; absolute immunity was required. 742

Unofficial Conduct

In Clinton v. Jones, 743 the Court, in a case of first impression, held that the President did not have qualified immunity from suit for conduct alleged to have taken place prior to his election to the Presidency, which would entitle him to delay of both the trial and discovery. The Court held that its precedents affording the President immunity from suit for his official conduct — primarily on the basis that he should be enabled to perform his duties effectively without fear that a particular decision might give rise to personal liability — were inapplicable in this kind of case. Moreover, the separation-of-powers doctrine did not require a stay of all private actions against the President. Separation of powers is preserved by guarding against the encroachment or aggrandizement of one of the coequal branches of the Government at the expense of another. However, a federal trial court tending to a civil suit in which the President is a party performs only its judicial function, not a function of another branch. No decision by a trial court could curtail the scope of the President’s powers. The trial court, the Supreme Court observed, had sufficient powers to accommodate the President’s schedule and his workload, so as not to impede the President’s performance of his duties. Finally, the Court stated its belief that allowing such suits to proceed would not generate a large vol-

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739 457 U.S. at 750.
740 457 U.S. at 751.
741 457 U.S. at 754.
742 457 U.S. at 755-57. Justices White, Brennan, Marshall, and Blackmun dissented. The Court reserved decision whether Congress could expressly create a damages action against the President and abrogate the immunity, id. at 748-49 n.27, thus appearing to disclaim that the decision is mandated by the Constitution; Chief Justice Burger disagreed with the implication of this footnote, id. at 763-64 n.7 (concurring opinion), and the dissenters noted their agreement on this point with the Chief Justice. Id. at 770 & n.4.
The Court observed at one point that it doubted that defending the suit would much preoccupy the President, that his time and energy would not be much taken up by it. "If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency." 520 U.S. at 702.

E.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (suit to enjoin Secretary of Commerce to return steel mills seized on President’s order); Dames & Moore v. Regan, 453 U.S. 654 (1981) (suit against Secretary of Treasury to nullify presidential orders on Iranian assets). See also Noble v. Union River Logging Railroad, 147 U.S. 165 (1893); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

This was originally on the theory that the Supreme Court of the District of Columbia had inherited, via the common law of Maryland, the jurisdiction of the King’s Bench “over inferior jurisdictions and officers.” Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838) (suit against Postmaster General to compel payment of money owed under act of Congress); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (suit to compel Secretary of Navy to pay a pension).

Spalding v. Vilas, 161 U.S. 483 (1896); Barr v. Mateo, 360 U.S. 564 (1959). See Westfall v. Erwin, 484 U.S. 292 (1988) (action must be discretionary in nature as well as being within the scope of employment, before federal official is entitled to absolute immunity). Following the Westfall decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time of the incident out of which a suit arose; upon certification, the employee is dismissed from the action, and the United States is substituted, the Federal Tort Claims Act (FTCA) then governing the action, which means that sometimes the action must be dismissed against the
Different rules prevail when such an official is sued for a “constitutional tort” for wrongs allegedly in violation of our basic charter, although the Court has hinted that in some “sensitive” areas officials acting in the “outer perimeter” of their duties may be accorded an absolute immunity from liability. Jurisdiction to reach such officers for acts for which they can be held responsible must be under the general “federal question” jurisdictional statute, which, as recently amended, requires no jurisdictional amount.

COMMISSIONING OFFICERS

The power to commission officers, as applied in practice, does not mean that the President is under constitutional obligation to commission those whose appointments have reached that stage, but merely that it is he and no one else who has the power to commission them, and that he may do so at his discretion. Under the doctrine of Marbury v. Madison, the sealing and delivery of the commission is a purely ministerial act which has been lodged by statute with the Secretary of State, and which may be compelled by mandamus unless the appointee has been in the meantime validly removed. By an opinion of the Attorney General many years later, however, the President, even after he has signed a commis-
ART. II—EXECUTIVE DEPARTMENT

Sec. 4—Impeachment

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

IMPEACHMENT

The impeachment provisions of the Constitution were derived from English practice, but there are important differences. In England, impeachment had a far broader scope. While impeachment was a device to remove from office one who abused his office or misbehaved but who was protected by the Crown, it could be used against anyone—office holder or not—and was penal in nature, with possible penalties of fines, imprisonment, or even death. By contrast, the American impeachment process is remedial, not penal: it is limited to office holders, and judgments are limited to no more than removal from office and disqualification to hold future office.

1 W. HOLDSWORTH, HISTORY OF ENGLISH COURTS 379-85 (7th ed. 1956); Clarke,
The Origin of Impeachment, in OXFORD ESSAYS IN MEDIEVAL HISTORY, PRESENTED TO HERBERT EDWARD SALTER 164 (1934); Alex Simpson, Jr., Federal Impeachments, 64 U. PA. L. REV. 651 (1916).

755 It should be remembered that, for various reasons, Marbury got neither commission nor office. The case assumes, in fact, the necessity of possession of his commission by the appointee.
756 Impeachment is the subject of several other provisions of the Constitution. Article I, § 2, cl. 5, gives to the House of Representatives “the sole power of impeachment.” Article I, § 3, cl. 6, gives to the Senate “the sole power to try all impeachments,” requires that Senators be under oath or affirmation when sitting for that purpose, stipulates that the Chief Justice of the United States is to preside when the President of the United States is tried, and provides for conviction on the vote of two-thirds of the members present. Article I, § 3, cl. 7, limits the judgment after impeachment to removal from office and disqualification from future federal office holding, but it allows criminal trial following conviction upon impeachment. Article II, § 2, cl. 1, deprives the President of the power to grant pardons or reprieves in cases of impeachment. Article III,§ 2, cl. 3, excepts impeachment cases from the jury trial requirement.

Although the word “impeachment” is sometimes used to refer to the process by which any member of the House may “impeach” an officer of the United States under a question of constitutional privilege (see 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2398 (impeachment of President John Tyler by a member) and 2469 (impeachment of Judge John Swayne by a member) (1907), the word as used in Article II, § 4 refers to impeachment by vote of the House, the consequence of which is that the Senate may then try the impeached officer.

757 1 W. HOLDSWORTH, HISTORY OF ENGLISH COURTS 379-85 (7th ed. 1956); Clarke, The Origin of Impeachment, in OXFORD ESSAYS IN MEDIEVAL HISTORY, PRESENTED TO HERBERT EDWARD SALTER 164 (1934); Alex Simpson, Jr., Federal Impeachments, 64 U. PA. L. REV. 651 (1916).
Impeachment was a device that figured from the first in the plans proposed to the Convention; discussion addressed such questions as what body was to try impeachments and what grounds were to be stated as warranting impeachment.\footnote{Alex Simpson, Jr., Federal Impeachments, 64 U. Pa. L. Rev. at 653-67 (1916).} The attention of the Framers was for the most part fixed on the President and his removal, and the results of this narrow frame of reference are reflected in the questions unresolved by the language of the Constitution.

**Persons Subject to Impeachment**

During the debate in the First Congress on the “removal” controversy, it was contended by some members that impeachment was the exclusive way to remove any officer of the Government from his post,\footnote{1 ANNALS OF CONG. 457, 473, 536 (1789).} but Madison and others contended that this position was destructive of sound governmental practice,\footnote{Id. at 375, 480, 496-97, 562.} and the view did not prevail. Impeachment, said Madison, was to be used to reach a bad officer sheltered by the President and to remove him “even against the will of the President; so that the declaration in the Constitution was intended as a supplementary security for the good behavior of the public officers.”\footnote{Id. at 372.} While the language of section 4 covers any “civil officer” in the executive branch,\footnote{The term “civil officers of the United States” is not defined in the Constitution, although there may be a parallel with “officers of the United States” under the Appointments Clause, Art. II, § 2, cl. 2, and it may be assumed that not all executive branch employees are “officers.” For precedents relating to the definition, see 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1785, 2022, 2486, 2493, and 2515 (1907). See also Ronald D. Rotunda, An Essay on the Constitutional Parameters of Federal Impeachment, 76 Ky. L. Rev. 707, 715-18 (1988).} it covers judges as well,\footnote{See also supra at 1448.} and the precedent was early established that it does not apply to members of Congress.\footnote{This point was established by a vote of the Senate holding a plea to this effect good in the impeachment trial of Senator William Blount in 1797. 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2294-2318 (1907); F. Wharton, State Trials of the United States During the Administrations of Washington and Adams 200-321 (1849); Buckner F. Melton, Jr., The First Impeachment: The Constitution’s Framers and the Case of Senator William Blount (1998).}

**Judges.**—Article III, § 1, specifically provides judges with “good behavior” tenure, but the Constitution nowhere expressly vests the power to remove upon bad behavior, and it has been assumed that judges are made subject to the impeachment power
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through being labeled “civil officers.” 766 The records in the Convention make this a plausible though not necessary interpretation. 767 And, in fact, eleven of the fifteen impeachments reaching trial in the Senate have been directed at federal judges, and all seven of those convicted in impeachment trials have been judges. 768 So set-


767 For practically the entire Convention, the plans presented and adopted provided that the Supreme Court was to try impeachments. 1 M. Farrand, supra at 22, 244, 252-24, 251; 2 id. at 186. On August 27, it was successfully moved that the provision in the draft of the Committee on Detail giving the Supreme Court jurisdiction of trials of impeachment be postponed, id. at 430, 431, which was one of the issues committed to the Committee of Eleven. Id. at 481. That Committee reported the provision giving the Senate power to try all impeachments, id. at 497, which the Convention thereafter approved. Id. at 551. It may be assumed that so long as trial was in the Supreme Court, the Framers did not intend that the Justices, at least, were to be subject to the process.

The Committee of Five on August 20 was directed to report “a mode for trying the supreme Judges in cases of impeachment,” id. at 337, and it returned a provision making Supreme Court Justices triable by the Senate on impeachment by the House. Id. at 367. Consideration of this report was postponed. On August 27, it was proposed that all federal judges should be removable by the executive upon the application of both houses of Congress, but the motion was rejected. Id. at 428-29. The matter was not resolved by the report of the Committee on Style, which left in the “good behavior” tenure but contained nothing about removal. Id. at 575. Therefore, unless judges were included in the term “civil officers,” which had been added without comment on September 8 to the impeachment clause, id. at 552, they were not made removable.

768 The following judges faced impeachment trials in the Senate: John Pickering, District Judge, 1803 (convicted), 3 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2319-2341 (1907); Justice Samuel Chase, 1804 (acquitted), id. at §§ 2342-2363; James H. Peck, District Judge, 1830 (acquitted), id. at 2364-2384; West H. Humphreys, District Judge, 1862 (convicted), id. at §§ 2385-2397; Charles Swayne, District Judge, 1904 (acquitted), id. at §§ 2469-2485; Robert W. Archbald, Judge of Commerce Court, 1912 (convicted), 6 CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 498-512 (1936); Harold Louderback, District Judge, 1932 (acquitted), id. at §§ 513-524; Halsted L. Ritter, District Judge, 1936 (convicted), Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter, S. Doc. No. 200, 74th Congress, 2d Sess. (1936); Harry Claiborne, District Judge, 1986 (convicted), Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, S. Doc. 99-48, 99th Cong., 2d Sess. (1986); Alcee Hastings, District Judge, 1989 (convicted), Proceedings of the United States Senate in the Impeachment Trial of Alcee L. Hastings, S. Doc. 101-18, 101st Cong., 1st Sess. (1989); Walter Nixon, District Judge, 1989 (convicted), Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr., S. Doc. 101-22, 101st Cong., 1st Sess. (1989). In addition, impeachment proceedings against district judge George W. English were dismissed in 1926 following his resignation six days prior to the scheduled start of his Senate trial. 68 CONG. REC. 344, 348 (1926). See also ten Broek, Partisan Politics and Federal Judgeship Impeachments Since 1903, 23 MINN. L. REV. 185, 194-96 (1939). The others who have faced impeachment trials in the Sen-
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It has been argued that the impeachment clause of Article II is a limitation on the power of Congress to remove judges and that Article III is a limitation on the executive power of removal, but that it is open to Congress to define "good behavior" and establish a mechanism by which judges may be judicially removed. Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution, 28 MICH. L. REV. 485, 723, 870 (1930). Proposals to this effect were considered in Congress in the 1930s and 1940s and revived in the late 1960s, stimulating much controversy in scholarly circles. E.g., Kramer & Barron, The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior," 35 GEO. WASH. L. REV. 455 (1967); Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 SUP. CT. REV. 135; Berger, Impeachment of Judges and "Good Behavior" Tenure, 79 YALE L. J. 1475 (1970). Congress did in the Judicial Conduct and Disability Act of 1980, P. L. 96-458, 94 Stat. 2035, 28 U.S.C. § 1 note, 331, 332, 372, 604, provide for disciplinary powers over federal judges, but it specifically denied any removal power. The National Commission, supra at 17-26, found impeachment to be the exclusive means of removal and recommended against adoption of an alternative. Congress repealed 28 U.S.C. § 372 in the Judicial Improvements Act of 2002, Pub. L. No. 107-273 and created a new chapter (28 U.S.C. §§ 351-64) dealing with judicial discipline short of removal for Article III judges, and authorizing discipline including removal for magistrate judges. The issue was obliquely before the Court as a result of a judicial conference action disciplining a district judge, but it was not reached, Chandler v. Judicial Council, 382 U.S. 1003 (1966); 398 U.S. 74 (1970), except by Justices Black and Douglas in dissent, who argued that impeachment was the exclusive power.

...tled apparently is this interpretation that the major arguments, scholarly and political, have concerned the question of whether judges, as well as others, are subject to impeachment for conduct that does not constitute an indictable offense, and the question of whether impeachment is the exclusive removal device for judges. 769

Judgment—Removal and Disqualification

Article II, section 4 provides that officers impeached and convicted "shall be removed from office"; Article I, section 3, cl. 7 provides further that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States." These restrictions on judgment, both of which relate to capacity to hold public office, emphasize the non-penal nature of impeachment, and help to distinguish American impeachment from the open-ended English practice under which criminal penalties could be imposed. 770

769 It has been argued that the impeachment clause of Article II is a limitation on the power of Congress to remove judges and that Article III is a limitation on the executive power of removal, but that it is open to Congress to define "good behavior" and establish a mechanism by which judges may be judicially removed. Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution, 28 MICH. L. REV. 485, 723, 870 (1930). Proposals to this effect were considered in Congress in the 1930s and 1940s and revived in the late 1960s, stimulating much controversy in scholarly circles. E.g., Kramer & Barron, The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior," 35 GEO. WASH. L. REV. 455 (1967); Ziskind, Judicial Tenure in the American Constitution: English and American Precedents, 1969 SUP. CT. REV. 135; Berger, Impeachment of Judges and "Good Behavior" Tenure, 79 YALE L. J. 1475 (1970). Congress did in the Judicial Conduct and Disability Act of 1980, P. L. 96-458, 94 Stat. 2035, 28 U.S.C. § 1 note, 331, 332, 372, 604, provide for disciplinary powers over federal judges, but it specifically denied any removal power. The National Commission, supra at 17-26, found impeachment to be the exclusive means of removal and recommended against adoption of an alternative. Congress repealed 28 U.S.C. § 372 in the Judicial Improvements Act of 2002, Pub. L. No. 107-273 and created a new chapter (28 U.S.C. §§ 351-64) dealing with judicial discipline short of removal for Article III judges, and authorizing discipline including removal for magistrate judges. The issue was obliquely before the Court as a result of a judicial conference action disciplining a district judge, but it was not reached, Chandler v. Judicial Council, 382 U.S. 1003 (1966); 398 U.S. 74 (1970), except by Justices Black and Douglas in dissent, who argued that impeachment was the exclusive power.

770 See discussion supra of the differences between English and American impeachment.
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The plain language of section four seems to require removal from office upon conviction, and in fact the Senate has removed those persons whom it has convicted. In the 1936 trial of Judge Ritter, the Senate determined that removal is automatic upon conviction, and does not require a separate vote.\(^\text{771}\) This practice has continued. Because conviction requires a two-thirds vote, this means that removal can occur only as a result of a two-thirds vote. Unlike removal, disqualification from office is a discretionary judgment, and there is no explicit constitutional linkage to the two-thirds vote on conviction. Although an argument can be made that disqualification should nonetheless require a two-thirds vote,\(^\text{772}\) the Senate has determined that disqualification may be accomplished by a simple majority vote.\(^\text{773}\)

Impeachable Offenses

The Convention came to its choice of words describing the grounds for impeachment after much deliberation, but the phrasing derived directly from the English practice. The framers early adopted, on June 2, a provision that the Executive should be removable by impeachment and conviction “of mal-practice or neglect of duty.”\(^\text{774}\) The Committee of Detail reported as grounds “Treason (or) Bribery or Corruption.”\(^\text{775}\) And the Committee of Eleven reduced the phrase to “Treason, or bribery.”\(^\text{776}\) On September 8, Mason objected to this limitation, observing that the term did not encompass all the conduct which should be grounds for removal; he therefore proposed to add “or maladministration” following “bribery.” Upon Madison’s objection that “[s]o vague a term will be equivalent to a tenure during pleasure of the Senate,” Mason suggested “other high crimes and misdemeanors,” which was adopted without further recorded debate.\(^\text{777}\)


\(^{773}\) The Senate imposed disqualification twice, on Judges Humphreys and Archbald. In the Humphreys trial the Senate determined that the issues of removal and disqualification are divisible. See Hinds’ Precedents of the House of Representatives § 2397 (1907), and in the Archbald trial the Senate imposed judgment of disqualification by vote of 39 to 35. See Cannon’s Precedents of the House of Representatives § 512 (1936). During the 1936 trial of Judge Ritter, a parliamentary inquiry as to whether a two-thirds vote or a simple majority vote is required for disqualification was answered by reference to the simple majority vote in the Archbald trial. 3 Deschler’s Precedents ch. 14, §13.10. The Senate then rejected disqualification of Judge Ritter by vote of 76-0. 80 Cong. Rec. 5607 (1936).

\(^{774}\) 1 M. Farrand, supra.

\(^{775}\) 2 M. Farrand at 172, 186.

\(^{776}\) Id. at 499.

\(^{777}\) Id. at 550.
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The phrase “high crimes and misdemeanors” in the context of impeachments has an ancient English history, first turning up in the impeachment of the Earl of Suffolk in 1388.\(^{778}\) Treason is defined in the Constitution.\(^{779}\) Bribery is not, but it had a clear common-law meaning and is now well covered by statute.\(^{780}\) “High crimes and misdemeanors,” however, is an undefined and indefinite phrase, which, in England, had comprehended conduct not constituting indictable offenses.\(^{781}\) Use of the word “other” to link “high crimes and misdemeanors” with “treason” and “bribery” is arguably indicative of the types and seriousness of conduct encompassed by “high crimes and misdemeanors.” Similarly, the word “high” apparently carried with it a restrictive meaning.\(^{782}\)

Debate prior to adoption of the phrase\(^ {783}\) and comments thereafter in the ratifying conventions\(^ {784}\) were to the effect that the President (all the debate was in terms of the President) should be removable by impeachment for commissions or omissions in office which were not criminally cognizable. And in the First Congress’ “removal” debate, Madison maintained that the wanton dismissal of meritorious officers would be an act of maladministration which would render the President subject to impeachment.\(^ {785}\) Other comments, especially in the ratifying conventions, tend toward a limitation of the term to criminal, perhaps gross criminal, behavior.\(^ {786}\)

\(^{778}\) T. Howell, State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Times 90, 91 (1809); A. Simpson, Treatise on Federal Impeachments 86 (1916).

\(^{779}\) Article III, § 3.


\(^{782}\) The extradition provision reported by the Committee on Detail had provided for the delivering up of persons charged with “Treason, Felony or high Misdemeanors.” 2 M. Farrand, supra at 174. But the phrase “high Misdemeanors” was replaced with “other crimes” “in order to comprehend all proper cases: it being doubtful whether ‘high misdemeanor’ had not a technical meaning too limited.” Id. at 443.

\(^{783}\) See id. at 64-69, 550-51.

\(^{784}\) E.g., 3 J. Elliot, Debates in the Several State Conventions on Adoption of the Constitution 341, 498, 500, 528 (1836) (Madison); 4 id. at 276, 281 (C. C. Pinckney: Rutledge); 3 id. at 516 (Corbin); 4 id. at 263 (Pendleton). Cf. The Federalist, No. 65 (J. Cooke ed. 1961), 439-45 (Hamilton).

\(^{785}\) 1 Annals of Cong. 372-73 (1789).

\(^{786}\) 4 J. Elliot, supra at 126 (Iredell); 2 id. at 478 (Wilson). For a good account of the debate at the Constitutional Convention and in the ratifying conventions, see Alex Simpson, Jr., Federal Impeachments, 64 U. Pa. L. Rev. 651, 676-95 (1916)
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The scope of the power has been the subject of continuing debate. 787

The Chase Impeachment

The issue of the scope of impeachable offenses was early joined as a consequence of the Jefferson Administration’s efforts to rid itself of some of the Federalist judges who were propagandizing the country through grand jury charges and other means. The theory of extreme latitude was enunciated by Senator Giles of Virginia during the impeachment trial of Justice Chase. “The power of impeachment was given without limitation to the House of Representatives; and the power of trying impeachments was given equally without limitation to the Senate. . . . A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him . . . [but] nothing more than a declaration of Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. We want your offices, for the purpose of giving them to men who will fill them better.” 788 Chase’s counsel responded that to be impeachable, conduct must constitute an indictable offense. 789 The issue was left unresolved, Chase’s acquittal owing more to the political divisions in the Senate than to the merits of the arguments. 790

Other Impeachments of Judges

The 1803 impeachment and conviction of Judge Pickering as well as several successful 20th century impeachments of judges appear to establish that judges may be removed for seriously ques-
tionable conduct that does not violate a criminal statute. 791 The articles on which Judge Pickering was impeached and convicted focused on allegations of mishandling a case before him and appearing on the bench in an intemperate and intoxicated state. 792 Both Judge Archbald and Judge Ritter were convicted on articles of impeachment that charged questionable conduct probably not amounting to indictable offenses. 793

Of the three most recent judicial impeachments, Judges Claiborne and Nixon had previously been convicted of criminal offenses, and Judge Hastings had been acquitted of criminal charges after trial. The impeachment articles against Judge Hastings charged both the conduct for which he had been indicted and trial conduct. A separate question was what effect the court acquittal should have had. 794

Although the language of the Constitution makes no such distinction, some argue that, because of the different nature of their responsibilities and because of different tenure, different standards should govern impeachment of judges and impeachment of executive officers. 795

791 Some have argued that the constitutional requirement of “good behavior” and “high crimes and misdemeanors” conjoin to allow the removal of judges who have engaged in non-criminal conduct inconsistent with their responsibilities, or that the standard of “good behavior”—not that of “high crimes and misdemeanors”—should govern impeachment of judges. See 3 Deschler’s Precedents of the House of Representatives, ch. 14, §§ 3.10 and 3.13, H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977) (summarizing arguments made during the impeachment investigation of Justice William O. Douglas in 1970). For a critique of these views, see Paul S. Fenton, The Scope of the Impeachment Power, 65 NW. U. L. REV. 719 (1970), reprinted in Staff of the House Committee on the Judiciary, 105th Cong., Impeachment: Selected Materials 1801-03 (Comm. Print. 1998).

792 See 3 Hinds’ Precedents of the House of Representatives §§ 2319-2341 (1907)

793 Ten Broek, Partisan Politics and Federal Judgeship Impeachments Since 1803, 23 MINN. L. REV. 185 (1939). Judge Ritter was acquitted on six of the seven articles brought against him, but convicted on a seventh charge that summarized the first six articles and charged that the consequence of that conduct was “to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge.” This seventh charge was challenged unsuccessfully on a point of order, but was ruled to be a separate charge of “general misbehavior.”


795 See, e.g., Frank O. Bowman, III and Stephen L. Sepinuck, “High Crimes and Misdemeanors”: Defining the Constitutional Limits on Presidential Impeachment, 72 S. CAL. L. REV. 1517, 1534-38 (1999). Congressional practice may reflect this view. Judges Ritter and Claiborne were convicted on charges of income tax evasion, while the House Judiciary Committee voted not to press such charges against President Nixon. So too, the convictions of Judges Hastings and Nixon on perjury charges may be contrasted with President Clinton’s acquittal on a perjury charge.
The Johnson Impeachment

President Andrew Johnson was impeached by the House on the ground that he had violated the “Tenure of Office” Act by dismissing a Cabinet chief. The theory of the proponents of impeachment was succinctly put by Representative Butler, one of the managers of the impeachment in the Senate trial. “An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.” Former Justice Benjamin Curtis controverted this argument, saying: “My first position is, that when the Constitution speaks of ‘treason, bribery, and other high crimes and misdemeanors,’ it refers to, and includes only, high criminal offences against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment.” The President’s acquittal by a single vote was no doubt not the result of a choice between the two theories, but the result may be said to have placed a gloss on the impeachment language approximating the theory of the defense.

The Nixon Impeachment Proceedings

For the first time in over a hundred years, Congress moved to impeach the President of the United States, a move forestalled only by the resignation of President Nixon on August 9, 1974.

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796 Act of March 2, 1867, ch. 154, 14 Stat. 430.
797 1 Trial of Andrew Johnson, President of the United States on Impeachment 88, 147 (1868).
798 Id. at 409.
799 For an account of the Johnson proceedings, see William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (1992).
800 The only occasion before the Johnson impeachment when impeachment of a President had come to a House vote was the House’s rejection in 1843 of an impeachment resolution against President John Tyler. The resolution, which listed nine separate counts and which was proposed by a member rather than by a committee, was defeated by vote of 127 to 84. See 3 Hinds’ Precedents of the House of Representatives § 2398 (1907); Cong. Globe, 27th Cong. 3d Sess. 144-46 (1843).
801 The President’s resignation did not necessarily require dismissal of the impeachment charges. Judgment upon conviction can include disqualification as well as removal. Art. I, § 3, cl. 7. Precedent from the 1876 impeachment of Secretary of War William Belknap, who had resigned prior to his impeachment by the House, suggests that impeachment can proceed even after a resignation. See 3 Hinds’
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Three articles of impeachment were approved by the House Judiciary Committee, charging obstruction of the investigation of the “Watergate” burglary inquiry, misuse of law enforcement and intelligence agencies for political purposes, and refusal to comply with the Judiciary Committee’s subpoenas. Following President Nixon’s resignation, the House adopted a resolution to “accept” the House Judiciary Committee’s report recommending impeachment, but there was no vote adopting the articles and thereby impeaching the former President, and consequently there was no Senate trial.

In the course of the proceedings, there was strenuous argument about the nature of an impeachable offense, whether only criminally-indictable actions qualify for that status or whether the definition is broader. The three articles approved by the Judiciary Committee were all premised on abuse of power, although the first article, involving obstruction of justice, also involved a criminal violation. A second issue arose that apparently had not been considered before: whether persons subject to impeachment could be indicted and tried prior to impeachment and conviction or whether indictment could occur only after removal from office. In fact, the argument was really directed only to the status of the President, inasmuch as it was argued that he embodied the Executive Branch itself, while lesser executive officials and judges were not of that calibre. That issue also remained unsettled, the Su-
The Clinton Impeachment

President Clinton was impeached by the House, but acquitted by vote of the Senate. The House approved two articles of impeachment against the President stemming from the President’s response to a sexual harassment civil lawsuit and to a subsequent grand jury investigation instigated by an Independent Counsel. The first article charged the President with committing perjury in testifying before the grand jury about his sexual relationship with a White House intern and his efforts to cover it up; the second article charged the President with obstruction of justice relating both to the civil lawsuit and to the grand jury proceedings. Two additional articles of impeachment had been approved by the House Judiciary Committee but were rejected by the full House. The Senate trial resulted in acquittal on both articles.

A number of legal issues surfaced during congressional consideration of the Clinton impeachment. Although the congressional process and could be indicted prior to removal, but that the President for a number of constitutional and practical reasons was not subject to the ordinary criminal process. Courts have held that a federal judge was indictable and could be convicted prior to removal from office. United States v. Claiborne, 727 F.2d 842, 847-848 (9th Cir.), cert. denied, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 710-711 (11th Cir.), cert. denied, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), cert. denied sub nom. Kerner v. United States, 417 U.S. 976 (1974).
votes on the different impeachment articles were not neatly divided between legal and factual matters and therefore cannot be said to have resolved the legal issues, several aspects of the proceedings merit consideration for possible precedential significance. The House’s acceptance of the grand jury perjury charge and its rejection of the civil deposition perjury charge may reflect a belief among some members that perjury in the criminal context is more serious than perjury in the civil context. Acceptance of the obstruction of justice charge may also have been based in part on an assessment of the seriousness of the charge. On the other hand, the House’s rejection of the article relating to President Clinton’s alleged non-cooperation with the Judiciary Committee’s interrogatories can be contrasted with the House’s 1974 “acceptance” of the Judiciary Committee’s report recommending a similar type of charge against President Nixon, and raises the issue of whether the different circumstances (e.g., the relative importance of the information sought, and the nature and extent of the responses) may account for the different approaches. So too, the acquittal of President Clinton on the perjury charge can be contrasted with convictions of Judges Hastings and Nixon on perjury charges, and presents the issue of whether different standards should govern Presidents and judges. The role of the Independent Counsel in complying with a statutory mandate to refer to the House “any substantial and credible information . . . that may constitute grounds for an impeachment” occasioned commentary. The relationship

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813 Following the trial, a number of Senators placed statements in the record explaining their votes. See 145 CONG. REC. S1462-1637 (daily ed. Feb. 12, 1999).

814 Note that the Judiciary Committee deleted from the article a charge based on President Clinton’s allegedly frivolous assertions of executive privilege in response to subpoenas from the Office of Independent Counsel. Similarly, the Committee in 1974 distinguished between President Nixon’s refusal to respond to congressional subpoenas and his refusal to respond to those of the special prosecutor; only the refusal to provide information to the impeachment inquiry was cited as an impeachable abuse of power.

of censure to impeachment was another issue that arose. Some members advocated censure of President Clinton as an alternative to impeachment, as an alternative to trial, or as a post-trial means for those Senators who voted to acquit to register their disapproval of the President’s conduct, but there was no vote on censure.\footnote{For analysis of the issue, see Jack Maskell, Censure of the President by Congress, CRS Report for Congress 98-843A (1998).}

Finally, the Clinton impeachment raised the issue of what the threshold is for “high crimes and misdemeanors.” While the Nixon charges were premised on the assumption that an abuse of power need not be a criminal offense to be an impeachable offense,\footnote{According to one scholar, the three articles of impeachment against President Nixon epitomized the “paradigm” for presidential impeachment—abuse of power in which there is “not only serious injury to the constitutional order but also a nexus between the misconduct of an impeachable official and the official’s formal duties.” Michael J. Gerhardt, The Lessons of Impeachment History, 67 GEO. WASH. L. REV. 603, 617 (1999).} the Clinton proceedings—or at least the perjury charge—raised the issue of whether criminal offenses that do not rise to the level of an abuse of power may nonetheless be impeachable offenses.\footnote{Although committing perjury in a judicial proceeding—regardless of purpose or subject matter—impedes the proper functioning of the judiciary both by frustrating the search for truth and by breeding disrespect for courts, and consequently may be viewed as an (impeachable) “offense against the state” (see 145 CONG. REC. S1556 (daily ed. Feb. 12, 1999) (statement of Sen. Thompson)), such perjury arguably constitutes an abuse of power only if the purpose or subject matter of the perjury relates to official duties or to aggrandizement of power. Note that one of the charges against President Clinton recommended by the House Judiciary Committee but rejected by the full House—providing false responses to the Committee’s interrogatories—was squarely premised on an abuse of power.} The House’s vote to impeach President Clinton arguably amounted to an affirmative answer,\footnote{The House vote can be viewed as rejecting the views of a number of law professors, presented in a letter to the Speaker entered into the Congressional Record, arguing that high crimes and misdemeanors must involve “grossly derelict exercise of official power.” 144 CONG. REC. H9649 (daily ed. Oct. 6, 1998).} but the Senate’s acquittal leaves the matter somewhat unsettled.\footnote{Some Senators who explained their acquittal votes rejected the idea that the particular crimes that President Clinton was alleged to have committed amounted to impeachable offenses (see, e.g., 145 CONG. REC. S1560 (daily ed. Feb. 12, 1999) (statement of Sen. Moynihan); id. at 1601 (statement of Sen. Lieberman)), some alleged failure of proof (see, e.g., id. at 1539 (statement of Sen. Specter); id. at 1581 (statement of Sen. Akaka)), and some cited both grounds (see., e.g., id. at S1578-91 (statement of Sen. Leahy), and id. at S1627 (statement of Sen. Hollings)).} There appeared to be broad consensus in the Senate that some private crimes not involving an abuse of power (e.g., murder for personal reasons) are so outrageous as to constitute grounds for removal,\footnote{See, e.g., 145 CONG. REC. S1525 (daily ed. Feb. 12, 1999) (statement of Sen. Cleland) (accepting the proposition that murder and other crimes would qualify for impeachment and removal, but contending that “the current case does not reach the necessary high standard”); id. at S1533 (statement of Sen. Kyl) (impeachment cannot be limited to wrongful official conduct, but must include murder); and id. at}
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consensus on where the threshold for outrageousness lies, and there was no consensus that the perjury and obstruction of justice with which President Clinton was charged were so outrageous as to impair his ability to govern, and hence to justify removal. Similarly, the almost evenly divided Senate vote to acquit meant that there was no consensus that removal was justified on the alternative theory that the alleged perjury and obstruction of justice so damaged the judiciary as to constitute an impeachable “offense against the state.”

Judicial Review of Impeachments

It was long assumed that no judicial review of the impeachment process was possible, that impeachment presents a true “political question” case, i.e., that the Constitution’s conferral on the Senate of the “sole” power to try impeachments is a textually demonstrable constitutional commitment of trial procedures to the Senate to decide without court review. That assumption was not contested until very recently, when Judges Nixon and Hastings challenged their Senate convictions.

In the Judge Nixon case, the Court held that a claim to judicial review of an issue arising in an impeachment trial in the Senate presents a nonjusticiable “political question.” Specifically, the Court rejected a claim that the Senate had departed from the

S1592 (statement of Sen. Leahy) (acknowledging that “heinous” crimes such as murder would warrant removal). This idea, incidentally, was not new; one Senator in the First Congress apparently assumed that impeachment would be the first recourse if a President were to commit a murder. IX DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-179, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling and Helen E. Veit eds. 1988).

One commentator, analogizing to the impeachment and conviction of Judge Claiborne for income tax evasion, viewed the basic issue in the Clinton case as whether his alleged misconduct was so outrageous as to “effectively rob[ ] him of the requisite moral authority to continue to function as President.” Gerhardt, supra n.817, at 619. Under this view, the Claiborne conviction established that income tax evasion by a judge, although unrelated to official duties, reveals the judge as lacking the unquestioned integrity and moral authority necessary to preside over criminal trials, especially those involving tax evasion.

Senator Thompson propounded this theory in arguing that “abuse of power” is too narrow a category to encompass all forms of subversion of government that should be grounds for removal. 145 CONG. REC. S1556 (daily ed. Feb. 12, 1999).

Both judges challenged the use under Rule XI of a trial committee to hear the evidence and report to the full Senate, which would then carry out the trial. The rule was adopted in the aftermath of an embarrassingly sparse attendance at the trial of Judge Louderback in 1935. National Comm. Report, supra at 50-53, 54-57; Grimes, supra at 1233-37. In the Nixon case, the lower courts held the issue to be non-justiciable (Nixon v. United States, 744 F. Supp. 9 (D.D.C. 1990), aff’d 938 F.2d 239 (D.C. Cir. 1991), but a year later a district court initially ruled in Judge Hastings’ favor. Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992), vacated 988 F.2d 1280 (D.C. Cir. 1993).

Nixon v. United States, 506 U.S. 224 (1993). Nixon at the time of his conviction and removal from office was a federal district judge in Mississippi.
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meaning of the word “try” in the impeachment clause by relying on a special committee to take evidence, including testimony. But the Court’s “political question” analysis has broader application, and appears to place the whole impeachment process off limits to judicial review. 826

826 The Court listed “reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments,” and elsewhere agreed with the appeals court that “opening the door of judicial review to the procedures used by the Senate in trying impeachments would expose the political life of the country to months, or perhaps years, of chaos.” 506 U.S. at 234, 296.
ARTICLE III

JUDICIAL DEPARTMENT

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JUDICIAL DEPARTMENT

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

ORGANIZATION OF COURTS, TENURE, AND COMPENSATION OF JUDGES

The Constitution is almost completely silent concerning the organization of the federal judiciary. “That there should be a national judiciary was readily accepted by all.” ² But whether it was to consist of one high court at the apex of a federal judicial system or a high court exercising appellate jurisdiction over state courts that would initially hear all but a minor fraction of cases raising national issues was a matter of considerable controversy. ³ The Virginia Plan provided for a “National judiciary [to] be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature ....” ⁴ In the Committee of the Whole, the proposition “that a national judiciary be established” was unanimously adopted, ⁵ but the clause “to consist of One supreme tribunal, and of one or more inferior tribunals” ⁶ was first agreed to, then reconsidered, and the provision for inferior tribunals stricken out, it being argued that state courts could adequately adjudicate all necessary matters while the supreme tribunal would protect the national interest and assure uniformity. ⁷

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² The most complete account of the Convention’s consideration of the judiciary is J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. 1 ch. 5 (1971).
³ ¹ M. Farrand, supra at 21-22. That this version might not possibly be an accurate copy, see ³ id. at 593-94.
⁴ ¹ Id. at 95, 104.
⁵ Id. at 95, 105. The words “One or more” were deleted the following day without recorded debate. Id. at 116, 119.
⁶ Id. at 124-25.
Wilson and Madison thereupon moved to authorize Congress “to appoint inferior tribunals,” which carried the implication that Congress could in its discretion either designate the state courts to hear federal cases or create federal courts. The word “appoint” was adopted and over the course of the Convention changed into phrasing that suggests something of an obligation on Congress to establish inferior federal courts.

The “good behavior” clause excited no controversy, while the only substantial dispute with regard to denying Congress the power to intimidate judges through actual or threatened reduction of salaries came on Madison’s motion to bar increases as well as decreases.

One Supreme Court

The Convention left up to Congress decision on the size and composition of the Supreme Court, the time and place for sitting, its internal organization, save for the reference to the Chief Justice in the impeachment provision, and other matters. These details Congress filled up in the Judiciary act of 1789, one of the seminal statutes of the United States. By the Act, the Court was made to consist of a Chief Justice and five Associate Justices. The number was gradually increased until it reached a total of ten under the act of March 3, 1863. As one of the Reconstruction

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7 Madison’s notes use the word “institute” in place of “appoint”, id. at 125, but the latter appears in the Convention Journal, id. at 118, and in Yates’ notes, id. at 127, and when the Convention took up the draft reported by the Committee of the Whole “appoint” is used even in Madison’s notes. 2 id. at 38, 45.

8 On offering their motion, Wilson and Madison “observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them.” 1 id. at 125. The Committee on Detail provided for the vesting of judicial power in one Supreme Court “and in such inferior Courts as shall, when necessary, from time to time, be constituted by the legislature of the United States.” 2 id. at 186. Its draft also authorized Congress “[t]o constitute tribunals inferior to the Supreme Court.” Id. at 182. No debate is recorded when the Convention approved these two clauses, Id. at 315, 422-23, 428-30. The Committee on Style left the clause empowering Congress to “constitute” inferior tribunals as was, but it deleted “as shall, when necessary” from the Judiciary article, so that the judicial power was vested “in such inferior courts as Congress may from time to time”—and here deleted “constitute” and substituted the more forceful—“ordain and establish.” Id. at 600.

9 The provision was in the Virginia Plan and was approved throughout, 1 id. at 21.

10 Id. at 121; 2 id. at 44-45, 429-430.

11 Article I, § 3, cl. 6.

12 Act of September 24, 1789, 1 Stat. 73. The authoritative works on the Act and its working and amendments are F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1928); Warren, New Light on the History of the Federal Judicial Act of 1789, 37 HARV. L. REV. 49 (1923); see also J. Goebel, supra at ch. 11.

13 Act of September 24, 1789, 1 Stat. 73, § 1.

14 12 Stat. 794, § 1.
Sec. 1—Judicial Power, Courts, Judges

Congress’ restrictions on President Andrew Johnson, the number was reduced to seven as vacancies should occur. The number actually never fell below eight before the end of Johnson’s term, and Congress thereupon made the number nine.

Proposals have been made at various times for an organization of the Court into sections or divisions. No authoritative judicial expression is available, although Chief Justice Hughes in a letter to Senator Wheeler in 1937 expressed doubts concerning the validity of such a device and stated that “the Constitution does not appear to authorize two or more Supreme Courts functioning in effect as separate courts.”

Congress has also determined the time and place of sessions of the Court. It utilized this power once in 1801 to change its terms so that for fourteen months the Court did not convene, as to forestall a constitutional attack on the repeal of the Judiciary Act of 1801.

Inferior Courts

Congress also acted in the Judiciary Act of 1789 to create inferior courts. Thirteen district courts were constituted to have four sessions annually, and three circuit courts were established. The circuit courts were to consist of two Supreme Court justices each and one of the district judges, and were to meet twice annually in the various districts comprising the circuit. This system had substantial faults in operation, not the least of which was the burden imposed on the Justices, who were required to travel thousands of miles each year under bad conditions. Despite numerous efforts to change this system, it persisted, except for one brief period, until

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16 Act of April 10, 1869, 16 Stat. 44.
17 Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judici-
ary Committee, 75th Congress, 1st sess. (1937), pt. 3, 491. For earlier proposals
to have the Court sit in divisions, see F. Frankfurter & J. Landis, supra at 74-85.
18 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 222-224 (rev.
ed. 1926).
19 Act of September 24, 1789, 1 Stat. 73, §§ 2-3.
20 Id. at 74, §§ 4-5
21 Cf. F. Frankfurter & J. Landis, supra at chs. 1-3; J. Goebel, supra at 554-
560, 565-569. Upon receipt of a letter from President Washington soliciting sugges-
tions regarding the judicial system, WRITINGS OF GEORGE WASHINGTON, (J.
Fitzpatrick ed., 1943), 31, Chief Justice Jay prepared a letter for the approval of
the other Justices, declining to comment on the policy questions but raising several
issues of constitutionality, that the same man should not be appointed to two offices,
that the offices were incompatible, and that the act invaded the prerogatives of the
President and Senate. 2 G. McREE, LIFE AND CORRESPONDENCE OF JAMES
IREDELL 293-296 (1858). The letter was apparently never forwarded to the Presi-
dent. WRITINGS OF Washington, supra at 31-32 n. 58. When the constitutional issue
was raised in Stuart v. Laird, 5 U.S. (1 Cr.) 299, 309 (1803), it was passed over
with the observation that the practice was too established to be questioned.
Sec. 1—Judicial Power, Courts, Judges

1891. Since then, the federal judicial system has consisted of district courts with original jurisdiction, intermediate appellate courts, and the Supreme Court.

Abolition of Courts.—That Congress “may from time to time ordain and establish” inferior courts would seem to imply that the system may be reoriented from time to time and that Congress is not restricted to the status quo but may expand and contract the units of the system. But if the judges are to have life tenure what is to be done with them when the system is contracted? Unfortunately, the first exercise of the power occurred in a highly politicized situation, and no definite answer emerged. By the Judiciary Act of February 13, 1801, passed in the closing weeks of the Adams Administration, the districts were reorganized, and six circuit courts consisting of three circuit judges each were created. Adams filled the positions with deserving Federalists, and upon coming to power the Jeffersonians set in motion plans to repeal the Act, which were carried out. No provision was made for the displaced judges, apparently under the theory that if there were no courts there could be no judges to sit on them. The validity of the repeal was questioned in Stuart v. Laird, where Justice Paterson scarcely noticed the argument in rejecting it.

Not until 1913 did Congress again utilize its power to abolish a federal court, this time the unfortunate Commerce Court, which had disappointed the expectations of most of its friends. But this time Congress provided for the redistribution of the Commerce Court judges among the circuit courts as well as a transfer of its jurisdiction to the district courts.

Compensation

Diminution of Salaries.—“The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other
branches of government.”

Thus, once a salary figure has gone into effect, Congress may not reduce it nor rescind any part of an increase, although prior to the time of its effectiveness Congress may repeal a promised increase. This decision was rendered in the context of a statutory salary plan for all federal officers and employees under which increases went automatically into effect on a specified date. Four years running, Congress interdicted the pay increases, but in two instances the increases had become effective, raising the barrier of this clause.

Also implicating this clause was a Depression-era appropriations act reducing “the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office),” by a fixed amount. While this provision presented no questions of constitutionality, it did require an interpretation as to which judges were excepted. Judges in the District of Columbia were held protected by Article III, while, on the other hand, salaries of the judges of the Court of Claims, that being a legislative court, were held subject to the reduction.

In Evans v. Gore, the Court invalidated the application of the income tax law to a federal judge, over the strong dissent of Justice Holmes, who was joined by Justice Brandeis. This ruling was extended, in Miles v. Graham, to exempt the salary of a judge of the Court of Claims appointed subsequent to the enactment of the taxing act. Evans v. Gore was disapproved, and Miles v. Graham was in effect overruled in O’Malley v. Woodrough, where the Court upheld section 22 of the Revenue Act of 1932, which extended the application of the income tax to salaries of judges taking office after June 6, 1932. Such a tax was regarded neither as an unconstitutional diminution of the compensation of judges nor as an encroachment on the independence of the judiciary.


29 United States v. Will, 449 U.S. 200, 224-230 (1980). In one year, the increase took effect of October 1, while the President signed the bill reducing the amount during the day of October 1. The Court held the increase had gone into effect by the time the reduction was signed. Will is also authority for the proposition that a general, nondiscriminatory reduction, affecting judges but not aimed solely at them, is covered by the clause. Id. at 226.


32 253 U.S. 245 (1920).

33 288 U.S. 501 (1933).

34 370 U.S. 277 (1939).

35 307 U.S. at 278-82.
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ject judges who take office after a stipulated date to a nondiscriminatory tax laid generally on an income, said the Court “is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.”

Formally overruling Evans v. Gore, the Court in United States v. Hatter reaffirmed the principle that judges should “share the tax burdens borne by all citizens.” The potential threats to judicial independence that underlie [the Compensation Clause] cannot justify a special judicial exemption from a commonly shared tax.”

The Medicare tax, extended to all federal employees in 1982, is such a non-discriminatory tax that may be applied to federal judges, the Court held. The 1983 extension of a Social Security tax to then-sitting judges was “a different matter,” however, because the judges were required to participate while almost all other federal employees were given a choice about participation. Congress did not cure the constitutional violation by a subsequent enactment that raised judges’ salaries by an amount greater than the amount of Social Security taxes that they were required to pay.

Courts of Specialized Jurisdiction

By virtue of its power “to ordain and establish” courts, Congress has occasionally created courts under Article III to exercise a specialized jurisdiction. These tribunals are like other Article III courts in that they exercise “the judicial power of the United States,” and only that power, that their judges must be appointed by the President and the Senate and must hold office during good behavior subject to removal by impeachment only, and that the compensation of their judges cannot be diminished during their continuance in office. One example of such courts was the Commerce Court created by the Mann-Elkins Act of 1910, which was given exclusive jurisdiction of all cases to enforce orders of the Interstate Commerce Commission except those involving money penalties and criminal punishment, of cases brought to enjoin, annul, or set aside orders of the Commission, of cases brought under the act of 1903 to prevent unjust discriminations, and of all mandamus proceedings authorized by the act of 1903. This court

36 307 U.S. at 282.
38 532 U.S. at 571.
39 532 U.S. at 572.
40 532 U.S. at 578-81.
41 Ch. 309, 36 Stat. 539.
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actually functioned for less than three years, being abolished in 1913, as was mentioned above.

Another court of specialized jurisdiction, but created for a limited time only, was the Emergency Court of Appeals organized by the Emergency Price Control Act of January 30, 1942. By the terms of the statute, this court consisted of three or more judges designated by the Chief Justice from the judges of the United States district courts and circuit courts of appeal. The Court was vested with jurisdiction and powers of a district court to hear appeals filed within thirty days against denials of protests by the Price Administrator and with exclusive jurisdiction to set aside regulations, orders, or price schedules, in whole or in part, or to remand the proceeding, but the court was tightly constrained in its treatment of regulations. There was interplay with the district courts, which were charged with authority to enforce orders issued under the Act, although only the Emergency Court had jurisdiction to determine the validity of such orders.

Other specialized courts are the Court of Appeals for the Federal Circuit, which is in many respects like the geographic circuits. Created in 1982, this court has exclusive jurisdiction to hear appeals from the United States Court of Federal Claims, from the Federal Merit System Protection Board, the Court of International Trade, the Patent Office in patent and trademark cases, and in various contract and tort cases. The Court of International Trade, which began life as the Board of General Appraisers, became the United States Customs Court in 1926, and was declared an Article III court in 1956, came to its present form and name in 1980. The Judicial Panel on Multidistrict Litigation, staffed by federal
judges from other courts, is authorized to transfer actions pending in different districts to a single district for trial. 46

To facilitate the gathering of foreign intelligence information, through electronic surveillance, search and seizure, as well as other means, Congress authorized in 1978 a special court, composed of seven regular federal judges appointed by the Chief Justice, to receive applications from the United States and to issue warrants for intelligence activities. 47

Even greater specialization was provided by the special court created by the Ethics in Government Act; 48 the court was charged, upon the request of the Attorney General, with appointing an independent counsel to investigate and prosecute charges of illegality in the Executive Branch. The court also had certain supervisory powers over the independent counsel.

**Legislative Courts**

Legislative courts, so-called because they are created by Congress in pursuance of its general legislative powers, have comprised a significant part of the federal judiciary. 49 The distinction between constitutional courts and legislative courts was first made in American Ins. Co. v. Canter, 50 which involved the question of the admiralty jurisdiction of the territorial court of Florida, the judges of which were limited to a four-year term in office. Said Chief Justice Marshall for the Court: “These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3rd article of the Constitution, but is conferred by Congress, in the execution of those
general powers which that body possesses over the territories of the United States." The Court went on to hold that admiralty jurisdiction can be exercised in the States only in those courts which are established in pursuance of Article III, but that the same limitation does not apply to the territorial courts, for in legislating for them "Congress exercises the combined powers of the general, and of a state government."

Canter postulated a simple proposition: "Constitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot." A two-fold difficulty attended this proposition, however. Admiralty jurisdiction is included within the "judicial power of the United States" specifically in Article III, requiring an explanation how this territorial court could receive and exercise it. Second, if territorial courts could not exercise Article III power, how might their decisions be subjected to appellate review in the Supreme Court, or indeed in other Article III courts, which could exercise only Article III judicial power? Moreover, if in fact some "judicial power" may be devolved upon courts not having the constitutional security of tenure and salary, what prevents Congress from undermining those values intended to be protected by Article III's guarantees by giving jurisdiction to non-protected entities that, being subjected to influence, would be bent to the popular will?

Attempts to explain or to rationalize the predicament or to provide a principled limiting point have from Canter to the present resulted in "frequently arcane distinctions and confusing precedents" spelled out in cases comprising "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night." Nonethe-

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51 26 U.S. at 546.

52 In Glidden Co. v. Zdanok, 370 U.S. 530, 544-45 (1962), Justice Harlan asserted that Chief Justice Marshall in the Canter case "did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States.... All the Chief Justice meant ... is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article...."


54 That the Supreme Court could review the judgments of territorial courts was established in Dorrousseau v. United States, 10 U.S. (6 Cr.) 307 (1810). See also Benner v. Porter, 50 U.S. (9 How.) 235, 243 (1850); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434 (1872); Balzac v. Porto Rico, 258 U.S. 298, 312-313 (1922).

Sec. 1—Judicial Power, Courts, Judges

In addition to the local courts of the District of Columbia, the bankruptcy courts, and the U.S. Court of Federal Claims, considered infra, these include the United States Tax Court, formerly an independent agency in the Treasury Department, but by the Tax Reform Act of 1969, § 951, 83 Stat. 730, 26 U.S.C. § 7441, made an Article I court of record, the Court of Veterans Appeals, Act of Nov. 18, 1988, 102 Stat. 4105, 38 U.S.C. § 4051, and the courts of the territories of the United States. Magistrate judges are adjuncts of the District Courts, see infra, and perform a large number of functions, usually requiring the consent of the litigants. See Gomez v. United States, 490 U.S. 858 (1989); Peretz v. United States, 501 U.S. 923 (1991). The U.S. Court of Military Appeals, strictly speaking, is not part of the judiciary but is a military tribunal, 10 U.S.C. § 867, although Congress designated it an Article I tribunal and has recently given the Supreme Court certiorari jurisdiction over its decisions.

Power of Congress Over Legislative Courts.—In creating legislative courts, Congress is not limited by the restrictions imposed in Article III concerning tenure during good behavior and the prohibition against diminution of salaries. Congress may limit tenure to a term of years, as it has done in acts creating territorial courts and the Tax Court, and it may subject the judges of legislative courts to removal by the President, or it may reduce their salaries during their terms. Similarly, it follows that Congress can vest in legislative courts nonjudicial functions of a legislative or advisory nature and deprive their judgments of finality. Thus, in Gordon v. United States, there was no objection to the power of the Secretary of the Treasury and Congress to revise or suspend the early judgments of the Court of Claims. Likewise, in United States v. Ferreira, the Court sustained the act conferring powers on the Florida territorial court to examine claims rising under the Spanish treaty and to report its decisions and the evidence on which they were based to the Secretary of the Treasury for subsequent action. “A power of this description,” it was said, “may constitutionally be conferred on a Secretary as well as on a commissioner. But [it] is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States.”

Review of Legislative Courts by Supreme Court.—Chief Justice Taney’s view, that would have been expressed in Gordon, would have been expressed in Gordon, 61

61See also United States v. Jones, 62

62The opinion in Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864), had originally been prepared by Chief Justice Taney, but following his death and reargument of the case the opinion cited was issued. The Court later directed the publishing of Taney’s original opinion at 117 U.S. 697. See also United States v. Jones,
that the judgments of legislative courts could never be reviewed by the Supreme Court, was tacitly rejected in *De Groot v. United States*, in which the Court took jurisdiction from a final judgment of the Court of Claims. Since the decision in this case, the authority of the Court to exercise appellate jurisdiction over legislative courts has turned not upon the nature or status of such courts but rather upon the nature of the proceeding before the lower court and the finality of its judgment. The Supreme Court will neither review the administrative proceedings of legislative courts nor entertain appeals from the advisory or interlocutory decrees of such a body. But in proceedings before a legislative court which are judicial in nature, admit of a final judgment, and involve the performance of judicial functions and therefore the exercise of judicial power, the Court may be vested with appellate jurisdiction.

**The “Public Rights” Distinction.**—A major delineation of the distinction between Article I courts and Article III courts was attempted in *Murray’s Lessee v. Hoboken Land & Improvement Co.* At issue was a summary procedure, without benefit of the courts, for the collection by the United States of moneys claimed to be due from one of its customs collectors. It was objected that the assessment and collection was a judicial act carried out by non-judicial officers and thus invalid under Article III. Accepting that the acts complained of were judicial, the Court nonetheless sustained the act by distinguishing between any act, “which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,” which, in other words, is inherently judicial, and other acts which Congress may vest in courts or in other agencies. “[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”

119 U.S. 477, 478 (1886), in which the Court noted that the official report of Chief Justice Chase’s Gordon opinion and the Court’s own record showed differences and quoted the record.


69 59 U.S. (18 How.) 272 (1856).

69 59 U.S. at 284.
executive or legislative acts and comprehended those matters that arose between the government and others. Thus, Article I courts “may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control.”

Among the matters susceptible of judicial determination, but not requiring it, are claims against the United States, the disposal of public lands and claims arising therefrom, questions concerning membership in the Indian tribes, and questions arising out of the administration of the customs and internal revenue laws. Other courts similar to territorial courts, such as consular courts and military courts martial, may be justified on like grounds.

The “public rights” distinction appears today to be a description without a significant distinction. Thus, in Crowell v. Benson, the Court approved an administrative scheme for determination, subject to judicial review, of maritime employee compensation claims, although it acknowledged that the case involved “one of private right, that is, of the liability of one individual to another under the law as defined.” This scheme was permissible, the Court said, because in cases arising out of congressional statutes, an administrative tribunal could make findings of fact and render an initial decision on legal and constitutional questions, as long as there is adequate review in a constitutional court. The “essential attributes” of decision must remain in an Article III court, but so long as it does, Congress may utilize administrative decision-makers in those private rights cases that arise in the context of a

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70 United States v. Coe, 155 U.S. 76 (1894) (Court of Private Land Claims).
72 Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); Ex Parte Bakelite Corp., 279 U.S. 438 (1929).
73 See In re Ross, 140 U.S. 453 (1891) (consular courts in foreign countries). Military courts may, on the other hand, be a separate entity of the military having no connection to Article III. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857).
75 301 U.S. at 51-65.
comprehensive federal statutory scheme. That the “public rights” distinction marked a dividing line between those matters that could be assigned to legislative courts and to administrative agencies and those matters “of private right” that could not be was reasserted in Marathon, but there was much the Court plurality did not explain.

The Court continued to waver with respect to the importance to decision-making of the public rights/private rights distinction. In two cases following Marathon, it rejected the distinction as “a bright line test,” and instead focused on “substance”—i.e., on the extent to which the particular grant of jurisdiction to an Article I court threatened judicial integrity and separation of powers principles. Nonetheless, the Court indicated that the distinction may be an appropriate starting point for analysis. Thus, the fact that private rights traditionally at the core of Article III jurisdiction are at stake leads the Court to “searching” inquiry as to whether Congress is encroaching inordinately on judicial functions, while the concern is not so great where “public” rights are involved.

However, in a subsequent case, the distinction was pronounced determinative not only of the issue whether a matter could be referred to a non-Article III tribunal but whether Congress could dispense with civil jury trials. In so doing, however, the Court viti-
ated much of the core content of “private” rights as a concept and
left resolution of the central issue to a balancing test. That is,
“public” rights are, strictly speaking, those in which the cause of
action inures in or lies against the Federal Government in its sov-
ereign capacity, the understanding since Murray’s Lessee. However,
to accommodate Crowell v. Benson, Atlas Roofing, and similar
cases, seemingly private causes of action between private parties
will also be deemed “public” rights, when Congress, acting for a
valid legislative purpose pursuant to its Article I powers, fashions
a cause of action that is analogous to a common-law claim and so
closely integrates it into a public regulatory scheme that it becomes
a matter appropriate for agency resolution with limited involve-
ment by the Article III judiciary. 82 Nonetheless, despite its fixing
by Congress as a “core proceeding” suitable for an Article I bank-
ruptcy court adjudication, the Court held the particular cause of ac-
tion at issue was a private issue as to which the parties were enti-
tled to a civil jury trial (and necessarily which Congress could not
commit to an Article I tribunal, save perhaps through the consent
of the parties. 83

Constitutional Status of the Court of Claims and the
Court of Customs and Patent Appeals.—Though the Supreme
Court for a long while accepted the Court of Claims as an Article
III court, 84 it later ruled that court to be an Article I court and its
judges without constitutional protection of tenure and salary. 85
Then, in the 1950s, Congress statutorily declared that the Court of
Claims, the Customs Court, and the Court of Customs and Patent
Appeals were Article III courts, 86 a questionable act under the
standards the Court had utilized to determine whether courts were

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82 492 U.S. at 52-54. The Court reiterated that the Government need not be a
party as a prerequisite to a matter being of “public right.” Id. at 54. Concurring,
Justice Scalia argued that public rights historically were and should remain only
those matters to which the Federal Government is a party. Id. at 65.
83 492 U.S. at 55-64. The Court reserved the question whether, a jury trial being
required, a non-Article III bankruptcy judge could oversee such a jury trial. Id. at
64. That question remains unresolved, both as a matter, first, of whether there is
statutory authorization for bankruptcy judges to conduct jury trials, and, second, if
there is, whether they may constitutionally do so. E.g., In re Ben Cooper, Inc., 896
F.2d 1394 (2d Cir. 1990), cert. granted, 497 U.S. 1023, vacated and remanded for
consideration of a jurisdictional issue, 998 U.S. 964 (1990), reinstated, 924 F.2d 36
(2d Cir.), cert. denied, 500 U.S. 928 (1991); In re Grabill Corp., 967 F.2d 1152 (7th
Cir. 1991), pet. for reh. en banc den., 976 F.2d 1126 (7th Cir. 1992).
84 De Groot v. United States, 72 U.S. (5 Wall.) 419 (1866); United States v.
85 Williams v. United States, 289 U.S. 553 (1933); cf. Ex parte Bakelite Corp.,
279 U.S. 438, 450-455 (1929).
86 67 Stat. 226, § 1, 28 U.S.C. § 171 (Court of Claims); 70 Stat. 532, § 1, 28
U.S.C. § 251 (Customs Court); 72 Stat. 848, § 1, 28 U.S.C. § 211 (Court of Customs
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legislative or constitutional. But in *Glidden Co. v. Zdanok*, five of seven participating Justices united to find that indeed the Court of Claims and the Court of Customs and Patent Appeals, at least, were constitutional courts and their judges eligible to participate in judicial business in other constitutional courts. Three Justices would have overruled *Bakelite* and *Williams* and would have held that the courts in question were constitutional courts. Whether a court is an Article III tribunal depends largely upon whether legislation establishing it is in harmony with the limitations of that Article, specifically, “whether … its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite.” When a court is created “to carry into effect [federal] powers … over subject matter … and not over localities,” a presumption arises that the status of such a tribunal is constitutional rather than legislative. The other four Justices expressly declared that *Bakelite* and *Williams* should not be overruled, but two of them thought the two courts had attained constitutional status by virtue of the clear manifestation of congressional intent expressed in the legislation. Two Justices maintained that both courts remained legislative tribunals. While the result is clear, no standard for pronouncing a court legislative rather than constitutional has obtained the adherence of a majority of the Court.

**Status of Courts of the District of Columbia.**—Through a long course of decisions, the courts of the District of Columbia were

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87 In *Ex parte Bakelite Corp.*, 279 U.S. 438, 459 (1929), Justice Van Devanter refused to give any weight to the fact that Congress had bestowed life tenure on the judges of the Court of Customs Appeals because that line of thought “mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.”


89 370 U.S. at 530, 531 (1962) (Justices Douglas and Black dissenting).

90 370 U.S. at 548, 552.

91 370 U.S. at 585 (Justice Clark and Chief Justice Warren concurring); 589 (Justices Douglas and Black dissenting).

92 370 U.S. at 585 (Justice Clark and Chief Justice Warren).

93 370 U.S. at 589 (Justices Douglas and Black). The concurrence thought that the rationale of *Bakelite* and *Williams* was based on a significant advisory and reference business of the two courts, which the two Justices now thought insignificant, but what there was of it they thought nonjudicial and the courts should not entertain it. Justice Harlan left that question open. Id. at 583.

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regarded as legislative courts upon which Congress could impose nonjudicial functions. In *Butterworth v. United States ex rel. Hoe*, the Court sustained an act of Congress which conferred revisory powers upon the Supreme Court of the District in patent appeals and made its decisions binding only upon the Commissioner of Patents. Similarly, the Court later sustained the authority of Congress to vest revisory powers in the same court over rates fixed by a public utilities commission. Not long after this the same rule was applied to the revisory powers of the District Supreme Court over orders of the Federal Radio Commission. These rulings were based on the assumption, express or implied, that the courts of the District were legislative courts, created by Congress in pursuance of its plenary power to govern the District of Columbia. In *Ex parte Bakelite Corp.*, while reviewing the history and analyzing the nature of the legislative courts, the Court stated that the courts of the District were legislative courts.

In 1933, nevertheless, the Court, abandoning all previous dicta on the subject, found the courts of the District of Columbia to be constitutional courts exercising judicial power of the United States, with the result that it assumed the task of reconciling the performance of nonjudicial functions by such courts with the rule that constitutional courts can exercise only the judicial power of the United States. This task was accomplished by the argument that in establishing courts for the District, Congress is performing dual functions in pursuance of two distinct powers, the power to constitute tribunals inferior to the Supreme Court, and its plenary and exclusive power to legislate for the District of Columbia. However, Article III, § 1, limits this latter power with respect to tenure and compensation, but not with regard to vesting legislative and administrative powers in such courts. Subject to the guarantees of personal liberty in the Constitution, “Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a State legislature has in conferring jurisdiction on its courts.”

In 1970, Congress formally recognized two sets of courts in the District, federal courts, district courts and a Court of Appeals for

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95 112 U.S. 50 (1884).
100 289 U.S. at 535-46. Chief Justice Hughes in dissent argued that Congress’ power over the District was complete in itself and the power to create courts there did not derive at all from Article III. Id. at 551. See the discussion of this point of *O’Donoghue* in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). *Cf.* Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967) (three-judge court).
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the District of Columbia, created pursuant to Article III, and courts equivalent to state and territorial courts, created pursuant to Article I.\footnote{101} Congress' action was sustained in \textit{Palmore v. United States}.\footnote{102} When legislating for the District, the Court held, Congress has the power of a local legislature and may, pursuant to Article I, § 8, cl. 17, vest jurisdiction to hear matters of local law and local concerns in courts not having Article III characteristics. The defendant's claim that he was denied his constitutional right to be tried before an Article III judge was denied on the basis that it was not absolutely necessary that every proceeding in which a charge, claim, or defense based on an act of Congress or a law made under its authority need be conducted in an Article III court. State courts, after all, could hear cases involving federal law as could territorial and military courts. "[T]he requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."\footnote{103}

**Bankruptcy Courts.**—After extended and lengthy debate, Congress in 1978 revised the bankruptcy act and created as an "adjunct" of the district courts a bankruptcy court composed of judges, vested with practically all the judicial power of the United States, serving for 14-year terms, subject to removal for cause by the judicial councils of the circuits, and with salaries subject to statutory change.\footnote{104} The bankruptcy courts were given jurisdiction over all civil proceedings arising under the bankruptcy code or arising in or related to bankruptcy cases, with review in Article III courts under a clearly erroneous standard. In a case in which a claim was made against a company for breaches of contract and warranty, purely state law claims, the Court held unconstitutional the conferral upon judges not having the Article III security of tenure and compensation of jurisdiction to hear state law claims of traditional common law actions of the kind existing at the time of the drafting

\footnotesize{\begin{itemize}
\item \footnote{101}{Pub. L. 91-358, 84 Stat. 475, D.C. Code § 11-101.}
\item \footnote{102}{411 U.S. 389 (1973)}
\item \footnote{104}{Bankruptcy Act of 1978, Pub. L. 95-598, 92 Stat. 2549, codified in titles 11, 28. The bankruptcy courts were made "adjuncts" of the district courts by § 201(a), 28 U.S.C. § 151(a). For citation to the debate with respect to Article III versus Article I status for these courts, \textit{see} \textit{Northern Pipeline Const. Co. v. Marathon Pipe Line Co.}, 458 U.S. 50, 61 n.12 (1982) (plurality opinion).}
\end{itemize}}
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of the Constitution. While the holding was extremely narrow, a plurality of the Court sought to rationalize and limit the Court’s jurisprudence of Article I courts. According to the plurality, as a fundamental principle of separation of powers, the judicial power of the United States must be exercised by courts having the attributes prescribed in Article III. Congress may not evade the constitutional order by allocating this judicial power to courts whose judges lack security of tenure and compensation. Only in three narrowly circumscribed instances may judicial power be distributed outside the Article III framework: in territories and the District of Columbia, that is, geographical areas in which no State operated as sovereign and Congress exercised the general powers of government; courts martial, that is, the establishment of courts under a constitutional grant of power historically understood as giving the political branches extraordinary control over the precise subject matter; and the adjudication of “public rights,” that is, the litigation of certain matters that historically were reserved to the political branches of government and that were between the government and the individual. In bankruptcy legislation and litigation not involving any of these exceptions, the plurality would have held, the judicial power to process bankruptcy cases could not be assigned to the tribunals created by the act.

The dissent argued that, while on its face Article III provided for exclusivity in assigning judicial power to Article III entities, the history since Canter belied that simplicity. Rather, the precedents clearly indicated that there is no difference in principle between the work that Congress may assign to an Article I court and that which must be given to an Article III court. Despite this, the dissent contended that Congress did not possess plenary discretion in choosing between the two systems; rather, in evaluating whether jurisdiction was properly reposed in an Article I court, the Supreme Court must balance the values of Article III against both the strength of the interest Congress sought to further by its Article I

105 The statement of the holding is that of the two concurring Justices, 458 U.S. at 89 (Justices Rehnquist and O’Connor), with which the plurality agreed “at the least,” while desiring to go further. Id. at 87 n.40.

106 458 U.S. at 63-76 (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens).

107 The plurality also rejected an alternative basis, a contention that as “adjuncts” of the district courts, the bankruptcy courts were like United States magistrates or like those agencies approved in Crowell v. Benson, 285 U.S. 22 (1932), to which could be assigned factfinding functions subject to review in Article III courts, the fount of the administrative agency system. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-86 (1982). According to the plurality, the act vested too much judicial power in the bankruptcy courts to treat them like agencies, and it limited the review of Article III courts too much.
investiture and the extent to which Article III values were undermined by the congressional action. This balancing would afford the Court, the dissent believed, the power to prevent Congress, were it moved to do so, from transferring jurisdiction in order to emasculate the constitutional courts of the United States. 108

Again, no majority could be marshaled behind a principled discussion of the reasons for and the limitation upon the creation of legislative courts, not that a majority opinion, or even a unanimous one, would necessarily presage the settling of the law. 109 But the breadth of the various opinions not only left unclear the degree of discretion left in Congress to restructure the bankruptcy courts, but also placed in issue the constitutionality of other legislative efforts to establish adjudicative systems outside a scheme involving the creation of life-tenured judges. 110

Congress responded to Marathon by enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984. 111 Bankruptcy courts were maintained as Article I entities, and overall their powers as courts were not notably diminished. However, Congress did establish a division between “core proceedings,” which bankruptcy courts could hear and determine, subject to lenient review, and other proceedings, which, though initially heard and decided by bankruptcy courts, could be reviewed de novo in the district court at the behest of any party, unless the parties consented to bankruptcy-court jurisdiction in the same manner as core proceedings. A safety valve was included, permitting the district court to withdraw any proceeding from the bankruptcy court on cause shown. 112 Notice that in Granfinanciera, S.A. v. Nordberg, the Court found that a cause of action founded on state law, though denominated a core proceeding, was a private right.

Agency Adjudication.—The Court in two decisions following Marathon involving legislative courts clearly suggested that the majority was now closer to the balancing approach of the Marathon dissenters than to the position of the Marathon plurality that Congress may confer judicial power on legislative courts in only

108 458 U.S. at 92, 105-13, 113-16 (Justice White, joined by Chief Justice Burger and Justice Powell).
109 Ex parte Bakelite Corp., 279 U.S. 438 (1929), was, after all, a unanimous opinion and did not long survive.
very limited circumstances. Subsequently, however, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), a reversion to the fundamentality of *Marathon*, with an opinion by the same author, Justice Brennan, cast some doubt on this proposition. In *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568 (1985), the Court upheld a provision of the pesticide law requiring binding arbitration, with limited judicial review, of compensation due one registrant by another for mandatory sharing of registration information, the right arising from federal statutory law. And in *CFTC v. Schor*, 478 U.S. at 851 (summarizing the Thomas rule), the Court upheld conferral on the agency of authority, in a reparations adjudication under the Act, also to adjudicate “counterclaims” arising out of the same transaction, including those arising under state common law. Neither the fact that the pesticide case involved a dispute between two private parties nor the fact that the CFTC was empowered to decide claims traditionally adjudicated under state law proved decisive to the Court’s analysis.

In rejecting a “formalistic” approach and analyzing the “substance” of the provision at issue in *Union Carbide*, Justice O’Connor’s opinion for the Court pointed to several considerations. The right to compensation was not a purely private right, but “bears many of the characteristics of a ‘public’ right,” since Congress was “authoriz[ing] an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program.” Also important was not “unduly constrict[ing] Congress in its ability to take needed and innovative action pursuant to its Article I powers;” arbitration was “a pragmatic solution to [a] difficult problem.” The limited nature of judicial review was seen as a plus in the sense that “no unwilling defendant is subjected to judicial enforcement power;” on the other hand, availability of limited judicial review of the arbitrator’s findings and determination for fraud, misconduct, or misrepresentation, and for due process violations, preserved the “appropriate exercise of the judicial function.” Thus, the Court concluded, Congress in exercise of Article I powers “may create a seemingly ‘private’ right that is so closely integrated into a public regulatory
scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.\textsuperscript{121}

In \textit{Schor}, the Court described Art. III, § 1 as serving a dual purpose: to protect the role of an independent judiciary and to safeguard the right of litigants to have claims decided by judges free from potential domination by the other branches of government. A litigant’s Article III right is not absolute, the Court determined, but may be waived. This the litigant had done by submitting to the administrative law judge’s jurisdiction rather than independently seeking relief as he was entitled to and then objecting only after adverse rulings on the merits. But the institutional integrity claim, not being personal, could not be waived, and the Court reached the merits. The threat to institutional independence was “weighed” by reference to “a number of factors.” The conferral on the CFTC of pendent jurisdiction over common law counterclaims was seen as more narrowly confined than was the grant to bankruptcy courts at issue in \textit{Marathon}, and as more closely resembling the “model” approved in \textit{Crowell v. Benson}. The CFTC’s jurisdiction, unlike that of bankruptcy courts, was said to be confined to “a particularized area of the law;” the agency’s orders were enforceable only by order of a district court,\textsuperscript{122} and reviewable under a less deferential standard, with legal rulings being subject to \textit{de novo} review; and the agency was not empowered, as had been the bankruptcy courts, to exercise “all ordinary powers of district courts.”

\textit{Granfinanciera} followed analysis different from that in \textit{Schor}, although it preserved \textit{Union Carbide} through its concept of “public rights.” State law and other legal claims founded on private rights could not be remitted to non-Article III tribunals for adjudication unless Congress in creating an integrated public regulatory scheme has so taken up the right as to transform it. It may not simply relabel a private right and place it into the regulatory scheme. The Court is hazy with respect to whether the right itself must be a creature of federal statutory action. The general descriptive language suggests that, but in its determination whether the right at issue in the case, the recovery of preferential or fraudulent transfers in the context of a bankruptcy proceeding, is a “private right,” the Court seemingly goes beyond this point. Though a statutory interest, the actions were identical to state-law contract claims

\textsuperscript{121}473 U.S. at 594.
\textsuperscript{122}Cf. \textit{Union Carbide}, 473 U.S. at 591 (fact that “FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement” cited as lessening danger of encroachment on “Article III judicial powers”).
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brought by a bankrupt corporation to augment the estate.\textsuperscript{123} Schor was distinguished solely on the waiver part of the decision, relating to the individual interest, without considering the part of the opinion deciding the institutional interest on the merits and utilizing a balancing test.\textsuperscript{124}

Thus, while the Court has made some progress in reconciling its growing line of disparate cases, doctrinal harmony has not yet been achieved.

**Noncourt Entities in the Judicial Branch**

Passing on the constitutionality of the establishment of the Sentencing Commission as an “independent” body in the judicial branch, the Court acknowledged that the Commission is not a court and does not exercise judicial power. Rather, its function is to promulgate binding sentencing guidelines for federal courts. It acts, therefore, legislatively, and its membership of seven is composed of three judges and three nonjudges. But the standard of constitutionality, the Court held, is whether the entity exercises powers that are more appropriately performed by another branch or that undermine the integrity of the judiciary. Because the imposition of sentences is a function traditionally exercised within congressionally prescribed limits by federal judges, the Court found the functions of the Commission could be located in the judicial branch. Nor did performance of its functions contribute to a weakening of the judiciary, or an aggrandizement of power either, in any meaningful way, the Court observed.\textsuperscript{125}

**JUDICIAL POWER**

**Characteristics and Attributes of Judicial Power**

Judicial power is the power “of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.”\textsuperscript{126} It is “the right to determine actual controversies arising between diverse litigants, duly

\textsuperscript{123} Granfinanciera, 492 U.S. at 51-55, 55-60.
\textsuperscript{124} 492 U.S. at 59 n.14.
\textsuperscript{125} Mistretta v. United States, 488 U.S. 361, 384-97 (1989). Clearly, some of the powers vested in the Special Division of the United States Court of Appeals for the District of Columbia Circuit under the Ethics in Government Act in respect to the independent counsel were administrative, but because the major nonjudicial power, the appointment of the independent counsel, was specifically authorized in the appointments clause, the additional powers were miscellaneous and could be lodged there by Congress. Implicit in the Court’s analysis was the principle that a line exists that Congress could not cross over. Morrison v. Olson, 487 U.S. 654, 677-685 (1988).
\textsuperscript{126} Justice Samuel Miller, On the Constitution 314 (1891).
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instituted in courts of proper jurisdiction.”

Although the terms “judicial power” and “jurisdiction” are frequently used interchangeably and jurisdiction is defined as the power to hear and determine the subject matter in controversy between parties to a suit or as the “power to entertain the suit, consider the merits and render a binding decision thereon,” the cases and commentary support, indeed require, a distinction between the two concepts. Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case.

Judicial power confers on federal courts the power to decide a case, to render a judgment conclusively resolving a case. Judicial power is the authority to render dispositive judgments, and Congress violates the separation of powers when it purports to alter final judgments of Article III courts. After the Court had unexpectedly fixed on a shorter statute of limitations to file certain securities actions than that believed to be the time in many jurisdictions, and after several suits that had been filed later than the determined limitations had been dismissed and had become final because they were not appealed, Congress enacted a statute which, while not changing the limitations period prospectively, retroactively extended the time for suits dismissed and provided for the reopening of the final judgments rendered in the dismissals of suits.

Holding the statute invalid, the Court held it impermissible for Congress to disturb a final judgment. “Having achieved finality, … a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that case.”

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131 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995). The Court was careful to delineate the difference between attempting to alter a final judgment, one rendered by a court and either not appealed or affirmed on appeal, and legislatively amending a statute so as to change the law as it existed at the time a court issued a decision that was on appeal or otherwise still alive at the time a federal court reviewed the determination below. A court must apply the law as revised when it considers the prior interpretation. Id. at 226-27.

Article III creates or authorizes Congress to create not a collection of unconnected courts, but a judicial department composed of “inferior courts” and “one Supreme Court.” “Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole.” Id. at 227.
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very case was something other than what the courts said it was.”

On the other hand, the Court ruled in *Miller v. French* that the

Prison Litigation Reform Act’s automatic stay of ongoing injunc-

tions remedying violations of prisoners’ rights did not amount to an

unconstitutional legislative revision of a final judgment. Rather,

the automatic stay merely alters “the prospective effect” of injunc-

tions, and it is well established that such prospective relief “re-

mains subject to alteration due to changes in the underlying

law.”

Included within the general power to decide cases are the an-

cillary powers of courts to punish for contempts of their author-

ity, to issue writs in aid of jurisdiction when authorized by stat-

ute, to make rules governing their process in the absence of stat-

utory authorizations or prohibitions, to order their own process

so as to prevent abuse, oppression, and injustice, and to protect

their own jurisdiction and officers in the protection of property in

custody of law, to appoint masters in chancery, referees, audi-

tors, and other investigators, and to admit and disbar attor-

neys.

“Shall Be Vested”—The distinction between judicial power

and jurisdiction is especially pertinent to the meaning of the words

“shall be vested” in § 1. Whereas all the judicial power of the

United States is vested in the Supreme Court and the inferior fed-

eral courts created by Congress, neither has ever been vested with

all the jurisdiction which could be granted and, Justice Story to the

country, the Constitution has not been read to mandate Con-

gress to confer the entire jurisdiction it might. Thus, except for

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132 514 U.S. at 227 (emphasis by Court).
133 530 U.S. 327 (2000).
134 530 U.S. at 344.
135 Michaelson v. United States, 266 U.S. 42 (1924).
136 McIntire v. Wood, 11 U.S. (7 Cr.) 504 (1813); Ex parte Bollman, 8 U.S. (4

Cr.) 75 (1807).
139 Ex parte Peterson, 253 U.S. 300 (1920).
141 Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 328-331 (1816). See

also 3 J. Story, Commentaries on the Constitution of the United States

(1833) 1584-1590.
142 See, e.g., Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10

(1799) (Justice Chase). A recent, sophisticated attempt to resurrect the core of Justice

Story’s argument is Amar, A Neo-Federalist View of Article III: Separating the Two

Tiers of Federal Jurisdiction, 65 B. U. L. Rev. 205 (1985); and see Amar, Meltzer,


Rev. 1499 (1990). Briefly, the matter is discussed more fully infra, Professor Amar

argues, in part, from the text of Article III, § 2, cl. 1, that the use of the word “all” in
each of federal question, admiralty, and public ambassador subclauses means
the original jurisdiction of the Supreme Court, which flows directly from the Constitution, two prerequisites to jurisdiction must be present: first, the Constitution must have given the courts the capacity to receive it, and, second, an act of Congress must have conferred it. The fact that federal courts are of limited jurisdiction means that litigants in them must affirmatively establish that jurisdiction exists and may not confer nonexistent jurisdiction by consent or conduct.

**Finality of Judgment as an Attribute of Judicial Power**

Since 1792, the federal courts have emphasized finality of judgment as an essential attribute of judicial power. In that year, Congress authorized Revolutionary War veterans to file pension claims in circuit courts of the United States, directed the judges to certify to the Secretary of War the degree of a claimant’s disability and their opinion with regard to the proper percentage of monthly pay to be awarded, and empowered the Secretary to withhold judicially certified claimants from the pension list if he suspected “imposition or mistake.” The Justices then on circuit almost immediately forwarded objections to the President, contending that the statute was unconstitutional because the judicial power was constitutionally committed to a separate department and the duties imposed by the act were not judicial, and because the subjection of a court’s opinions to revision or control by an officer of the executive or the legislature was not authorized by the Constitution.

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143 Which was, of course, the point of Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803), once the power of the Court to hold legislation unconstitutional was established.

144 The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Sill v. Sheldon, 49 U.S. (8 How.) 441 (1850); United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812); Kline v. Burke Construction Co., 260 U.S. 226 (1922). It should be noted, however, that some judges have expressed the opinion that Congress’ authority is limited to some degree by the Constitution, such as by the due process clause, so that a limitation on jurisdiction which denied a litigant access to any remedy might be unconstitutional. Cf. Eisenbreyer v. Forrestal, 174 F.2d 961, 965-966 (D.C. Cir. 1949), revd. on other grounds sub nom., Johnson v. Eisenbreyer, 339 U.S. 763 (1950); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir.), cert. denied, 335 U.S. 887 (1948); Petersen v. Clark, 285 F. Supp. 700, 703 n.5 (N.D. Calif. 1968); Murray v. Vaughn, 300 F. Supp. 688, 694-695 (D.R.I. 1969). The Supreme Court has had no occasion to consider the question.


147 1 AMERICAN STATE PAPERS: MISCELLANEOUS DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 49, 51, 52 (1832). President Washington transmitted the remonstrances to Congress.
ney General Randolph, upon the refusal of the circuit courts to act under the new statute, filed a motion for mandamus in the Supreme Court to direct the Circuit Court in Pennsylvania to proceed on a petition filed by one Hayburn seeking a pension. Although the Court heard argument, it put off decision until the next term, presumably because Congress was already acting to delete the objectionable features of the act, and upon enactment of a new law the Court dismissed the action. 148 Hayburn’s Case has been since followed, so that the Court has rejected all efforts to give it and the lower federal courts jurisdiction over cases in which judgment would have been subject to executive or legislative revision. 149 Thus, in a 1948 case, the Court held that an order of the Civil Aeronautics Board denying to one citizen air carrier and granting to another a certificate of convenience and necessity for an overseas and foreign air route was not reviewable. Such an order was subject to review and confirmance or revision by the President, and the Court decided it could not review the discretion exercised by him in that situation; the lower court had thought the matter could be handled by permitting presidential review of the order after judicial review, but the Court rejected. “[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government,” 150 More recently, the

148 Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1792). The new pension law was the Act of February 28, 1793, 1 Stat. 324. The reason for the Court’s inaction may, on the other hand, have been doubt about the proper role of the Attorney General in the matter, an issue raised in the opinion. See Marcus & Teir, Hayburn’s Case: A Misinterpretation of Precedent, 1988 Wis. L. Rev. 4; Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism, 1989 DUKE L. J. 561, 590-618. Notice the Court’s discussion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225-26 (1995).


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Court avoided a similar situation by a close construction of a statute.\(^{151}\)

**Award of Execution.**—The adherence of the Court to this proposition, however, has not extended to a rigid rule formulated by Chief Justice Taney, given its fullest expression in a posthumously-published opinion.\(^{152}\) In *Gordon v. United States*,\(^{153}\) the Court refused to hear an appeal from a decision of the Court of Claims; the act establishing the Court of Claims provided for appeals to the Supreme Court, after which judgments in favor of claimants were to be referred to the Secretary of the Treasury for payments out of the general appropriation for payment of private claims. But the act also provided that no funds should be paid out of the Treasury for any claims “till after an appropriation therefor shall be estimated by the Secretary of the Treasury.”\(^{154}\) The opinion of the Court merely stated that the implication of power in the executive officer and in Congress to revise all decisions of the Court of Claims requiring payment of money denied that court the judicial power from the exercise of which “alone” appeals could be taken to the Supreme Court.\(^{155}\)

In his posthumously-published opinion, Chief Justice Taney, because the judgment of the Court of Claims and the Supreme Court depended for execution upon future action of the Secretary and of Congress, regarded any such judgment as nothing more than a certificate of opinion and in no sense a judicial judgment.

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\(^{151}\) Connor v. Johnson, 402 U.S. 690 (1971). Under § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973e, no State may “enact or seek to administer” any change in election law or practice different from that in effect on a particular date without obtaining the approval of the Attorney General or the district court in the District of Columbia, a requirement interpreted to reach reapportionment and redistricting. Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971). The issue in Connor was whether a districting plan drawn up and ordered into effect by a federal district court, after it had rejected a legislatively-drawn plan, must be submitted for approval. Unanimously, on the papers without oral argument, the Court ruled that, despite the statute’s inclusive language, it did not apply to court-drawn plans.

\(^{152}\) The opinion was published in 117 U.S. 697. See supra, and text. See United States v. Jones, 119 U.S. 477 (1886). The Chief Justice’s initial effort was in United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

\(^{153}\) 69 U.S. (2 Wall.) 561 (1865).


Congress could not therefore authorize appeals to the Supreme Court in a case where its judicial power could not be exercised, where its judgment would not be final and conclusive upon the parties, and where processes of execution were not awarded to carry it into effect. Taney then proceeded to enunciate a rule which was rigorously applied until 1933: the award of execution is a part and an essential part of every judgment passed by a court exercising judicial powers and no decision was a legal judgment without an award of execution. The rule was most significant in barring the lower federal courts from hearing proceedings for declaratory judgments and in denying appellate jurisdiction in the Supreme Court from declaratory proceedings in state courts. But, in 1927, the Court began backing away from its absolute insistence upon an award of execution. Unanimously holding that a declaratory judgment in a state court was res judicata in a subsequent proceeding in federal court, the Court admitted that “[w]hile ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function.”

Then, in 1933, the Court interred the award-of-execution rule in its rigid form and accepted an appeal from a state court in a declaratory proceeding. Finality of judgment, however, remains the rule in determination of what is judicial power without regard to the demise of Chief Justice Taney’s formulation.

ANCILLARY POWERS OF FEDERAL COURTS

The Contempt Power

Categories of Contempt.—Crucial to an understanding of the history of the law governing the courts’ powers of contempt is an awareness of the various kinds of contempt. With a few notable ex-
the Court has consistently distinguished between criminal and civil contempts on the basis of the vindication of the authority of the courts on the one hand and the preservation and enforcement of the rights of the parties on the other. A civil contempt has been traditionally viewed as the refusal of a person in a civil case to obey a mandatory order. It is incomplete in nature, may be purged by obedience to the court order, and does not involve a sentence for a definite period of time. The classic criminal contempt is one where the act of contempt has been completed, punishment is imposed to vindicate the authority of the court, and a person cannot by subsequent action purge himself of such contempt. In *International Union, UMW v. Bagwell*, the Court formulated a new test for drawing the distinction between civil and criminal contempts, which has important consequences for the procedural rights to be accorded those cited. Henceforth, the imposition of non-compensatory contempt fines for the violation of any complex injunction will require criminal proceedings. This case, as have so many, involved the imposition of large fines (here, $52 million) upon a union in a strike situation for violations of an elaborate court injunction restraining union activity during the strike. The Court was vague with regard to the standards for determining when a court order is “complex” and thus requires the protection of criminal proceedings. Much prior doctrine remains, however, as in the distinction between remedial sanctions, which are civil, and punitive sanctions, which are criminal, and between in-court and out-of-court contempts. In the case of *Shillitani v. United States*, the defendants were sentenced by their respective District Courts for two years imprisonment for contempt of court; the sentence contained a purge clause providing for the unconditional release of the contemnors upon agreeing to testify before a grand jury. On appeal, the Supreme Court held that the defendants were in civil contempt, notwithstanding their sentence for a definite period of time, on the grounds that the test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing sentence. Here, the purpose was to obtain answers to the questions for the grand jury, and the court

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164 512 U.S. at 832-38. Relevant is the fact that the alleged contempts did not occur in the presence of the court and that determinations of violations require elaborate and reliable factfinding. *See esp.*id. at 837-38.
166 384 U.S. at 370.
provided for the defendants’ release upon compliance; whereas, “a
criminal contempt proceeding would be characterized by the impos-
ition of an unconditional sentence for punishment or deterrence.”\(^\text{167}\) The issue of whether a certain contempt is civil or
criminal can be of great importance as demonstrated in the dictum
of \textit{Ex parte Grossman},\(^\text{168}\) in which Chief Justice Taft, while holding
for the Court on the main issue that the President may pardon a
criminal contempt, noted that he may not pardon a civil contempt.
Notwithstanding the importance of distinguishing between the two,
there have been instances where defendants have been charged
with both civil and criminal contempt for the same act.\(^\text{169}\)

A second but more subtle distinction, with regard to the cat-
egories of contempt, is the difference between direct and indirect
contempt—whether civil or criminal in nature. Direct contempt re-
results when the contumacious act is committed “in the presence of
the Court or so near thereto as to obstruct the administration of
justice;”\(^\text{170}\) indirect contempt is behavior which the Court did not
itself witness.\(^\text{171}\) The nature of the contumacious act, i.e., whether
it is direct or indirect, is important because it determines the ap-
propriate procedure for charging the contemnor. As will be evi-
denced in the following discussion, the history of the contempt pow-
ers of the American judiciary is marked by two trends: a shrinking
of the court’s power to punish a person summarily and a multi-
plying of the due process requirements that must otherwise be met
when finding an individual to be in contempt.\(^\text{172}\)

determination whether payment of child support arrearages would purge a deter-
minate sentence, the proper characterization critical to decision on a due process
claim).

\(^\text{168}\) 267 U.S. 87, 119-120 (1925). In an analogous case, the Court was emphatic
in a dictum that Congress cannot require a jury trial where the contemnor has
failed to perform a positive act for the relief of private parties, Michaelson v. United


\(^\text{170}\) Act of March 2, 1831, ch. 99, § 1, 4 Stat. 488. \textit{Cf.} Rule 42(a), FRCrP, which
provides that “[a] criminal contempt may be punished summarily if the judge cer-
tifies that he saw or heard the conduct constituting the contempt and that it was
committed in the actual presence of the court.” \textit{See also} Beale, \textit{Contempt of Court,


\(^\text{172}\) Many of the limitations placed on the inferior federal courts have been issued
on the basis of the Supreme Court’s supervisory power over them rather than upon
a constitutional foundation, while, of course, the limitations imposed on state courts
necessarily are on constitutional dimensions. Indeed, it is often the case that a limi-
tation, which is applied to an inferior federal court as a superintending measure, is
then transformed into a constitutional limitation and applied to state courts. \textit{Compare}
U.S. 194 (1968). In the latter stage, the limitations then bind both federal and state
courts alike. Therefore, in this section, Supreme Court constitutional limitations on
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The Act of 1789.—The summary power of the courts of the United States to punish contempts of their authority had its origin in the law and practice of England where disobedience of court orders was regarded as contempt of the King himself and attachment was a prerogative process derived from presumed contempt of the sovereign. By the latter part of the eighteenth century, summary power to punish was extended to all contempts whether committed in or out of court. In the United States, the Judiciary Act of 1789 in section 17 conferred power on all courts of the United States “to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same.” The only limitation placed on this power was that summary attachment was made a negation of all other modes of punishment. The abuse of this extensive power led, following the unsuccessful impeachment of Judge James H. Peck of the Federal District Court of Missouri, to the passage of the Act of 1831 limiting the power of the federal courts to punish contempts to misbehavior in the presence of the courts, “or so near thereto as to obstruct the administration of justice,” to the misbehavior of officers of courts in their official capacity, and to disobedience or resistance to any lawful writ, process or order of the court.

An Inherent Power.—The validity of the act of 1831 was sustained forty-three years later in Ex parte Robinson, in which Justice Field for the Court expounded principles full of potentialities for conflict. He declared: “The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.” Expressing doubts concerning the validity of the act as to the Supreme Court, he declared, however, that there could be no question of its validity as applied to the lower courts on the ground that they are created by Congress and that their “powers and duties depend upon the act calling them into existence, or subsequent

state court contempt powers are cited without restriction for equal application to federal courts.

175 1 Stat. 83 (1789).
177 86 U.S. (19 Wall.) 505 (1874).
acts extending or limiting their jurisdiction." 178 With the passage of time, later adjudications, especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment.

By 1911, the Court was saying that the contempt power must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. 179 In *Michaelson v. United States*, 180 the Court intentionally placed a narrow interpretation upon those sections of the Clayton Act 181 relating to punishment for contempt of court by disobedience of injunctions in labor disputes. The sections in question provided for a jury upon the demand of the accused in contempt cases in which the acts committed in violation of district court orders also constituted a crime under the laws of the United States or of those of the State where they were committed. Although Justice Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that "the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor rendered practically inoperative." The Court mentioned specifically "the power to deal summarily with contempt committed in the presence of the courts or so near thereto as to obstruct the administration of justice," and the power to enforce mandatory decrees by coercive means. 182 This latter power, to enforce, the Court has held, includes the authority to appoint private counsel to prosecute a criminal contempt. 183 While the contempt power may be in-

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178 86 U.S. at 505-11.
180 266 U.S. 42 (1924).
181 38 Stat. 730, 738 (1914).
183 Young v. United States ex rel. Vuitton, 481 U.S. 787, 793-801 (1987). However, the Court, invoking its supervisory power, instructed the lower federal courts first to request the United States Attorney to prosecute a criminal contempt and only if refused should they appoint a private lawyer. Id. at 801-802. Still using its supervisory power, the Court held that the district court had erred in appointing counsel for a party that was the beneficiary of the court order; disinterested counsel had to be appointed. Id. at 802-08. Justice Scalia contended that the power to prosecute is not comprehended within Article III judicial power and that federal judges had no power, inherent or otherwise, to initiate a prosecution for contempt or to appoint counsel to pursue it. Id. at 815. See also United States v. Providence Journal Co., 485 U.S. 693 (1988), which involved the appointment of a disinterested private attorney. The Supreme Court dismissed the writ of certiorari after granting it, however, holding that only the Solicitor General representing the United States could bring the petition to the Court. See 28 U.S.C. § 518.
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herent, it is not unlimited. In *Spallone v. United States*, the Court held that a district court had abused its discretion by imposing contempt sanctions on individual members of a city council for refusing to vote to implement a consent decree remedying housing discrimination by the city. The proper remedy, the Court indicated, was to proceed first with contempt sanctions against the city, and only if that course failed should it proceed against the council members individually.

**First Amendment Limitations on the Contempt Power.**—
The phrase “in the presence of the Court or so near thereto as to obstruct the administration of justice” was interpreted so broadly in *Toledo Newspaper Co. v. United States* as to uphold the action of a district court judge in punishing a newspaper for contempt for publishing spirited editorials and cartoons on questions at issue in a contest between a street railway company and the public over rates. A majority of the Court held that the test to be applied in determining the obstruction of the administration of justice is not the actual obstruction resulting from an act, but “the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty.” Similarly, the test whether a particular act is an attempt to influence or intimidate a court is not the influence exerted upon the mind of a particular judge but “the reasonable tendency of the acts done to influence or bring about the baleful result ... without reference to the consideration of how far they may have been without influence in a particular case.”

In *Craig v. Hecht*, these criteria were applied to sustain the imprisonment of the comptroller of New York City for writing and publishing a letter to a public service commissioner which criticized the action of a United States district judge in receivership proceedings. The decision in the *Toledo Newspaper* case, however, did not follow earlier decisions interpreting the act of 1831 and was grounded on historical error. For these reasons, it was reversed in *Nye v. United States*, and the theory of constructive contempt based on the “reasonable tendency” rule was rejected in a proceeding wherein defendants in a civil suit, by persuasion and the use of liquor, induced a plaintiff feeble in mind and body to ask for dismissal of the suit he had brought against them. The events in the episode occurred more than 100 miles from where the court was sitting and were held not to put the persons responsible for

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184 493 U.S. 265 (1990). The decision was an exercise of the Court’s supervisory power. Id. at 276. Four Justices dissented. Id. at 281.
185 247 U.S. 402 (1918).
186 247 U.S. at 418-21.
188 313 U.S. 33, 47-53 (1941).
them in contempt of court. Although Nye v. United States was exclusively a case of statutory construction, it was significant from a constitutional point of view because its reasoning was contrary to that of earlier cases narrowly construing the act of 1831 and asserting broad inherent powers of courts to punish contemps independently of, and contrary to, congressional regulation of this power. Bridges v. California\(^\text{189}\) was noteworthy for the dictum of the majority that the contempt power of all courts, federal as well as state, is limited by the guaranty of the First Amendment against interference with freedom of speech or of the press.\(^\text{190}\)

A series of cases involving highly publicized trials and much news media attention and exploitation,\(^\text{191}\) however, caused the Court to suggest that the contempt and other powers of trial courts should be utilized to stem the flow of publicity before it can taint a trial. Thus, Justice Clark, speaking for the majority in Sheppard v. Maxwell,\(^\text{192}\) noted that “[i]f publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. Neither prosecutors, counsel for defense, the accused, witness, court staff nor law enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.” Though the regulation the Justice had in mind was presumably to be of the parties and related persons rather than of the press, the potential for conflict with the First Amendment is obvious as well as is the necessity for protection of the equally important right to a fair trial.\(^\text{193}\)

\(^{189}\) 314 U.S. 252, 260 (1941).

\(^{190}\) See also Wood v. Georgia, 370 U.S. 375 (1962), further clarifying the limitations imposed by the First Amendment upon this judicial power and delineating the requisite serious degree of harm to the administration of law necessary to justify exercise of the contempt power to punish the publisher of an out-of-court statement attacking a charge to the grand jury, absent any showing of actual interference with the activities of the grand jury.

\(^{191}\) A series of cases involving highly publicized trials and much news media attention and exploitation, however, caused the Court to suggest that the contempt and other powers of trial courts should be utilized to stem the flow of publicity before it can taint a trial. Thus, Justice Clark, speaking for the majority in Sheppard v. Maxwell, noted that “[i]f publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. Neither prosecutors, counsel for defense, the accused, witness, court staff nor law enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.” Though the regulation the Justice had in mind was presumably to be of the parties and related persons rather than of the press, the potential for conflict with the First Amendment is obvious as well as is the necessity for protection of the equally important right to a fair trial.

Due Process Limitations on Contempt Power: Right to Notice and to a Hearing versus Summary Punishment.—Included among the notable cases raising questions concerning the power of a trial judge to punish summarily for alleged misbehavior in the course of a trial is Ex parte Terry, decided in 1888. Terry had been jailed by the United States Circuit Court of California for assaulting in its presence a United States marshal. The Supreme Court denied his petition for a writ of habeas corpus. In Cooke v. United States, however, the Court remanded for further proceedings a judgment sentencing to jail an attorney and his client for presenting the judge a letter which impugned his impartiality with respect to their case, still pending before him. Distinguishing the case from that of Terry, Chief Justice Taft, speaking for the unanimous Court, said: “The important distinction ... is that this contempt was not in open court.... To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law.”

As to the timeliness of summary punishment, the Court at first construed Rule 42(a) of the Federal Rules of Criminal Procedure, which was designed to afford judges clearer guidelines as to the exercise of their contempt power, in Sacher v. United States, as to allow “the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay [would] prejudice the trial.... [On the other hand,] if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power.” However, subsequently, interpreting the due process clause and thus binding both federal and state courts, the Court held that, although the trial judge may summarily and without notice or hearing punish contemptuous conduct committed in his presence and observed by him, if he does choose to wait until the conclusion of the proceeding he must afford the alleged contemnor at least reasonable notice of the specific charge and opportunity to

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194 128 U.S. 289 (1888).
196 267 U.S. at 535, 534.
197 343 U.S. 1 (1952).
198 343 U.S. at 11.
be heard in his own defense. Apparently, a “full scale trial” is not contemplated. 199

Curbing the judge’s power to consider conduct as occurring in his presence, the Court, in Harris v. United States, 200 held that summary contempt proceedings in aid of a grand jury probe, achieved through swearing the witness and repeating the grand jury’s questions in the presence of the judge, did not constitute contempt “in the actual presence of the court” for purposes of Rule 42(a); rather, the absence of a disturbance in the court’s proceedings or of the need to immediately vindicate the court’s authority makes the witness’ refusal to testify an offense punishable only after notice and a hearing. 201 Moreover, when it is not clear the judge was fully aware of the contemptuous behavior when it occurred, notwithstanding the fact it occurred during the trial, “a fair hearing would entail the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete.” 202

Due Process Limitations on Contempt Power: Right to Jury Trial.—Originally the right to a jury trial was not available in criminal contempt cases. 203 But in Cheff v. Schnackenberg, 204 it was held that when the punishment in a criminal contempt case in federal court is more than the sentence for a petty offense, the Court drew the traditional line at six months, a defendant is entitled to trial by jury. Although the ruling was made pursuant to the Supreme Court’s supervisory powers and was thus inapplicable to state courts and presumably subject to legislative revision, two years later the Court held that the Constitution did require jury trials in criminal contempt cases in which the offense was more

199 Taylor v. Hayes, 418 U.S. 488 (1974). In a companion case, the Court observed that although its rule conceivably encourages a trial judge to proceed immediately rather than awaiting a calmer moment, “[s]ummary convictions during trials that are unwarranted by the facts will not be invulnerable to appellate review.” Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974).


201 But see Green v. United States, 356 U.S. 165 (1958) (noncompliance with order directing defendants to surrender to marshal for execution of their sentence is an offense punishable summarily as a criminal contempt); Reina v. United States, 364 U.S. 507 (1960).


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than a petty one. Whether an offense is petty or not is determined by the maximum sentence authorized by the legislature or, in the absence of a statute, by the sentence actually imposed. Again the Court drew the line between petty offenses and more serious ones at six months imprisonment. Although this case involved an indirect criminal contempt, willful petitioning to admit to probate a will known to be falsely prepared, the majority in dictum indicated that even in cases of direct contempt a jury will be required in appropriate instances. “When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power.” Presumably, there is no equivalent right to a jury trial in civil contempt cases, although one could spend much more time in jail pursuant to a judgment of civil contempt than would be the case with most criminal contempt fines. The Court has, however, expanded the right to jury trials in federal civil cases on nonconstitutional grounds.

Due Process Limitations on Contempt Powers: Impartial Tribunal.—In Cooke v. United States, Chief Justice Taft uttered some cautionary words to guide trial judges in the utilization of their contempt powers. “The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal im-

206 391 U.S. at 209. In Codispoti v. Pennsylvania, 418 U.S. 506 (1974) the Court held required a jury trial when the trial judge awaits the conclusion of the proceeding and then imposes separate contempt sentences in which the total aggregated more than six months. For a tentative essay at defining a petty offense when a fine is levied, see Muniz v. Hoffman, 422 U.S. 454, 475-477 (1975). In International Union, UMW v. Bagwell, 512 U.S. 821, 837 n.5 (1994), the Court continued to reserve the question of the distinction between petty and serious contempt fines, because of the size of the fine in that case.
207 The Sixth Amendment is applicable only to criminal cases and the Seventh to suits at common law, but the due process clause is available if needed.
208 Note that under 28 U.S.C. § 1826 a recalcitrant witness before a grand jury may be imprisoned for the term of the grand jury, which can be 36 months. 18 U.S.C. § 3331(a).
210 267 U.S. 517, 539 (1925).
pulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course, where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. "Cornish v. United States, 299 F. 283, 285; Toledo Newspaper Co. v. United States, 237 F. 986, 988. "The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."

Sacher v. United States grew out of a tempestuous trial of eleven Communist Party leaders in which Sacher and others were counsel for the defense. Upon the conviction of the defendants, the trial judge at once found counsel guilty of criminal contempt and imposed jail terms of up to six months. At issue directly was whether the contempt charged was one which the judge was authorized to determine for himself or whether it was one which under Rule 42(b) could only be passed upon by another judge and after notice and hearing, but behind this issue loomed the applicability and nature of due process requirements, in particular whether the defense attorneys were constitutionally entitled to trial before a different judge. A divided Court affirmed most of the convictions, set aside others, and denied that due process required a hearing before a different judge. "We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion, he may do so without extinguishing his power .... We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers

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would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar’s reluctance to appear for them rather more than fear of contempt. But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyers calling.”

In *Offutt v. United States*, acting under its supervisory powers over the lower federal courts, the Court set aside a criminal contempt conviction imposed on a lawyer after a trial marked by highly personal recriminations between the trial judge and the lawyer. In a situation in which the record revealed that the contumacious conduct was the product of both lack of self-restraint on the part of the contemnor and a reaction to the excessive zeal and personal animosity of the trial judge, the majority felt that any contempt trial must be held before another judge. This holding that when a judge becomes personally embroiled in the controversy with an accused he must defer trial of his contempt citation to another judge, founded on the Court’s supervisory powers, was constitutionalized in *Mayberry v. Pennsylvania*, in which a defendant acting as his own counsel engaged in quite personal abuse of the trial judge. The Court appeared to leave open the option of the trial judge to act immediately and summarily to quell contempt by citing and convicting an offender, thus empowering the judge to keep the trial going, but if he should wait until the conclusion of the trial he must defer to another judge.

**Contempt by Disobedience of Orders.**—Disobedience of injunctive orders, particularly in labor disputes, has been a fruitful source of cases dealing with contempt of court. In *United States v.
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*United Mine Workers*, 216 the Court held that disobedience of a temporary restraining order issued for the purpose of maintaining existing conditions, pending the determination of the court’s jurisdiction, is punishable as criminal contempt where the issue is not frivolous but substantial. Second, the Court held that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional. 217 Third, on the basis of *United States v. Shipp*, 218 it was held that violations of a court’s order are punishable as criminal contempt even though the order is set aside on appeal as in excess of the court’s jurisdiction or though the basic action has become moot. Finally, the Court held that conduct can amount to both civil and criminal contempt, and the same acts may justify a court in resorting to coercive and punitive measures, which may be imposed in a single proceeding. 219

**Contempt Power in Aid of Administrative Power**.—Proceedings to enforce the orders of administrative agencies and subpoenas issued by them to appear and produce testimony have become increasingly common since the leading case of *ICC v. Brimson*, 220 where it was held that the contempt power of the courts might by statutory authorization be utilized in aid of the Interstate Commerce Commission in enforcing compliance with its orders. In 1947 a proceeding to enforce a *subpoena duces tecum* issued by the Securities and Exchange Commission during the course of an investigation was ruled to be civil in character on the ground that the only sanction was a penalty designed to compel obedience. The Court then enunciated the principle that where a fine or imprisonment imposed on the contemnor is designed to coerce him to do what he has refused to do, the proceeding is one for civil contempt. 221 Notwithstanding the power of administrative agencies to cite an individual for contempt, however, such bodies

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218 203 U.S. 563 (1906).
220 154 U.S. 447 (1894).
must be acting within the authority that has been lawfully delegated to them. 222

**Sanctions Other Than Contempt**

Long recognized by the courts as inherent powers are those authorities that are necessary to the administration of the judicial system itself, of which the contempt power just discussed is only the most controversial. 223 Courts, as an independent and coequal branch of government, once they are created and their jurisdiction established, have the authority to do what courts have traditionally done in order to accomplish their assigned tasks. 224 Of course, these inherent powers may be limited by statutes and by rules, 225 but, just as was noted in the discussion of the same issue with respect to contempt, the Court asserts both the power to act in areas not covered by statutes and rules and the power to act unless Congress has not only provided regulation of the exercise of the power but also unmistakably enunciated its intention to limit the inherent powers. 226

Thus, in the cited Chambers case, the Court upheld the imposition of monetary sanctions against a litigant and his attorney for bad-faith litigation conduct in a diversity case. Some of the conduct was covered by a federal statute and several sanction provisions of the Federal Rules of Civil Procedure, but some was not, and the Court held that, absent a showing that Congress had intended to limit the courts, they could utilize inherent powers to sanction for the entire course of conduct, including shifting attorney fees, ordinarily against the American rule. 227 In another case, a party failed to comply with discovery orders and a court order concerning a schedule for filing briefs. The Supreme Court held that the attorney’s fees statute did not allow assessment of such fees in that sit-

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222 Gjack v. United States, 384 U.S. 702 (1966). See also Sanctions of the Investigatory Power: Contempt, supra for a discussion on Congress’ power to cite an individual for contempt by virtue of its investigatory duties, which is applicable, at least by analogy, to administrative agencies.

223 “Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute.” United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 34 (1812).


226 501 U.S. at 49-51. On the implications of the fact that this was a diversity case, see id. at 51-55.
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...uation, but it remanded for consideration of sanctions under both the Federal Rule and the trial court’s inherent powers, subject to a finding of bad faith. But bad faith is not always required for the exercise of some inherent powers. Thus, courts may dismiss an action for an unexplained failure of the moving party to prosecute it.

Power to Issue Writs: The Act of 1789

From the beginning of government under the Constitution of 1789, Congress has assumed, under the necessary and proper clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts and the power to regulate the issuance of writs. The Thirteenth section of the Judiciary Act of 1789 authorized the circuit courts to issue writs of prohibition to the district courts and the Supreme Court to issue such writs to the circuit courts. The Supreme Court was also empowered to issue writs of mandamus “in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

Section 14 provided that all courts of the United States should “have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the principles and usages of law.” Although the Act of 1789 left the power over writs subject largely to the common law, it is significant as a reflection of the belief, in which the courts have on the whole concurred, that an act of Congress is necessary to confer judicial power to issue writs. Whether Article III itself is an independent source of the power of federal courts to fashion equitable remedies for constitutional violations or whether such remedies must fit within congressionally authorized writs or procedures is often left unexplored. In Missouri v. Jenkins, for example, the Court, rejecting a claim that a federal court exceeded judicial power under Article III by or...

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231 1 Stat. 73, § 81.
232 Id. at §§ 81-82. See also United States v. Morgan, 346 U.S. 502 (1954), holding that the All Writs section of the Judicial Code, 28 U.S.C. § 1651(a), gives federal courts the power to employ the ancient writ of coram nobis.
233 This proposition was recently reasserted in Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985) (holding that a federal district court lacked authority to order U.S. marshals to transport state prisoners, such authority not being granted by the relevant statutes).
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Ordering local authorities to increase taxes to pay for desegregation remedies, declared that “a court order directing a local government body to levy its own taxes” is plainly a judicial act within the power of a federal court. In the same case, the Court refused to rule on “the difficult constitutional issues” presented by the State’s claim that the district court had exceeded its constitutional powers in a prior order directly raising taxes, instead ruling that this order had violated principles of comity.

Common Law Powers of District of Columbia Courts.—That portion of § 13 of the Judiciary Act of 1789 which authorized the Supreme Court to issue writs of mandamus in the exercise of its original jurisdiction was held invalid in Marbury v. Madison, as an unconstitutional enlargement of the Supreme Court’s original jurisdiction. After two more futile efforts to obtain a writ of mandamus, in cases in which the Court found that power to issue the writ had not been vested by statute in the courts of the United States except in aid of already existing jurisdiction, a litigant was successful in Kendall v. United States ex rel. Stokes, in finding a court that would take jurisdiction in a mandamus proceeding. This was the circuit court of the United States for the District of Columbia, which was held to have jurisdiction, on the theory that the common law, in force in Maryland when the cession of that part of the State that became the District of Columbia was made to the District of Columbia, remained in force in the District. At an early time, therefore, the federal courts established the rule that mandamus can be issued only when authorized by a constitutional statute and within the limits imposed by the common law and the separation of powers.

Habeas Corpus: Congressional and Judicial Control.—Although the writ of habeas corpus has a special status because
its suspension is forbidden, except in narrow circumstances, by Article I, § 9, cl. 2, nowhere in the Constitution is the power to issue the writ vested in the federal courts. Could it be that despite the suspension clause restriction Congress could suspend de facto the writ simply by declining to authorize its issuance? Is a statute needed to make the writ available or does the right to habeas corpus stem by implication from the suspension clause or from the grant of judicial power?242 Since Chief Justice Marshall’s opinion in Ex parte Bollman,243 it has been generally accepted that “the power to award the writ by any of the courts of the United States, must be given by written law.”244 The suspension clause, Marshall explained, was an “injunction,” an “obligation” to provide “efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.”245 And so it has been understood since,246 with a few judicial voices raised to suggest that what Congress could not do directly it could not do by omission.247 But inasmuch as statutory authority has always existed authorizing the federal courts to grant the relief they deemed necessary under habeas corpus, the Court...
has never had to face the question. 248 In *Felker v. Turpin*, 249 the Court again passed up the opportunity to delineate Congress’ permissive authority over habeas, finding that none of the provisions of the Antiterrorism and Effective Death Penalty Act 250 raised questions of constitutional import.

Having determined that a statute was necessary before the federal courts had power to issue writs of habeas corpus, Chief Justice Marshall pointed to § 14 of the Judiciary Act of 1789 as containing the necessary authority. 251 As the Chief Justice read it, the authorization was limited to persons imprisoned under federal authority, and it was not until 1867, with two small exceptions, 252 that legislation specifically empowered federal courts to inquire into the imprisonment of persons under state authority. 253 Pursuant to this authorization, the Court expanded the use of the writ into a major instrument to reform procedural criminal law in federal and state jurisdictions.

### Habeas Corpus: The Process of the Writ

A petition for a writ of habeas corpus is filed by or on behalf of a person in “custody,” a concept which has been expanded so much that it is no longer restricted to actual physical detention in jail or prison. 254 Traditionally, the proceeding could not be used to secure an adjudication of a question which if determined in the petitioner’s favor would not result in his immediate release, since a discharge from...
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custody was the only function of the writ, but this restraint too the Court has abandoned in an emphasis upon the statutory language directing the habeas court to "dispose of the matter as law and justice require." Thus, even if a prisoner has been released from jail, the presence of collateral consequences flowing from his conviction gives the court jurisdiction to determine the constitutional validity of the conviction.

Petitioners seeking federal habeas relief must first exhaust their state remedies, a limitation long settled in the case law and codified in 1948. It is only required that prisoners once present their claims in state court, either on appeal or collateral attack, and they need not return time and again to raise their issues before coming to federal court. While they were once required to petition the Supreme Court on certiorari to review directly their state convictions, prisoners have been relieved of this largely pointless exercise, although if the Supreme Court has taken and decided a case its judgment is conclusive in habeas on all issues of fact or law actually adjudicated. A federal prisoner in a § 2255 proceeding will file his motion in the court which sentenced him; a state prisoner in a federal habeas action may file either in the district of the court in which he was sentenced or in the district in which he is in custody.

257 Carafas v. LaVallee, 391 U.S. 234 (1968), overruling Parker v. Ellis, 362 U.S. 574 (1960). In Peyton v. Rowe, 391 U.S. 54 (1968), the Court overruled McNally v. Hill, 293 U.S. 131 (1934), and held that a prisoner may attack on habeas the second of two consecutive sentences while still serving the first. See also Walker v. Wainwright, 390 U.S. 335 (1968) (prisoner may attack the first of two consecutive sentences although the only effect of a successful attack would be immediate confinement on the second sentence). Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), held that one sufficiently in custody of a State could use habeas to challenge the State's failure to bring him to trial on pending charges.
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Habeas corpus is not a substitute for an appeal.\textsuperscript{264} It is not a method to test ordinary procedural errors at trial or violations of state law but only to challenge alleged errors which if established would go to make the entire detention unlawful under federal law.\textsuperscript{265} If after appropriate proceedings, the habeas court finds that on the facts discovered and the law applied the prisoner is entitled to relief, it must grant it, ordinarily ordering the government to release the prisoner unless he is retried within a certain period.\textsuperscript{266}

Congressional Limitation of the Injunctive Power

Although the speculations of some publicists and some judicial dicta\textsuperscript{267} support the idea of an inherent power of the federal courts sitting in equity to issue injunctions independently of statutory limitations, neither the course taken by Congress nor the specific rulings of the Supreme Court support any such principle. Congress has repeatedly exercised its power to limit the use of the injunction in federal courts. The first limitation on the equity jurisdiction of the federal courts is to be found in § 16 of the Judiciary Act of 1789, which provided that no equity suit should be maintained where there was a full and adequate remedy at law. Although this provision did no more than declare a pre-existing rule long applied in chancery courts,\textsuperscript{268} it did assert the power of Congress to regulate the equity powers of the federal courts. The Act of March 2, 1793,\textsuperscript{269} prohibited the issuance of any injunction by any court of the United States to stay proceedings in state courts except where such injunctions may be authorized by any law relating to bank-
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ruptency proceedings. In subsequent statutes, Congress prohibited the issuance of injunctions in the federal courts to restrain the collection of taxes,\textsuperscript{270} provided for a three-judge court as a prerequisite to the issuance of injunctions to restrain the enforcement of state statutes for unconstitutionality,\textsuperscript{271} for enjoining federal statutes for unconstitutionality,\textsuperscript{272} and for enjoining orders of the Interstate Commerce Commission,\textsuperscript{273} limited the power to issue injunctions restraining rate orders of state public utility commissions,\textsuperscript{274} and the use of injunctions in labor disputes,\textsuperscript{275} and placed a very rigid restriction on the power to enjoin orders of the Administrator under the Emergency Price Control Act.\textsuperscript{276}

Perhaps pressing its powers further than prior legislation, Congress has enacted the Prison Litigation Reform Act of 1996.\textsuperscript{277} Essentially, the law imposes a series of restrictions on judicial remedies in prison-conditions cases. Thus, courts may not issue prospective relief that extends beyond that necessary to correct the violation of a federal right that they have found, that is narrowly drawn, is the least intrusive, and that does not give attention to the adverse impact on public safety. Preliminary injunctive relief is limited by the same standards. Consent decrees may not be approved unless they are subject to the same conditions, meaning that the court must conduct a trial and find violations, thus cutting off consent decrees. If a decree was previously issued without regard to the standards now imposed, the defendant or intervenor is entitled to move to vacate it. No prospective relief is to last longer than two years if any party or intervenor so moves. Finally, a previously issued decree that does not conform to the new standards imposed by the Act is subject to termination upon the motion of the defendant or an intervenor. After a short period (30 or 60 days, depending on whether there is “good cause” for a 30-day extension), such a motion operates as an automatic stay of the prior decree.

\textsuperscript{270}26 U.S.C. § 7421(a).
\textsuperscript{273} Repealed by P. L. 93-584, § 7, 88 Stat. 1118.
\textsuperscript{274} 28 U.S.C. § 1342.
\textsuperscript{275} 29 U.S.C. §§ 52, 101-110.
\textsuperscript{276} 56 Stat. 31, 204 (1942).
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...pending the court's decision on the merits. The Court upheld the termination and automatic stay provisions in *Miller v. French*, rejecting the contention that the automatic stay provision offends separation of powers principles by legislative revision of a final judgment. Rather, Congress merely established new standards for the enforcement of prospective relief, and the automatic stay provision "helps to implement the change in the law." A number of constitutional challenges can be expected respecting Congress' power to limit federal judicial authority to remedy constitutional violations.

All of these restrictions have been sustained by the Supreme Court as constitutional and applied with varying degrees of thoroughness. The Court has made exceptions to the application of the prohibition against the stay of proceedings in state courts, but it has on the whole adhered to the statute. The exceptions raise no constitutional issues, and the tendency has been alternately to contract and to expand the scope of the exceptions.

In *Duplex Printing Press v. Deering*, the Supreme Court placed a narrow construction upon the labor provisions of the Clayton Act and thereby contributed in part to the more extensive restriction by Congress on the use of injunctions in labor disputes in the Norris-LaGuardia Act of 1932, which has not only been declared constitutional but has been applied liberally and in such a manner as to repudiate the notion of an inherent power to issue injunctions contrary to statutory provisions.

**Injunctions Under the Emergency Price Control Act of 1942.**—*Lockerty v. Phillips* justifies the same conclusion. Here the validity of the special appeals procedure of the Emergency Price Control Act of 1942 was sustained. This act provided for a special Emergency Court of Appeals, which, subject to review by the Supreme Court, was given exclusive jurisdiction to determine the validity of regulations, orders, and price schedules issued by the Office of Price Administration. The Emergency Court and the Emergency Court alone was permitted to enjoin regulations or or-

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279 530 U.S. at 348.
280 Freeman v. Howe, 65 U.S. (24 How.) 450 (1861); Gaines v. Fuentes, 92 U.S. 10 (1876); Ex parte Young, 209 U.S. 123 (1908).
281 Infra, Anti-Injunction Statute.
282 254 U.S. 443 (1921).
284 319 U.S. 182 (1943).
orders of OPA, and even it could enjoin such orders only after finding that the order was not in accordance with law or was arbitrary or capricious. The Emergency Court was expressly denied power to issue temporary restraining orders or interlocutory decrees, and in addition the effectiveness of any permanent injunction it might issue was to be postponed for thirty days. If review was sought in the Supreme Court by *certiorari*, effectiveness was to be postponed until final disposition. A unanimous Court, speaking through Chief Justice Stone, declared that there “is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court.” All federal courts, other than the Supreme Court, it was asserted, derive their jurisdiction solely from the exercise of the authority to ordain and establish inferior courts conferred on Congress by Article III, § 1, of the Constitution. This power, which Congress is left free to exercise or not, was held to include the power “of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.”

Although the Court avoided passing upon the constitutionality of the prohibition against interlocutory decrees, the language of the Court was otherwise broad enough to support it, as was the language of *Yakus v. United States*, which sustained a different phase of the special procedure for appeals under the Emergency Price Control Act.

**The Rule-Making Power and Powers Over Process**

Among the incidental powers of courts is that of making all necessary rules governing their process and practice and for the orderly conduct of their business. However, this power too is derived from the statutes and cannot go beyond them. The landmark case is *Wayman v. Southard*, which sustained the validity of the Process Acts of 1789 and 1792 as a valid exercise of authority...
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under the necessary and proper clause. Although Chief Justice Marshall regarded the rule-making power as essentially legislative in nature, he ruled that Congress could delegate to the courts the power to vary minor regulations in the outlines marked out by the statute. Fifty-seven years later, in Fink v. O'Neil, in which the United States sought to enforce by summary process the payment of a debt, the Supreme Court ruled that under the process acts the law of Wisconsin was the law of the United States, and hence the Government was required to bring a suit, obtain a judgment, and cause execution to issue. Justice Matthews for a unanimous Court declared that the courts have "no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the law confers and limits it." Conceding, in 1934, the limited competence of legislative bodies to establish a comprehensive system of court procedure, and acknowledging the inherent power of courts to regulate the conduct of their business, Congress authorized the Supreme Court to prescribe rules for the lower federal courts not inconsistent with the Constitution and statutes. Their operation being restricted, in conformity with the proviso attached to the congressional authorization, to matters of pleading and practice, the Federal Rules of Civil Procedure thus judicially promulgated neither affect the substantive rights of litigants nor alter the jurisdiction of federal courts and the venue of actions therein and, thus circumscribed, have been upheld as valid.

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292 See Miner v. Atlatt, 363 U.S. 641 (1960), holding that a federal district court, sitting in admiralty, has no inherent power, independent of any statute or the Supreme Court's Admiralty Rules, to order the taking of deposition for the purpose of discovery. See also Harris v. Nelson, 394 U.S. 286 (1969), in which the Court found statutory authority in the "All Writs Statute" for a habeas corpus court to propound interrogatories.
294 However, the abolition of old rights and the creation of new ones in the course of litigation conducted in conformance with these judicially prescribed federal rules has been sustained as against the contention of a violation of substantive rights. Sibbach v. Wilson, 312 U.S. 1, 14 (1941).
Limitations to This Power.—The principal function of court rules is that of regulating the practice of courts as regards forms, the operation and effect of process, and the mode and time of proceedings. However, rules are sometimes employed to state in convenient form principles of substantive law previously established by statutes or decisions. But no such rule “can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law.” This rule is applicable equally to courts of law, equity, and admiralty, to rules prescribed by the Supreme Court for the guidance of lower courts, and to rules “which lower courts make for their own guidance under authority conferred.”

As incident to the judicial power, courts of the United States possess inherent authority to supervise the conduct of their officers, parties, witnesses, counsel, and jurors by self-preserving rules for the protection of the rights of litigants and the orderly administration of justice.

The courts of the United States possess inherent equitable powers over their process to prevent abuse, oppression, and injustice, and to protect their jurisdiction and officers in the protection of property in the custody of law. Such powers are said to be essential to and inherent in the organization of courts of justice. The courts of the United States also possess inherent power to amend their records, correct the errors of the clerk or other court officers, and to rectify defects or omissions in their records even after the lapse of a term, subject, however, to the qualification that the power to amend records conveys no power to create a record or re-create one of which no evidence exists.

Appointment of Referees, Masters, and Special Aids

The administration of insolvent enterprises, investigations into the reasonableness of public utility rates, and the performance of...
other judicial functions often require the special services of masters in chancery, referees, auditors, and other special aids. The practice of referring pending actions to a referee was held in *Heckers v. Fowler*[^302] to be coequal with the organization of the federal courts. In the leading case of *Ex parte Peterson*,[^303] a United States district court appointed an auditor with power to compel the attendance of witnesses and the production of testimony. The court authorized him to conduct a preliminary investigation of facts and file a report thereon for the purpose of simplifying the issues for the jury. This action was neither authorized nor prohibited by statute. In sustaining the action of the district judge, Justice Brandeis, speaking for the Court, declared: “Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties…. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause.”[^304] The power to appoint auditors by federal courts sitting in equity has been exercised from their very beginning, and here it was held that this power is the same whether the court sits in law or equity.

**Power to Admit and Disbar Attorneys**

Subject to general statutory qualifications for attorneys, the power of the federal courts to admit and disbar attorneys rests on the common law from which it was originally derived. According to Chief Justice Taney, it was well settled by the common law that “it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed.” Such power, he made clear, however, “is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the right and dignity of the Court itself.”[^305]

The Test-Oath Act of July 2, 1862, which purported to exclude

[^302]: 69 U.S. (2 Wall.) 123, 128-129 (1864).
[^303]: 253 U.S. 300 (1920).
[^304]: 253 U.S. at 312.
[^305]: Ex parte Secombe, 60 U.S. (19 How.) 9, 13 (1857). In Frazier v. Heebe, 482 U.S. 641 (1987), the Court exercised its supervisory power to invalidate a district court rule respecting the admission of attorneys. See In re Sawyer, 360 U.S. 622 (1959), with reference to the extent to which counsel of record during a pending case may attribute error to the judiciary without being subject to professional discipline.
former Confederates from the practice of law in the federal courts, was invalidated in Ex parte Garland. In the course of his opinion for the Court, Justice Field discussed generally the power to admit and disbar attorneys. The exercise of such a power, he declared, is judicial power. The attorney is an officer of the court, and though Congress may prescribe qualifications for the practice of law in the federal courts, it may not do so in such a way as to inflict punishment contrary to the Constitution or to deprive a pardon of the President of its legal effect.

SECTION 2. Clause 1. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

307 71 U.S. at 378-80. Although a lawyer is admitted to practice in a federal court by way of admission to practice in a state court, he is not automatically sent out of the federal court by the same route, when “principles of right and justice” require otherwise. A determination of a state court that an accused practitioner should be disbarred is not conclusively binding on the federal courts. Theard v. United States, 354 U.S. 278 (1957), citing Selling v. Radford, 243 U.S. 46 (1917). Cf. In re Isserman, 345 U.S. 286, 288 (1953), where it was acknowledged that upon disbarment by a state court, Rule 2, par. 5 of the Rules of the Supreme Court imposes upon the attorney the burden of showing cause why he should not be disbarred in the latter, and upon his failure to meet that burden, the Supreme Court will “follow the finding of the state that the character requisite for membership in the bar is lacking.” In 348 U.S. 1 (1954), Isserman’s disbarment was set aside for reason of noncompliance with Rule 8 requiring concurrence of a majority of the Justices participating in order to sustain a disbarment. See also In re Disbarment of Crow, 359 U.S. 1007 (1959). For an extensive treatment of disbarment and American and English precedents thereon, see Ex parte Wall, 107 U.S. 265 (1883).
JUDICIAL POWER AND JURISDICTION—CASES AND CONTROVERSIES

Late in the Convention, a delegate proposed to extend the judicial power to cases arising under the Constitution of the United States as well as under its laws and treaties. Madison's notes continue: "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department."

"The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—", 308

That the Framers did not intend for federal judges to roam at large in construing the Constitution and laws of the United States but rather preferred and provided for resolution of disputes arising in a "judicial" manner is revealed not only in the language of § 2 and the passage quoted above but also in the refusal to associate the judges in the extra-judicial functions which some members of the Convention—Madison and Wilson notably—conceived for them. Thus, proposals for associating the judges in a council of revision to pass on laws generally were voted down four times, 309 and similar fates befell suggestions that the Chief Justice be a member of a privy council to assist the President, 310 and that the President or either House of Congress be able to request advisory opinions of the Supreme Court. 311

This intent of the Framers was early effecuated when the Justices declined a request of President Washington to tender him advice respecting legal issues growing out of United States neutrality between England and France in 1793. 312 Moreover, the refusal of the Justices to participate in the congressional plan for awarding veterans' pensions 313 bespoke a similar adherence to the restricted role of courts. These restrictions have been encapsulated in a series of principles or doctrines, the application of which determines whether an issue is meet for judicial resolution and whether the parties raising it are entitled to have it ju-

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308 2 M. Farrand, supra at 430.
309 The proposal was contained in the Virginia Plan. 1 id. at 21. For the four rejections, see id. at 97-104, 108-10, 138-40, 2 id. at 73-80, 298.
310 Id. at 328-29, 342-44. Although a truncated version of the proposal was reported by the Committee on Detail, id. at 367, the Convention never took it up.
311 Id. at 340-41. The proposal was referred to the Committee on Detail and never heard of again.
313 Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), discussed "Finality of Judgment as an Attribute of Judicial Power", supra.
The Two Classes of Cases and Controversies

By the terms of the foregoing section, the judicial power extends to nine classes of cases and controversies, which fall into two general groups. In the words of Chief Justice Marshall in *Cohens v. Virginia*: 315 "In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This cause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended controversies between two or more States, 'between a State and citizens of another State,' and 'between a State and foreign States, citizens or subjects.' If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union." 316

Judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." 317 The meaning attached to the terms "cases" and "controversies" 318 determines therefore the extent of the judicial power as well as the capacity of the federal courts to receive jurisdiction. According to Chief Justice Marshall, judicial power is capable of acting only when the subject is submitted in a case and a case arises only when a party asserts his rights "in a form prescribed by law." 319 "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are estab-

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315 19 U.S. (6 Wheat.) 264 (1821).
316 19 U.S. at 378.
318 The two terms may be used interchangeably, inasmuch as a "controversy," if distinguishable from a "case" at all, is so only because it is a less comprehensive word and includes only suits of a civil nature. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).
Sec. 2—Judicial Power and Jurisdiction

Established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication.  

Chief Justice Hughes once essayed a definition, which, however, presents a substantial problem of labels. "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Of the "case" and "controversy" requirement, Chief Justice Warren admitted that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine." Justice Frankfurter perhaps best captured the flavor of the "case" and "controversy" requirement by noting that it takes the "expert feel of lawyers" often to note it.

From these quotations may be isolated several factors which, in one degree or another, go to make up a "case" and "controversy."

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323 "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'" Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149, 150 (1951).
Adverse Litigants

The presence of adverse litigants with real interests to contend for is a standard which has been stressed in numerous cases, and the requirement implicates a number of complementary factors making up a justiciable suit. The requirement was a decisive factor, if not the decisive one, in *Muskrat v. United States*, in which the Court struck down a statute authorizing certain named Indians to bring a test suit against the United States to determine the validity of a law affecting the allocation of Indian lands. Attorney’s fees of both sides were to be paid out of tribal funds deposited in the United States Treasury. “The judicial power,” said the Court, “... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction... It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question.”

Collusive and Feigned Suits.—Adverse litigants are lacking in those suits in which two parties have gotten together to bring a friendly suit to settle a question of interest to them. Thus, in *Lord v. Veazie*, the latter had executed a deed to the former warranting that he had certain rights claimed by a third person, and suit was instituted to decide the “dispute.” Declaring that “the

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325 219 U.S. 346 (1911).

326 219 U.S. at 361-62. The Indians obtained the sought-after decision the following year by the simple expedient of suing to enjoin the Secretary of the Interior from enforcing the disputed statute. Gritts v. Fisher, 224 U.S. 640 (1912). Other cases have involved similar problems, but they resulted in decisions on the merits. E.g., *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 455-463 (1899); *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966); *but see id. at 357* (Justice Black dissenting). The principal effect of Muskrat was to put in doubt for several years the validity of any sort of declaratory judgment provision in federal law.

whole proceeding was in contempt of the court, and highly reprehensible,” the Court observed: “The contract set out in the pleadings was made for the purpose of instituting this suit…. The plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to the suit…. And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed upon between themselves … and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision.”328 “Whenever,” said the Court in another case, “in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must … determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”329 Yet several widely known constitutional decisions have been rendered in cases in which friendly parties contrived to have the actions brought and in which the suits were supervised and financed by one side.330 And there are instances in which there may not be in fact an adverse party at certain stages, that is, some instances when the parties do not actually disagree, but in which the Court and the lower courts are empowered to adjudicate.331

328 49 U.S. at 254-55.
330 E.g., Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796); Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Cf. 1 C. Warren, supra at 147, 392-95; 2 id. at 279-82. In Powell v. Texas, 392 U.S. 514 (1968), the Court adjudicated on the merits a challenge to the constitutionality of criminal treatment of chronic alcoholics although the findings of the trial court, agreed to by the parties, appeared rather to be “the premises of a syllogism transparently designed to bring this case” within the confines of an earlier enunciated constitutional principle. But adversity arguably still existed.
Stockholder Suits.—Moreover, adversity in parties has often been found in suits by stockholders against their corporation in which the constitutionality of a statute or a government action is drawn in question, even though one may suspect that the interests of plaintiffs and defendant are not all that dissimilar. Thus, in *Pollock v. Farmers' Loan and Trust Co.*, 332 the Court sustained the jurisdiction of a district court which had enjoined the company from paying an income tax even though the suit was brought by a stockholder against the company, thereby circumventing a statute which forbade the maintenance in any court of a suit to restrain the collection of any tax. 333 Subsequently, the Court sustained jurisdiction in cases brought by a stockholder to restrain a company from investing its funds in farm loan bonds issued by federal land banks 334 and by preferred stockholders against a utility company and the TVA to enjoin the performance of contracts between the company and TVA on the ground that the statute creating it was unconstitutional. 335 Perhaps most notorious was *Carter v. Carter Coal Co.* 336 in which the president of the company brought suit against the company and its officials, among whom was Carter's father, a vice president of the company, and in which the Court entertained the suit and decided the case on the merits. 337

Substantial Interest: Standing

Perhaps the most important element of the requirement of adverse parties may be found in the "complexities and vagaries" of the standing doctrine. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." 338 The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the con-

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334 *Smith v. Kansas City Title Co.*, 255 U.S. 180 (1921).
336 298 U.S. 238 (1936).
troversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”

This practical conception of standing has now given way to a primary emphasis upon separation of powers as the guide. “[T]he ‘case or controversy’ requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are ‘founded in concern about the proper—and properly limited—role of the courts in a democratic society.’”

Standing as a doctrine is composed of both constitutional and prudential restraints on the power of the federal courts to render decisions, and is almost exclusively concerned with such public law questions as determinations of constitutionality and review of administrative or other governmental action. As such, it is often interpreted according to the prevailing philosophies of judicial activism and restraint and narrowly or broadly in terms of the viewed desirability of access to the courts by persons seeking to challenge legislation or other governmental action. The trend in the 1960s was to broaden access; in the 1970s, 1980s, and 1990s, it was to narrow access by stiffening the requirements of standing, although Court majorities were not entirely consistent. The major difficulty in setting forth the standards is that the Court’s generalizations and the results it achieves are often at variance.

339 Baker v. Carr, 369 U.S. 186, 204 (1962). That persons or organizations have a personal, ideological interest sufficiently strong to create adverseness is not alone enough to confer standing; rather, the adverseness is the consequence of one being able to satisfy the Article III requisite of injury in fact. Valley Forge Christian College v. Americans United, 454 U.S. 464, 482-486 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225-226 (1974). Nor is the fact that if plaintiffs have no standing to sue, no one would have standing, a sufficient basis for finding standing. Id. at 227.

340 Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). All the standards relating to whether a plaintiff is entitled to adjudication of his claims must be evaluated “by reference to the Art. III notion that federal courts may exercise power only ‘in the last resort, and as a necessity,’ … and only when adjudication is ‘consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.’” Id. at 752 (quoting, respectively, Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892), and Flast v. Cohen, 392 U.S. 83, 97 (1968)). For the strengthening of the separation-of-powers barrier to standing, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60, 571-78 (1992).


343 “[T]he concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court … [and] this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition.” Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982). “Generalizations about standing to sue are largely worthless as
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The standing rules apply to actions brought in federal courts, and they have no direct application to actions brought in state courts.344

Citizen Suits.—Persons do not have standing to sue to enforce a constitutional provision when all they can show or claim is that they have an interest or have suffered an injury that is shared by all members of the public. Thus, a group of persons suing as citizens to litigate a contention that membership of Members of Congress in the military reserves constituted a violation of Article I, § 6, cl. 2, was denied standing.345 “The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract... [The] claimed nonobservance [of the clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.”346

Taxpayer Suits.—Save for a narrow exception, standing is also lacking when a litigant attempts to sue to contest governmental action that he claims injures him as a taxpayer. In Frothingham v. Mellon,347 the Court denied standing to a taxpayer suing to restrain disbursements of federal money to those States that chose to participate in a program to reduce maternal and infant mortality; her claim was that Congress lacked power to appropriate funds for those purposes and that the appropriations would increase her taxes in future years in an unconstitutional manner. Noting that a federal taxpayer’s “interest in the moneys of the Treasury... is comparatively minute and indeterminate” and that “the effect upon future taxation, of any payment out of the funds... [is] remote, fluctuating and uncertain,” the Court ruled that plaintiff had failed to allege the type of “direct injury” necessary to confer standing.348

344 Thus, state courts could adjudicate a case brought by a person without standing in the federal sense. If the plaintiff lost, he would have no recourse in the United States Supreme Court, inasmuch as he lacks standing, Tileston v. Ullman, 318 U.S. 44 (1943); Doremus v. Board of Education, 342 U.S. 429 (1952), but if plaintiff prevailed, the losing defendant may be able to appeal, because he might well be able to assert sufficient injury to his federal interests. ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).


347 Usually cited as Massachusetts v. Mellon, 262 U.S. 447 (1923), the two suits being consolidated.

348 262 U.S. at 487, 488.
Taxpayers were found to have standing, however, in *Flast v. Cohen*, 349 to contest the expenditure of federal moneys to assist religious-affiliated organizations. The Court asserted that the answer to the question whether taxpayers have standing depends on whether the circumstances of each case demonstrate that there is a logical nexus between the status asserted and the claim sought to be adjudicated. First, there must be a logical link between the status of taxpayer and the type of legislative enactment attacked; this means a taxpayer must allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8, rather than also of incidental expenditure of funds in the administration of an essentially regulatory statute. Second, there must be a logical nexus between the status of taxpayer and the precise nature of the constitutional infringement alleged; this means the taxpayer must allege the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the taxing and spending power, rather than simply arguing that the enactment is generally beyond the powers delegated to Congress. Both *Frothingham* and *Flast* met the first test, because they attacked a spending program. *Flast* met the second test, because the Establishment Clause of the First Amendment operates as a specific limitation upon the exercise of the taxing and spending power, while *Frothingham* had alleged only that the Tenth Amendment had been exceeded. Reserved was the question whether other specific limitations constrained the taxing and spending clause in the same manner as the Establishment Clause.

Since *Flast*, the Court has refused to expand taxpayer standing. Litigants seeking standing as taxpayers to challenge legislation permitting the CIA to withhold from the public detailed information about its expenditures as a violation of Article I, § 9, cl. 7, and to challenge certain Members of Congress from holding commissions in the reserves as a violation of Article I, § 6, cl. 2, were denied standing, in the former cases because their challenge was not to an exercise of the taxing and spending power and in the latter because their challenge was not to legislation enacted under Article I, § 8, but rather was to executive action in permitting Members to maintain their reserve status. 351 An organization promoting

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349 392 U.S. 83 (1968).
350 392 U.S. at 105.
church-state separation was denied standing to challenge an executive decision to donate surplus federal property to a church-related college, both because the contest was to executive action under valid legislation and because the property transfer was not pursuant to a taxing and spending clause exercise but was taken under the property clause of Article IV, § 3, cl. 2. It seems evident that for at least the foreseeable future taxpayer standing will be restricted to Establishment Clause limitations on spending programs.

Local taxpayers attacking local expenditures have generally been permitted more leeway than federal taxpayers insofar as standing is concerned. Thus, in Everson v. Board of Education, such a taxpayer was found to have standing to challenge the use of public funds for transportation of pupils to parochial schools. But in Doremus v. Board of Education, the Court refused an appeal from a state court for lack of standing of a taxpayer challenging Bible reading in the classroom. No measurable disbursement of public funds was involved in this type of activity, so that there was no direct injury to the taxpayer, a rationale similar to the spending program-regulatory program distinction of Flast.

Constitutional Standards: Injury in Fact, Causation, and Redressability.—While the Court has been inconsistent, it has now settled upon the rule that, “at an irreducible minimum,” the constitutional requisites under Article III for the existence of standing are that the plaintiff must personally have suffered some actual or threatened injury that can fairly be traced to the challenged action of the defendant, and that the injury is likely to be redressed by a favorable decision.
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For some time, injury alone was not sufficient; rather, the injury had to be "a wrong which directly results in violation of a legal right,"357 that is, "one of property, one arising out of contract, one protected against tortious invasion, or one founded in a statute which confers a privilege."358 The problem was that the "legal right" language was "demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected."359 The observable tendency of the Court, however, was to find standing frequently in cases distinctly not grounded in property rights.360

In any event, the "legal rights" language has now been dispensed with. Rejection occurred in two administrative law cases in which the Court announced that parties had standing when they suffered "injury in fact" to some interest, "economic or otherwise," that is arguably within the zone of interest to be protected or regulated by the statute or constitutional provision in question.361 Now political,362 environmental, aesthetic, and social interests, when impaired, afford a basis for making constitutional attacks upon governmental action.363 The breadth of the injury in fact concept may be discerned in a series of cases involving the right of private parties to bring actions under the Fair Housing Act to challenge al-

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359 C. Wright, supra at 65-66.
361 See Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). The "zone of interest" test is a prudential rather than constitutional standard. The Court sometimes uses language characteristic of the language. Thus, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), the Court refers to injury in fact as "an invasion of a legally-protected interest," but in context, here and in the cases cited, it is clear the reference is to any interest that the Court finds protectable under the Constitution, statutes, or regulations.
leged discriminatory practices. The subjective and intangible interests of persons in enjoying the benefits of living in integrated communities were found sufficient to permit them to attack actions which threatened or harmed those interests even though the actions were not directed at them. In *FEC v. Akins*, the Court found “injury-in-fact” present when plaintiff voters alleged that the Federal Election Commission had denied them information, to which they alleged an entitlement, respecting an organization that might or might not be a political action committee. Congress had afforded persons access to the Commission and had authorized “any person aggrieved” by the actions of the FEC to sue to challenge the action. That the injury was widely shared did not make the claimed injury a “generalized grievance,” the Court held, but rather in this case, as in others, it was a concrete harm to each member of the class. The case is a principal example of the ability of Congress to confer standing and to remove prudential constraints on judicial review. Similarly, the interests of individuals and associations of individuals in using the environment afforded them the standing to challenge actions which threatened those environmental conditions. Even citizens who bring *qui tam* actions under the False Claims Act, an action that entitles them to a percentage of any civil penalty assessed for violation, have been held to have standing, on the theory that the Government has assigned a portion of its damages claim to the plaintiff, and the assignee of a claim has standing to assert the injury in fact suffered by the assignor. Nonetheless, the Court has also in constitutional cases

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364 *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). While Congress had provided for standing in the Act, thus removing prudential considerations affecting standing, it could not abrogate constitutional constraints. Thus, the injury alleged satisfied Article III.


been wary of granting standing to persons who alleged threats or harm to interests which they shared with the larger community of people at large, a rule against airing “generalized grievances” through the courts, although it is unclear whether this rule (or subrule) has a constitutional or a prudential basis. And in a number of cases, the Court has refused standing apparently in the belief that the assertion of harm is too speculative or too remote to credit.  

Of increasing importance are the second and third elements of standing, causation and redressability, recently developed and held to be of constitutional requisite. There must be a causal connection between the injury and the conduct complained of; that is, the Court insists that the plaintiff show that “but for” the action, she would not have been injured. And the Court has insisted that there must be a “substantial likelihood” that the relief sought from the court if granted would remedy the harm. Thus, poor people who had been denied service at certain hospitals were held to lack standing to challenge IRS policy of extending tax benefits to hospitals that did not serve indigents, since they could not show that alteration of the tax policy would cause the hospitals to alter their policies and treat them. Low-income persons seeking the invalidation actions, since the Constitution’s restriction of judicial power to “cases” and “controversies” has been interpreted to mean “cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.” Id. at 1863. See “Citizen Suits” supra.


E.g. Laird v. Tatum, 408 U.S. 1 (1972) (“allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”). See also O’Shea v. Littleton, 414 U.S. 488 (1974); California Bankers Ass’n v. Schultz, 416 U.S. 21 (1974); Rizzo v. Goode, 423 U.S. 262, 371-373 (1976). In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court held that victim of police chokehold seeking injunctive relief was unable to show sufficient likelihood of recurrence as to him.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 595 (1992); Allen v. Wright, 468 U.S. 737, 751 (1984). See also ASARCO Inc. v. Kadish, 490 U.S. 605, 612-617 (1989) (plurality opinion). Although the two tests were initially articulated as two facets of a single requirement, the Court now insists they are separate inquiries. Id. at 753 n. 19. To the extent there is a difference, it is that the former examines a causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. Id. In Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), the Court denied standing because of the absence of redressability. An environmental group sued the company for failing to file timely reports required by statute; by the time the complaint was filed, the company was in full compliance. Acknowledging that the entity had suffered injury in fact, the Court found that no judicial action would afford it a remedy.

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dation of a town’s restrictive zoning ordinance were held to lack standing, because they had failed to allege with sufficient particularity that the complained-of injury, inability to obtain adequate housing within their means, was fairly attributable to the ordinance instead of to other factors, so that voiding of the ordinance might not have any effect upon their ability to find affordable housing.  

Similarly, the link between fully integrated public schools and allegedly lax administration of tax policy permitting benefits to discriminatory private schools was deemed too tenuous, the harm flowing from private actors not before the courts and the speculative possibility that directing denial of benefits would result in any minority child being admitted to a school.  

But the Court did permit plaintiffs to attack the constitutionality of a law limiting the liability of private utilities in the event of nuclear accidents and providing for indemnification, on a showing that “but for” the passage of the law there was a “substantial likelihood,” based upon industry testimony and other material in the legislative history, that the nuclear power plants would not be constructed and that therefore the environmental and aesthetic harm alleged by plaintiffs would not occur; thus, a voiding of the law would likely relieve the plaintiffs of the complained of injuries.  

Operation of these requirements makes difficult but not impossible the establishment of standing by persons indirectly injured by governmental action, that is, action taken as to third parties that is alleged to have as a consequence injured the claimants.

In a case permitting a plaintiff contractors’ association to challenge an affirmative-action, set-aside program, the Court seemed to lack standing to contest prosecutorial policy of utilizing child support laws to coerce support of legitimate children only, since it was “only speculative” that prosecution of father would result in support rather than jailing.

Warth v. Seldin, 422 U.S. 490 (1975). But in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 (1974), a person who alleged he was seeking housing in the community and that he would qualify if the organizational plaintiff were not inhibited by allegedly racially discriminatory zoning laws from constructing housing for low-income persons like himself was held to have shown a “substantial probability” that voiding of the ordinance would benefit him.

Allen v. Wright, 468 U.S. 737 (1984). But compare Heckler v. Mathews, 465 U.S. 728 (1984), where persons denied equal treatment in conferral of benefits were held to have standing to challenge the treatment, although a judicial order could only have terminated benefits to the favored class. In that event, members would have secured relief in the form of equal treatment, even if they did not receive benefits. And see Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221 (1987); Orr v. Orr, 440 U.S. 268, 271-273 (1979).


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depart from several restrictive standing decisions in which it had held that the claims of attempted litigants were too “speculative” or too “contingent.” The association had sued, alleging that many of its members “regularly bid on and perform construction work” for the city and that they would have bid on the set-aside contracts but for the restrictions. The Court found the association had standing, because certain prior cases under the equal protection clause established a relevant proposition. “When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.” The association, therefore, established standing by alleging that its members were able and ready to bid on contracts but that a discriminatory policy prevented them from doing so on an equal basis.

Redressability can be present in an environmental citizen suit even when the remedy is civil penalties payable to the government. The civil penalties, the Court explained, “carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs’] injuries by abating current violations and preventing future ones.”

Prudential Standing Rules.—Even when Article III constitutional standing rules have been satisfied, the Court has held that principles of prudence may counsel the judiciary to refuse to adjudicate some claims. It is clear that the Court feels free to disregard any of these prudential rules in cases in which it thinks

377Thus, it appears that had the Court applied its standard in the current case, the results would have been different in such cases as Linda R. S. v. Richard D., 410 U.S. 614 (1973); Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Allen v. Wright, 468 U.S. 737 (1984).


379508 U.S. at 666. But see, in the context of ripeness, Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993), in which the Court, over the dissent’s reliance on Jacksonville, id. at 81-82, denied the relevance of its distinction between entitlement to a benefit and equal treatment. Id. at 58 n.19.


381Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979) (“a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim”).
exceptional circumstances exist,\textsuperscript{382} and Congress is free to legislate away prudential restraints and confer standing to the extent permitted by Article III.\textsuperscript{383} The Court has identified three rules as prudential ones,\textsuperscript{384} only one of which has been a significant factor in the jurisprudence of standing. The first two rules are that the plaintiff's interest, to which she asserts an injury, must come within the “zone of interest” arguably protected by the constitutional provision or statute in question\textsuperscript{385} and that plaintiffs may not air “generalized grievances” shared by all or a large class of citizens.\textsuperscript{386} The important rule concerns the ability of a plaintiff to represent the constitutional rights of third parties not before the court.

**Standing to Assert the Constitutional Rights of Others.**—

Usually, one may assert only one’s interest in the litigation and not


\textsuperscript{383}Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. Warth v. Seldin, 422 U.S. 490, 501 (1975). That is, the actual or threatened injury required may exist solely by virtue of “statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” Linda R.S. v. Richard D., 410 U.S. 614, 617 n. 3 (1973); O’Shea v. Littleton, 414 U.S. 488, 493 n. 2 (1974). Examples include United States v. SCRAP, 412 U.S. 669 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). See also Buckley v. Valeo, 424 U.S. 1, 8 n.4, 11-12 (1976). For a good example of the congressionally-created interest and the injury to it, see Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-75 (1982) (Fair Housing Act created right to truthful information on availability of housing; black tester’s right injured through false information, but white tester not injured because he received truthful information). It is clear, however, that the Court will impose separation-of-powers restraints on the power of Congress to create interests to which injury would give standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-78 (1992). Justice Scalia, who wrote the opinion in Lujan, reiterated the separation-of-powers objection to congressional conferral of standing in FEC v. Akins, 524 U.S. 11, 29, 36 (1998) (alleged infringement of President’s “take care” obligation), but this time in dissent; the Court did not advert to this objection in finding that Congress had provided for standing based on denial of information to which the plaintiffs, as voters, were entitled.


\textsuperscript{386}United States v. Richardson, 418 U.S. 166, 173, 174-176 (1974); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978); Allen v. Wright, 468 U.S. 737, 751 (1984). In United States v. SCRAP, 412 U.S. 669, 687-688 (1973), a congressional conferral case, the Court agreed that the interest asserted was one shared by all, but the Court has disparaged SCRAP, asserting that it “surely went to the very outer limit of the law,” Whitmore v. Arkansas, 495 U.S. 149, 159 (1990).
challenge the constitutionality of a statute or a governmental action because it infringes the protectable rights of someone else. In *Tileston v. Ullman*, an early round in the attack on a state anticontraceptive law, a doctor sued, charging that he was prevented from giving his patients needed birth control advice. The Court held he had no standing; no right of his was infringed, and he could not represent the interests of his patients. But there are several exceptions to this part of the standing doctrine that make generalization misleading. Many cases allow standing to third parties if they demonstrate a requisite degree of injury to themselves and if under the circumstances the injured parties whom they seek to represent would likely not be able to assert their rights. Thus, in *Barrows v. Jackson*, a white defendant who was being sued for damages for breach of a restrictive covenant directed against African Americans—and therefore able to show injury in liability for damages—was held to have standing to assert the rights of the class of persons whose constitutional rights were infringed. Similarly, the Court has permitted defendants who have been convicted under state law—giving them the requisite injury—to assert the rights of those persons not before the Court whose rights would be adversely affected through enforcement of the law in question. In fact, the Court has permitted persons who would be subject to future prosecution or future legal action—thus satisfying the injury requirement—to represent the rights of third parties with whom the challenged law has interfered with a relationship. It is also

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389 346 U.S. 249 (1953).

390 See also Buchanan v. Warley, 245 U.S. 60 (1917) (white plaintiff suing for specific performance of a contract to convey property to a Negro had standing to contest constitutionality of ordinance barring sale of property to African Americans, inasmuch as black defendant was relying on ordinance as his defense); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (white assignor of membership in discriminatory private club could raise rights of black assignee in seeking injunction against expulsion from club).

391 E.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (persons convicted of prescribing contraceptives for married persons and as accessories to crime of using contraceptives have standing to raise constitutional rights of patients with whom they had a professional relationship; although use of contraceptives was a crime, it was doubtful any married couple would be prosecuted so that they could challenge the statute); Eisenstadt v. Baird, 405 U.S. 438 (1972) (advocate of contraception convicted of giving device to unmarried woman had standing to assert rights of unmarried persons denied access; unmarried persons were not subject to prosecution and were thus impaired in their ability to gain a forum to assert their rights).

392 E.g., Doe v. Bolton, 410 U.S. 179, 188-189 (1973) (doctors have standing to challenge abortion statute since it operates directly against them and they should
possible, of course, that one’s own rights can be affected by action directed at someone from another group. A substantial dispute was occasioned in Singleton v. Wulff, over the standing of doctors who were denied Medicaid funds for the performance of abortions not “medically indicated” to assert the rights of absent women to compensated abortions. All the Justices thought the Court should be hesitant to resolve a controversy on the basis of the rights of third parties, but they divided with respect to the standards exceptions. Four Justices favored a lenient standard, permitting third party representation when there is a close, perhaps confidential, relationship between the litigant and the third parties and when there is some genuine obstacle to third party assertion of their rights; four Justices would have permitted a litigant to assert the rights of third parties only when government directly interdicted the relationship between the litigant and the third parties through the criminal process and when litigation by the third parties is in all practicable terms impossible.

Following Wulff, the Court emphasized the close attorney-client relationship in holding that a lawyer had standing to assert his client’s Sixth Amendment right to counsel in challenging application of a drug-forfeiture law to deprive the client of the means of paying counsel. However, a “next friend” whose stake in the outcome is only speculative must establish that the real party in interest is unable to litigate his own cause because of mental incapacity, lack of access to courts, or other disability.


Holland v. Illinois, 493 U.S. 474 (1990) (white defendant had standing to raise a Sixth Amendment challenge to exclusion of blacks from his jury, since defendant had a right to a jury comprised of a fair cross section of the community). The Court has expanded the rights of non-minority defendants to challenge the exclusion of minorities from petit and grand juries, both on the basis of the injury-in-fact to defendants and because the standards for being able to assert the rights of third parties were met. Powers v. Ohio, 499 U.S. 400 (1991); Campbell v. Louisiana, 523 U.S. 392 (1998).

Compare 428 U.S. at 112-18 (Justices Blackmun, Brennan, White, and Marshall), with id. at 123-31 (Justices Powell, Stewart, and Rehnquist, and Chief Justice Burger). Justice Stevens concurred with the former four Justices on narrower grounds limited to this case.

Whitmore v. Arkansas, 495 U.S. 149 (1990) (death row inmate’s challenge to death penalty imposed on a fellow inmate who knowingly, intelligently, and voluntarily chose not to appeal cannot be pursued).
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A variant of the general rule is that one may not assert the unconstitutionality of a statute in other respects when the statute is constitutional as to him.\textsuperscript{398} Again, the exceptions may be more important than the rule. Thus, an overly broad statute, especially one that regulates speech and press, may be considered on its face rather than as applied, and a defendant to whom the statute constitutionally applies may thereby be enabled to assert its unconstitutionality.\textsuperscript{399}

Organizational Standing.—Organizations do not have standing as such to represent their particular concept of the public interest,\textsuperscript{400} but organizations have been permitted to assert the rights of their members.\textsuperscript{401} In Hunt v. Washington State Apple Advertising Comm’n,\textsuperscript{402} the Court promulgated elaborate standards, holding that an organization or association “has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.” Similar considerations arise in the context of class actions, in which the Court holds that a named representative with a justiciable claim for relief is necessary when the action is filed and when the class is certified, but that following class certification there need be only a live con-


troverys with the class, provided the adequacy of the representation is sufficient. 403

Standing of States to Represent Their Citizens.—The right of a State to sue as parens patriae, in behalf of its citizens, has long been recognized. 404 No State, however, may be parens patriae of her citizens “as against the Federal Government.” 405 But a State may sue to protect its citizens from environmental harm, 406 and to enjoin other States and private parties from engaging in actions harmful to the economic or other well being of it citizens. 407 The State must be more than a nominal party without a real interest of its own, merely representing the interests of particular citizens who cannot represent themselves; 408 it must articulate an interest apart from those of private parties that partakes of a “quasi-sovereign interest” in the health and well-being, both physical and economic, of its residents in general, although there are suggestions that the restrictive definition grows out of the Court’s wish to constrain its original jurisdiction and may not fit such suits brought in the lower federal courts. 409

Standing of Members of Congress.—The lower federal courts, principally the District of Columbia Circuit, developed a

404 Louisiana v. Texas, 176 U.S. 1 (1900) (recognizing the propriety of parens patriae suits but denying it in this particular suit).
409 Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607-08 (1982). Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued that the Court’s standards should apply only in original actions and not in actions filed in federal district courts, where, they contended, the prerogative of a State to bring suit on behalf of its citizens should be commensurate with the ability of private organizations to do so. Id. at 610. The Court admitted that different considerations might apply between original actions and district court suits. Id. at 603 n.12.
body of law with respect to the standing of Members of Congress, as Members, to bring court actions, usually to challenge actions of the executive branch.\footnote{Member standing has not fared well in other Circuits. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975).} When the Supreme Court finally addressed the issue on the merits in 1997, however, it severely curtailed Member standing.\footnote{All agree that a legislator “receives no special consideration in the standing inquiry,” and that he, along with every other person attempting to invoke the aid of a federal court, must show “injury in fact” as a predicate to standing. What that injury in fact may consist of, however, is the basis of the controversy.} All agree that a legislator “receives no special consideration in the standing inquiry,” and that he, along with every other person attempting to invoke the aid of a federal court, must show “injury in fact” as a predicate to standing. What that injury in fact may consist of, however, is the basis of the controversy.

A suit by Members for an injunctive against continued prosecution of the Indochina war was held maintainable on the theory that if the court found the President’s actions to be beyond his constitutional authority, the holding would have a distinct and significant bearing upon the Members’ duties to vote appropriations and other supportive legislation and to consider impeachment.\footnote{The breadth of this rationale was disapproved in subsequent cases. The leading decision is Kennedy v. Sampson,\footnote{Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).} in which a Member was held to have standing to contest the alleged improper use of a pocket veto to prevent from becoming law a bill the Senator had voted for. Thus, Congressmen were held to have a derivative rather than direct interest in protecting their votes, which was sufficient for

\footnote{Kennedy v. Sampson, 414 U.S. 996 (1979), the Court vacated a decision, in which the lower Court had found Member standing but had then decided against the Member on the merits. The “unexplicated affirmance” could have reflected disagreement with the lower court on standing or agreement with it on the merits. Note Justice Rehnquist’s appended statement. Id. In Goldwater v. Carter, 444 U.S. 996 (1979), the Court vacated a decision, in which the lower Court had found Member standing, and directed dismissal, but none of the Justices who set forth reasons addressed the question of standing. The opportunity to consider Member standing was strongly pressed in Burke v. Barnes, 479 U.S. 361 (1987), but the expiration of the law in issue mooted the case.}
standing purposes, when some "legislative disenfranchisement" occurred. In a comprehensive assessment of its position, the Circuit distinguished between (1) a diminution in congressional influence resulting from executive action that nullifies a specific congressional vote or opportunity to vote in an objectively verifiable manner, which will constitute injury in fact, and (2) a diminution in a legislator's effectiveness, subjectively judged by him, resulting from executive action, such a failing to obey a statute, where the plaintiff legislator has power to act through the legislative process, in which injury in fact does not exist. Having thus established a fairly broad concept of Member standing, the Circuit then proceeded to curtail it by holding that the equitable discretion of the court to deny relief should be exercised in many cases in which a Member had standing but in which issues of separation of powers, political questions, and other justiciability considerations counseled restraint. The status of this issue thus remains in confusion.

Member or legislator standing has been severely curtailed, although not quite abolished, in Raines v. Byrd. Several Members of Congress, who had voted against passage of the Line Item Veto Act, sued in their official capacities as Members of Congress to invalidate the law, alleging standing based on the theory that the statute adversely affected their constitutionally prescribed law-making power. Emphasizing its use of standing doctrine to maintain separation-of-powers principles, the Court adhered to its holdings that, in order to possess the requisite standing, a person must establish that he has a "personal stake" in the dispute and that the alleged injury suffered is particularized as to him. Nei-
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First, the Members did not suffer a particularized loss that distinguished them from their colleagues or from Congress as an entity. Second, the Members did not claim that they had been deprived of anything to which they were personally entitled. “[A]ppellees’ claim of standing is based on loss of political power, not loss of any private right, which would make the injury more concrete.... If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member’s seat, a seat which the Member holds ... as trustee for his constituents, not as a prerogative of personal power.”

So, is there no such thing as Member standing? Not necessarily so, because the Court turned immediately to preserving (at least a truncated version of) *Coleman v. Miller*, in which the Court had found that 20 of the 40 members of a state legislature had standing to sue to challenge the loss of the effectiveness of their votes as a result of a tie-breaker by the lieutenant governor. Although there are several possible explanations for the result in that case, the Court in *Raines* chose to fasten on a particularly narrow point. “[O]ur holding in *Coleman* stands (at most, ... ) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” Because these Members could still pass or reject appropriations bills, vote to repeal the Act, or exempt any appropriations bill from presidential cancellation, the Act did not nullify their votes and thus give them standing.

It will not pass notice that the Court’s two holdings do not cohere. If legislators have standing only to allege personal injuries suffered in their personal capacities, how can they have standing to assert official-capacity injury in being totally deprived of the effectiveness of their votes? A period of dispute in the D. C. Circuit seems certain to follow.

*Standing to Challenge Lawfulness of Governmental Action.*—Standing to sue on statutory or other non-constitutional grounds has a constitutional content to the degree that Article III requires a “case” or “controversy,” necessitating a litigant who has sustained or will sustain an injury so that he will be moved to
present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution." Liberalization of the law of standing in this field has been notable. The "old law" required that in order to sue to contest the lawfulness of agency administrative action, one must have suffered a "legal wrong," that is, "the right invaded must be a legal right," requiring some resolution of the merits preliminarily. An injury-in-fact was insufficient.

A "legal right" could be established in one of two ways. It could be a common-law right, such that if the injury were administered by a private party, one could sue on it; or it could be a right created by the Constitution or a statute. The statutory right most relied on was the judicial review section of the Administrative Procedure Act, which provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Early decisions under this statute interpreted the language as adopting the "legal interest" and "legal wrong" standard then prevailing as constitutional requirements of

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425 Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 151-152 (1970), citing Flast v. Cohen, 392 U.S. 83, 101 (1968). "But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' [quoting Flast, supra, 100], is one within the power of Congress to determine." Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).


427 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). This was apparently the point of the definition of "legal right" as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Tennessee Power Co. v. TVA, 306 U.S. 118, 137-138 (1939).

428 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). The Court approached this concept in two interrelated ways. (1) It might be that a plaintiff had an interest that it was one of the purposes of the statute in question to protect in some degree. Chicago Junction Case, 264 U.S. 258 (1924); Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930); Alton R.R. v. United States, 315 U.S. 15 (1942). Thus, in Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968), a private utility was held to have standing to contest allegedly illegal competition by TVA on the ground that the statute was meant to give private utilities some protection from certain forms of TVA competition. (2) It might be that a plaintiff was a "person aggrieved" within the terms of a judicial review section of an administrative or regulatory statute. Injury to an economic interest was sufficient to "aggrieve" a litigant. FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Associated Industries v. Ickes, 134 F.2d 694 (2d Cir.), cert. dismd. as moot, 320 U.S. 707 (1943).

standing, which generally had the effect of limiting the type of injury cognizable in federal court to economic ones.\footnote{FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 477 (1940); City of Chicago v. Atchison, T. & S.F. Ry. Co., 357 U.S. 77, 83 (1958); Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968).}

In 1970, however, the Court promulgated a two-pronged standing test: if the litigant (1) has suffered injury-in-fact and if he (2) shows that the interest he seeks to protect is arguably within the zone of interests to be protected or regulated by the statutory guarantee in question, he has standing.\footnote{Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). Justices Brennan and White argued that only injury-in-fact should be requisite for standing. Id. at 167. In Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987), the Court applied a liberalized zone-of-interest test. But see Lujan v. National Wildlife Federation, 497 U.S. 871, 885-889 (1990); Air Courier Conf. v. American Postal Workers Union, 498 U.S. 517 (1991). In applying these standards, the Court, once it determined that the litigant's interests were "arguably protected" by the statute in question, proceeded to the merits without thereafter pausing to inquire whether in fact the interests asserted were among those protected. Arnold Tours v. Camp, 400 U.S. 45 (1970); Investment Company Institute v. Camp, 401 U.S. 617 (1971); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320 n. 3 (1977). Almost contemporaneously, the Court also liberalized the ripeness requirement in review of administrative actions. Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). See also National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998), in which the Court found that a bank had standing to challenge an agency ruling expanding the role of employer credit unions to include multi-employer credit unions, despite a statutory limit that any such union could be of groups having a common bond of occupation or association. The Court held that a plaintiff did not have to show it was the congressional purpose to protect its interests. It is sufficient if the interest asserted is "arguably within the zone of interests to be protected . . . by the statute." Id. at 492 (internal quotation marks and citation omitted). But the Court divided 5-to-4 in applying the test. And see Bennett v. Spear, 520 U.S. 154 (1997).}

Of even greater importance was the expansion of the nature of the cognizable injury beyond economic injury, to encompass "aesthetic, conservational, and recreational" interests as well.\footnote{Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 154 (1970).} "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."\footnote{Sierra Club v. Morton, 405 U.S. 727, 734 (1972). Moreover, said the Court, once a person establishes that he has standing to seek judicial review of an action because of particularized injury to him, he may argue the public interest as a "representative of the public interest," as a "private attorney general," so that he may contest not only the action which injures him but the entire complex of actions of which his injury-inducing action is a part. Id. at 737-738, noting Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Brothers Radio Station, 309 U.S. (1940). See also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 n. (1979); Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 n.16 (1982) (noting ability of such party to represent interests of third parties).} Thus, plaintiffs who pleaded that they used the...
natural resources of the Washington area, that rail freight rates would deter the recycling of used goods, and that their use of natural resources would be disturbed by the adverse environmental impact caused by the nonuse of recyclable goods, had standing as “persons aggrieved” to challenge the rates set. Neither the large numbers of persons allegedly injured nor the indirect and less perceptible harm to the environment was justification to deny standing. The Court granted that the plaintiffs might never be able to establish the “attenuated line of causation” from rate setting to injury, but that was a matter for proof at trial, not for resolution on the pleadings.\footnote{434 United States v. SCRAP, 412 U.S. 669, 683-690 (1973). As was noted above, this case has been disparaged by the later Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 566-67 (1992); Whitmore v. Arkansas, 495 U.S. 149, 158-160 (1990).}

Much debate has occurred in recent years with respect to the validity of “citizen suit” provisions in the environmental laws, especially in light of the Court’s retrenchment in constitutional standing cases. The Court in insisting on injury in fact as well as causation and redressability has curbed access to citizen suits,\footnote{435 See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).} but that Congress may expansively confer substantial degrees of standing through statutory creations of interests remains true.

**The Requirement of a Real Interest**

Almost inseparable from the requirements of adverse parties and substantial enough interests to confer standing is the requirement that a real issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues. It has long been the Court’s “considered practice not to decide abstract, hypothetical or contingent questions.”\footnote{436 A party cannot maintain a suit “for a mere declaration in the air.”\footnote{437 In \textit{Texas v. ICC},\footnote{438 \textit{258 U.S. 158} (1922).} the State attempted to enjoin the enforcement of the Transportation Act of 1920 on the ground that it invaded the reserved rights of the State. The Court dismissed the complaint as presenting no case or controversy, declaring: “It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an}
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exertion of the judicial power.” And in Ashwander v. TVA, the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company. “The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining.”

Concepts of real interest and abstract questions appeared prominently in United Public Workers v. Mitchell, an omnibus attack on the constitutionality of the Hatch Act prohibitions on political activities by governmental employees. With one exception, none of the plaintiffs had violated the Act, though they stated they desired to engage in forbidden political actions. The Court found no justiciable controversy except in regard to the one, calling for “concrete legal issues, presented in actual cases, not abstractions”, and seeing the suit as really an attack on the political expediency of the Act.

Advisory Opinions.—In 1793, the Court unanimously refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of international law arising out of the wars of the French Revolution. Noting the constitutional separation of powers and functions in his reply, Chief Justice Jay said: “These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power

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439 258 U.S. at 162.
441 297 U.S. at 324. Chief Justice Hughes cited New York v. Illinois, 274 U.S. 488 (1927), in which the Court dismissed as presenting abstract questions a suit about the possible effects of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future, and Arizona v. California, 283 U.S. 423 (1931), in which it was held that claims based merely upon assumed potential invasions of rights were insufficient to warrant judicial intervention. See also Massachusetts v. Mellon, 262 U.S. 447, 484-485 (1923); New Jersey v. Sargent, 269 U.S. 328, 338-340 (1926); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76 (1867).
443 330 U.S. at 89-91. Justices Black and Douglas dissented, contending that the controversy was justiciable. Justice Douglas could not agree that the plaintiffs should have to violate the act and lose their jobs in order to test their rights. In CSC v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973), the concerns expressed in Mitchell were largely ignored as the Court reached the merits in an anticipatory attack on the Act. Compare Epperson v. Arkansas, 393 U.S. 97 (1968).
given by the Constitution to the President, of calling on the heads
of departments for opinions, seem to have been purposely as well
as expressly united to the Executive departments.”  Although the
Court has generally adhered to its refusal, Justice Jackson was not
quite correct when he termed the policy a “firm and unvarying
practice...” The Justices in response to a letter calling for sugges-
tions on improvements in the operation of the courts drafted a
letter suggesting that circuit duty for the Justices was unconsti-
tutional, but they apparently never sent it; Justice Johnson com-
municated to President Monroe, apparently with the knowledge
and approval of the other Justices, the views of the Justices on the
constitutionality of internal improvements legislation; and Chief
Justice Hughes in a letter to Senator Wheeler on President Roo-
sevelt’s Court Plan questioned the constitutionality of a proposal to
increase the membership and have the Court sit in divisions. Other
Justices have individually served as advisers and confidants of
Presidents in one degree or another.

Nonetheless, the Court has generally adhered to the early
precedent and would no doubt have developed the rule in any
event, as a logical application of the case and controversy doctrine.
As stated by Justice Jackson, when the Court refused to review an
order of the Civil Aeronautics Board, which in effect was a mere
recommendation to the President for his final action: “To revise or
review an administrative decision which has only the force of a re-
commandation to the President would be to render an advisory op-
inion in its most obnoxious form—advice that the President has not
asked, tendered at the demand of a private litigant, on a subject
concededly within the President’s exclusive, ultimate control. This
Court early and wisely determined that it would not give advisory
opinions even when asked by the Chief Executive. It has also been
the firm and unvarying practice of Constitutional Courts to render

445 Jay Papers at 488.
447 See supra.
448 1 C. Warren, supra at 595-597.
449 Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judi-
ciciary Committee, 75th Congress, 1st sess. (1937), pt. 3, 491. See also Chief Justice
Taney’s private advisory opinion to the Secretary of the Treasury that a tax levied
on the salaries of federal judges violated the Constitution. S. Tyler, Memoirs of
Roger B. Taney 432-435 (1876).
450 E.g., Acheson, Removing the Shadow Cast on the Courts, 55 A.B.A.J. 919
(1969); Jaffe, Professors and Judges as Advisors to Government: Reflections on the
Roosevelt-Frankfurter Relationship, 83 Harv. L. Rev. 366 (1969). The issue has late-
ly earned the attention of the Supreme Court, Mistretta v. United States, 488 U.S.
361, 397-408 (1989) (citing examples and detailed secondary sources), when it
upheld the congressionally-authorized service of federal judges on the Sentencing
Commission.
no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action.” The early refusal of the Court to render advisory opinions has discouraged direct requests for advice so that the advisory opinion has appeared only collaterally in cases where there was a lack of adverse parties, or where the judgment of the Court was subject to later review or action by the executive or legislative branches of Government, or where the issues involved were abstract or contingent.

Declaratory Judgments.—Rigid emphasis upon such elements of judicial power as finality of judgment and award of execution coupled with equally rigid emphasis upon adverse parties and real interests as essential elements of a case and controversy created serious doubts about the validity of any federal declaratory judgment procedure. These doubts were largely dispelled by Court decisions in the late 1920s and early 1930s, and Congress quickly responded with the Federal Declaratory Judgment Act of 1934. Quickly tested, the Act was unanimously sustained. “The principle involved in this form of procedure,” the House Report said, “is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.” Said the Senate Report: “The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice.”

The 1934 Act provided that “[i]n cases of actual controversy” federal courts could “declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed.” Upholding the Act, the Court said: “The Declaratory Judgment Act of 1934, in its limi-
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The Declaratory Judgment Act of 1932,


300 U.S. at 242-44.


An exception "with respect to Federal taxes" was added in 1935. 49 Stat. 1027. The Tax Injunction Act of 1937, 50 Stat. 738, U.S.C. § 1341, prohibited federal injunctive relief directed at state taxes but said nothing about declaratory relief. It was held to apply, however, in California v. Grace Brethren Church, 457 U.S. 393 (1982). Earlier, in Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943), the Court had reserved the issue but held that considerations of comity should preclude federal courts from giving declaratory relief in such cases. Cf. Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).
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has, however, at various times demonstrated a substantial reluctance to have important questions of public law, especially regarding the validity of legislation, resolved by such a procedure.\textsuperscript{468} In part, this has been accomplished by a strict insistence upon concreteness, ripeness, and the like.\textsuperscript{469} Nonetheless, even at such times, several noteworthy constitutional decisions were rendered in declaratory judgment actions.\textsuperscript{470}

As part of the 1960s hospitality to greater access to courts, the Court exhibited a greater receptivity to declaratory judgments in constitutional litigation, especially cases involving civil liberties issues.\textsuperscript{471} The doctrinal underpinnings of this hospitality were sketched out by Justice Brennan in his opinion for the Court in \textit{Zwickler v. Koota},\textsuperscript{472} in which the relevance to declaratory judgments of the \textit{Dombrowski v. Pfister}\textsuperscript{473} line of cases involving federal injunctive relief against the enforcement of state criminal statutes was in issue. First, it was held that the vesting of “federal question” jurisdiction in the federal courts by Congress following the Civil War, as well as the enactment of more specific civil rights jurisdictional statutes, “imposed the duty upon all levels of the federal judiciary to give due respect to a suitor’s choice of a federal forum for the hearing and decision of his federal constitutional claims.”\textsuperscript{474} Escape from that duty might be found only in “narrow circumstances,” such as an appropriate application of the abstention doctrine, which was not proper where a statute affecting civil liberties was so broad as to reach protected activities as well as unprotected activities. Second, the judicially-developed doctrine that a litigant must show “special circumstances” to justify the issuance of a federal injunction against the enforcement of state criminal laws is not applicable to requests for federal declaratory relief: “a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclu-
tion as to the propriety of the issuance of the injunction.”

This language was qualified subsequently, so that declaratory and injunctive relief were equated in cases in which a criminal prosecution is pending in state court at the time the federal action is filed or is begun in state court after the filing of the federal action but before any proceedings of substance have taken place in federal court, and federal courts were instructed not to issue declaratory judgments in the absence of the factors permitting issuance of injunctions under the same circumstances. But in the absence of a pending state action or the subsequent and timely filing of one, a request for a declaratory judgment that a statute or ordinance is unconstitutional does not have to meet the stricter requirements justifying the issuance of an injunction.

Ripeness.—Just as standing historically has concerned who may bring an action in federal court, the ripeness doctrine concerns when it may be brought. Formerly, it was a wholly constitutional principle requiring a determination that the events bearing on the substantive issue have happened or are sufficiently certain to occur so as to make adjudication necessary and so as to assure that the issues are sufficiently defined to permit intelligent resolution; the focus was on the harm to the rights claimed rather than on the harm to the plaintiff that gave him standing to bring the action, although, to be sure, in most cases the harm is the same. But in liberalizing the doctrine of ripeness in recent years the Court subdivided it into constitutional and prudential parts and conflated standing and ripeness considerations.

The early cases generally required potential plaintiffs to expose themselves to possibly irreparable injury in order to invoke federal


475 Hicks v. Miranda, 422 U.S. 332, 349 (1975).


judicial review. Thus, in United Public Workers v. Mitchell,482 government employees alleged that they wished to engage in various political activities and that they were deterred from their desires by the Hatch Act prohibitions on political activities. As to all but one plaintiff, who had himself actually engaged in forbidden activity, the Court held itself unable to adjudicate because the plaintiffs were not threatened with “actual interference” with their interests. The Justices viewed the threat to plaintiffs’ rights as hypothetical and refused to speculate about the kinds of political activity they might engage in or the Government’s response to it. “No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations.”483 Similarly, resident aliens planning to work in the Territory of Alaska for the summer and then return to the United States were denied a request for an interpretation of the immigration laws that they would not be treated on their return as excludable aliens entering the United States for the first time, or alternatively, for a ruling that the laws so interpreted would be unconstitutional. The resident aliens had not left the country and attempted to return, although other alien workers had gone and been denied reentry, and the immigration authorities were on record as intending to enforce the laws as they construed them.484 Of course, the Court was not entirely consistent in applying the doctrine.485

It remains good general law that pre-enforcement challenges to criminal and regulatory legislation will often be unripe for judicial consideration because of uncertainty of enforcement,486 because the

482 330 U.S. 75 (1947).
483 330 U.S. at 90. In CSC v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973), without discussing ripeness, the Court decided on the merits anticipatory attacks on the Hatch Act. Plaintiffs had, however, alleged a variety of more concrete infringements upon their desires and intentions than the UPW plaintiffs had.


485 In Adler v. Board of Education, 342 U.S. 485 (1952), without discussing ripeness, the Court decided on the merits a suit about a state law requiring dismissal of teachers advocating violent overthrow of the government, over a strong dissent arguing the case was indistinguishable from Mitchell. Id. at 504 (Justice Frankfurter dissenting). In Cramp v. Board of Public Instruction, 368 U.S. 278 (1961), a state employee was permitted to attack a non-Communist oath, although he alleged he believed he could take the oath in good faith and could prevail if prosecuted, because the oath was so vague as to subject plaintiff to the “risk of unfair prosecution and the potential deterrence of constitutionally protected conduct.” Id. at 283-84. See also Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

486 E.g., Poe v. Ullman, 367 U.S. 497 (1961) (no adjudication of challenge to law barring use of contraceptives because in 80 years of the statute’s existence the State had never instituted a prosecution). But compare Epperson v. Arkansas, 393 U.S.
plaintiffs can allege only a subjective feeling of inhibition or fear arising from the legislation or from enforcement of it, or because the courts need before them the details of a concrete factual situation arising from enforcement in order to engage in a reasoned balancing of individual rights and governmental interests. But one who challenges a statute or possible administrative action need demonstrate only a realistic danger of sustaining an injury to his rights as a result of the statute’s operation and enforcement and need not await the consummation of the threatened injury in order to obtain preventive relief, such as exposing himself to actual arrest or prosecution. When one alleges an intention to engage in conduct arguably affected with a constitutional interest but proscribed by statute and there exists a credible threat of prosecution thereunder, he may bring an action for declaratory or injunctive relief. Similarly, the reasonable certainty of the occurrence of the perceived threat to a constitutional interest is sufficient to afford a basis for bringing a challenge, provided the court has sufficient facts before it to enable it to intelligently adjudicate the issues.

Of considerable uncertainty in the law of ripeness is the Duke Power case, in which the Court held ripe for decision on the merits a challenge to a federal law limiting liability for nuclear accidents at nuclear power plants, on the basis that because plaintiffs had

97 (1987) (merits reached in absence of enforcement and fair indication State would not enforce it); Vance v. Amusement Co., 445 U.S. 308 (1980) (reaching merits, although State asserted law would not be used, although local prosecutor had so threatened; no discussion of ripeness, but dissent relied on Poe, id. at 317-18).


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sustained injury-in-fact and had standing the Article III requisite of ripeness was satisfied and no additional facts arising out of the occurrence of the claimed harm would enable the court better to decide the issues.491 Should this analysis prevail, ripeness as a limitation on justiciability will decline in importance.

Mootness.—It may be that a case presenting all the attributes necessary for federal court litigation will at some point lose some attribute of justiciability, will, in other words, become “moot.” The usual rule is that an actual controversy must exist at all stages of trial and appellate consideration and not simply at the date the action is initiated.492 “Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.... Article III denies federal courts the power ‘to decide questions that cannot affect the rights of litigants in the case before them,’ ... and confines them to resolving ‘real and substantial controversies admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’ This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals.... The parties must continue to have a ‘personal

491 Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 81-82 (1978). The injury giving standing to plaintiffs was the environmental harm arising from the plant’s routine operation; the injury to their legal rights was alleged to be the harm caused by the limitation of liability in the event of a nuclear accident. The standing injury had occurred, the ripeness injury was conjectural and speculative and might never occur. See id. at 102 (Justice Stevens concurring in the result). It is evident on the face of the opinion and expressly stated by the objecting Justices that the Court utilized its standing/ripeness analyses in order to reach the merits, so as to remove the constitutional cloud cast upon the federal law by the district court decision. Id. at 95, 103 (Justices Rehnquist and Stevens concurring in the result).

492 E.g., United States v. Munsingwear, 340 U.S. 36 (1950); Golden v. Zwicker, 394 U.S. 103, 108 (1969); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972); Roe v. Wade, 410 U.S. 113, 125 (1973); Sosna v. Iowa, 419 U.S. 393, 398-399 (1975); United States Parole Comm’n v. Geraghty, 445 U.S. 388, 397 (1980), and id. at 411 (Justice Powell dissenting); Burke v. Barnes, 479 U.S. 361, 363 (1987); Honig v. Doe, 484 U.S. 305, 317 (1988); Lewis v. Continental Bank Corp., 494 U.S. 472, 477-478 (1990). Munsingwear had long stood for the proposition that the appropriate practice of the Court in a civil case that had become moot while on the way to the Court or after certiorari had been granted was to vacate or reverse and remand with directions to dismiss. But, in U. S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), the Court held that when mootness occurs because the parties have reached a settlement, vacatur of the judgment below is ordinarily not the best practice; instead, equitable principles should be applied so as to preserve a presumptively correct and valuable precedent, unless a court concludes that the public interest would be served by vacatur.
stake in the outcome' of the lawsuit." Since, with the advent of declaratory judgments, it is open to the federal courts to “declare the rights and other legal relations” of the parties with res judicata effect, the question in cases alleged to be moot now seems largely if not exclusively to be decided in terms of whether an actual controversy continues to exist between the parties rather than some additional older concepts.

Cases may become moot because of a change in the law, or in the status of the parties, or because of some act of one of the parties to the suit that renders the case immaterial. If this foundation exists, it is hard to explain the exceptions, which partake of practical reasoning. In any event, Chief Justice Rehnquist has argued that the mootness doctrine is not constitutionally based, or not sufficiently based only on Article III, so that the Court should not dismiss cases that have become moot after the Court has taken them for review. Id. at 329 (concurring). Consider the impact of Cardinal Chemical Co. v. Morton Int’l, Inc., 508 U.S. 83 (1993).

But see Steffel v. Thompson, 415 U.S. 452, 470-72 (1974); id. at 477 (Justice White concurring), 482 n.3 (Justice Rehnquist concurring) (on res judicata effect in state court in subsequent prosecution). In any event, the statute authorizes the federal court to grant “[f]urther necessary or proper relief” which could include enjoining state prosecutions.

Award of process and execution are no longer essential to the concept of judicial power. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

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Atherton Mills v. Johnston, 259 U.S. 13 (1922) (in challenge to laws regulating labor of youths 14 to 16, Court held case two-and-one-half years after argument and dismissed as moot since certainly none of the challengers was now in the age bracket); Golden v. Zwicker, 394 U.S. 103 (1969); DeFunis v. Odegard, 416 U.S. 312 (1974); Dove v. United States, 423 U.S. 325 (1976); Lane v. Williams, 455 U.S. 624 (1982). Compare County of Los Angeles v. Davis, 440 U.S. 625 (1979), with Bivens v. Jones, 446 U.S. 130 (1980). In Arizonans For Official English v. Arizona, 520 U.S. 43 (1997), a state employee attacking an English-only work requirement had standing at the time she brought the suit, but she resigned following a decision in the trial court, thus mooting the case before it was taken to the appellate court, which should not have acted to hear and decide it.
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Cl. 1—Cases and Controversies

...parties which dissolves the controversy. But the Court has developed several exceptions, which operate to prevent many of the cases in which mootness is alleged from being in law moot. Thus, in criminal cases, although the sentence of the convicted appellant has been served, the case "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." The "mere possibility" of such a consequence, even a "remote" one, is enough to find that one who has served his sentence has retained the requisite personal stake giving his case "an adversary cast and making it justiciable." This exception has its counterpart in civil litigation in which a lower court judgment may still have certain present or future adverse effects on the challenging party.

A second exception, the "voluntary cessation" doctrine, focuses on whether challenged conduct which has lapsed or the utilization of a statute which has been superseded is likely to recur. Thus, cessation of the challenged activity by the voluntary choice of the person engaging in it, especially if he contends that he was properly engaging in it, will moot the case only if it can be said with assurance "that there is no reasonable expectation that the wrong..."
will be repeated.” 503 Otherwise, “[t]he defendant is free to return to his old ways” and this fact would be enough to prevent mootness because of the “public interest in having the legality of the practices settled.” 504

Still a third exception concerns the ability to challenge short-term conduct which may recur in the future, which has been denominated as disputes “capable of repetition, yet evading review.” 505 Thus, in cases in which (1) the challenged action is too short in its duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again, mootness will not be found when the complained-of conduct ends. 506 The imposition of short sentences in criminal cases, 507 the issuance of injunctions to expire in a brief period, 508 and the short-term factual context of certain events, such as elections 509 or pregnancies, 510 are all instances in which this exception is frequently invoked.

An interesting and potentially significant liberalization of the law of mootness, perhaps as part of a continuing circumstances exception, is occurring in the context of class action litigation. It is now clearly established that, when the controversy becomes moot as to the plaintiff in a certified class action, it still remains alive for the class he represents so long as an adversary relationship sufficient to constitute a live controversy between the class members and the other party exists. 511 The Court was closely divided, how-

505 Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).
ever, with respect to the right of the named party, when the sub-
stantive controversy became moot as to him, to appeal as error the
denial of a motion to certify the class which he sought to represent
and which he still sought to represent. The Court held that in the
class action setting there are two aspects of the Article III
mootness question, the existence of a live controversy and the exist-
ence of a personal stake in the outcome for the named class rep-
gerative. Finding a live controversy, the Court determined
that the named plaintiff retained a sufficient interest, "a personal
stake," in his claimed right to represent the class in order to satisfy
the "imperatives of a dispute capable of judicial resolution;" that is,
his continuing interest adequately assures that "sharply presented
issues" are placed before the court "in a concrete factual setting"
with "self-interested parties vigorously advocating opposing posi-
tions." 

The immediate effect of the decision is that litigation in which
class actions are properly certified or in which they should have
been certified will rarely ever be mooted if the named plaintiff (or
in effect his attorney) chooses to pursue the matter, even though
the named plaintiff can no longer obtain any personal relief from
the decision sought. Of much greater potential significance is
the possible extension of the weakening of the "personal stake" re-
quirement in other areas, such as the representation of third-party
claims in non-class actions and the initiation of some litigation in
the form of a "private attorneys general" pursuit of adjudication.

It may be that the evolution in this area will be confined to the

513 445 U.S. at 403. Justices Powell, Stewart, Rehnquist, and Chief Justice
Burger dissented, id. at 409, arguing there could be no Article III personal stake
in a procedural decision separate from the outcome of the case. In Deposit Guaranty
the Court held that a class action was not mooted when defendant tendered to the
named plaintiffs the full amount of recovery they had individually asked for and
could hope to retain. Plaintiffs' interest in shifting part of the share of costs of litiga-
tion to those who would share in its benefits if the class were certified was deemed
to be a sufficient "personal stake", although the value of this interest was at best
speculative.

514 The named plaintiff must still satisfy the class action requirement of ade-
quacy of representation. United States Parole Comm'n v. Geraghty, 445 U.S. 388,
405-407 (1980). On the implications of Geraghty, which the Court has not returned
to, see Hart & Wechsler, supra at 225-230.
515 Geraghty, 445 U.S. at 404 & n.11.
class action context, but cabining of a “flexible” doctrine of standing may be difficult. 516

Retroactivity Versus Prospectivity.—One of the distinguishing features of an advisory opinion is that it lays down a rule to be applied to future cases, much as does legislation generally. It should therefore follow that an Article III court could not decide purely prospective cases, cases which do not govern the rights and disabilities of the parties to the cases. 517 The Court asserted that this principle is true, while applying it only to give retroactive effect to the parties to the immediate case. 518 Yet, occasionally, the Court did not apply its holding to the parties before it, 519 and in a series of cases beginning in the mid-1960s it became embroiled in attempts to limit the retroactive effect of its—primarily but not exclusively 520 constitutional-criminal law decisions. The results have been confusing and unpredictable. 521

Prior to 1965, “both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions.” 522 Statutory and judge-made law have consequences, at least to the extent that people must rely on them in making decisions and shaping their conduct. Therefore, the Court was moved to recognize that there should be a reconciling of constitutional interests reflected in a new rule of law with reliance interests found-

516 445 U.S. at 419-24 (Justice Powell dissenting).
517 For a masterful discussion of the issue in both criminal and civil contexts, see Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731 (1991).
521 Because of shifting coalitions of Justices, Justice Harlan complained, the course of retroactivity decisions “became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim.” Mackey v. United States, 401 U.S. 667, 676 (1971) (separate opinion).
522 Robinson v. Neil, 409 U.S. 505, 507 (1973). The older rule of retroactivity derived from the Blackstonian notion “that the duty of the court was not to ‘pronounce a new law, but to maintain and expound the old one.’” Linkletter v. Walker, 381 U.S. 618, 622-623 (1965) (quoting 1 W. Blackstone, Commentaries 669).
ed upon the old. In both criminal and civil cases, however, the Court’s discretion to do so has been constrained by later decisions.

When in the 1960s the Court began its expansion of the Bill of Rights and applied the rulings to the States, a necessity arose to determine the application of the rulings to criminal defendants who had exhausted all direct appeals but could still resort to 

habeas corpus, to those who had been convicted but still were on direct appeal, and to those who had allegedly engaged in conduct but who had not gone to trial. At first, the Court drew the line at cases in which judgments of conviction were not yet final, so that all persons in those situations obtained retrospective use of decisions, but the Court then promulgated standards for a balancing process that resulted in different degrees of retroactivity in different cases. Generally, in cases in which the Court declared a rule which was “a clear break with the past,” it denied retroactivity to all defendants, with the sometime exception of the appellant himself. With respect to certain cases in which a new rule was intended to overcome an impairment of the truth-finding function of a criminal trial or to cases in which the Court found that a constitutional doctrine barred the conviction or punishment of someone, full retroactivity, even to habeas claimants, was the rule. Justice Harlan strongly argued that the Court should sweep away its confusing balancing rules and hold that all defendants whose cases are still pending on direct appeal at the time of a law-changing decision should be entitled to invoke the new rule, but that no habeas claimant should be entitled to benefit.

The Court has now drawn a sharp distinction between criminal cases pending on direct review and cases pending on collateral re-

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view. For cases on direct review, “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” Justice Harlan’s habeas approach was then adopted by a plurality in Teague v. Lane and then by the Court in Penry v. Lynaugh. Thus, for collateral review in federal courts of state court criminal convictions, the general rule is that “new rules” of constitutional interpretation, those that break new ground or impose a new obligation on the States or the Federal Government, announced after a defendant’s conviction has become final, will not be applied. For such habeas cases, a “new rule” is defined very broadly to include interpretations that are a logical outgrowth or application of an earlier rule unless the result was “dictated” by that precedent. The only exceptions are for decisions placing certain conduct or defendants beyond the reach of the criminal law, and for decisions recognizing a fundamental procedural right “without which the likelihood of an accurate conviction is seriously diminished.”

What the rule is to be in civil cases, and indeed if there is to be a rule, has been disputed to a rough draw in recent cases. As was noted above, there is a line of civil cases, constitutional and nonconstitutional, in which the Court has declined to apply new rules, the result often of overruling older cases, retrospectively, sometimes even to the prevailing party in the case. As in crim-
nal cases, the creation of new law, through overrulings or other-
wise, may result in retroactivity in all instances, in pure
prospectivity, or in partial prospectivity in which the prevailing
party obtains the results of the new rule but no one else does. In
two cases raising the question when States are required to refund
taxes collected under a statute that is subsequently ruled to be un-
constitutional, the Court revealed itself to be deeply divided.536 The
question in Beam was whether the company could claim a tax re-
fund under an earlier ruling holding unconstitutional the imposi-
tion of certain taxes upon its products. The holding of a
fractionated Court was that it could seek a refund, because in the
earlier ruling the Court had applied the holding to the contesting
company, and once a new rule has been applied retroactively to the
litigants in a civil case considerations of equality and stare deci-
sis compel application to all.537 While partial or selective
prospectivity is thus ruled out, neither pure retroactivity nor pure
prospectivity is either required or forbidden.

Four Justices adhered to the principle that new law, new rules,
as defined above, may be applied purely prospectively, without viol-
ating any tenet of Article III or any other constitutional value.538
Three Justices argued that all prospectivity, whether partial or
total, violates Article III by expanding the jurisdiction of the fed-
eral courts beyond true cases and controversies.539 Apparently, the
Court now has resolved this dispute, although the principal deci-
sion is a close five-to-four result. In Harper v. Virginia Dep’t of Tax-
ation,540 the Court adopted the principle of the Griffith decision in
criminal cases and disregarded the Chevron Oil approach in civil

536 James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); American
Trucking Assn’s, Inc. v. Smith, 496 U.S. 167 (1990). The
537 Beam. The holding described in the text is expressly that of only a two-Jus-
tice plurality. 501 U.S. at 534-44 (Justices Souter and Stevens). Justice White, Justice
Blackmun, and Justice Scalia (with Justice Marshall joining the latter Justices)
concurred, id. at 544, 547, 548 (respectively), but on other, and in the instance of
the three latter Justices, and broader justifications. Justices O’Connor and Kennedy
and Chief Justice Rehnquist dissented. Id. at 549.

538 Beam, 501 U.S. at 549 (dissenting opinion of Justices O’Connor and Kennedy
and Chief Justice Rehnquist), and id. at 544 (Justice White concurring). And see
Smith, 496 U.S. at 171 (plurality opinion of Justices O’Connor, White, Kennedy, and
Chief Justice Rehnquist).

539 Beam, 501 U.S. at 547, 548 (Justices Blackmun, Scalia, and Marshall concur-
ring). These three Justices, in Smith, 496 U.S. at 205, had joined the dissenting
opinion of Justice Stevens arguing that constitutional decisions must be given retro-
active effect.

cases. Henceforth, in civil cases, the rule is: “When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” 541 Four Justices continued to adhere to Chevron Oil, however, 542 so that with one Justice each retired from the different sides one may not regard the issue as definitively settled. 543 Future cases must, therefore, be awaited for resolution of this issue.

Political Questions

It may be that the Court will refuse to adjudicate a case assuredly within its jurisdiction, presented by parties with standing in which adverseness and ripeness will exist, a case in other words presenting all the qualifications we have considered making it a justiciable controversy. The “label” for such a case is that it presents a “political question.” Although the Court has referred to the political question doctrine as “one of the rules basic to the federal system and this Court’s appropriate place within that structure,” 544 a commentator has remarked that “[i]t is, measured by any of the normal responsibilities of a phrase of definition, one of the least satisfactory terms known to the law. The origin, scope,
and purpose of the concept have eluded all attempts at precise statements.” 545 That the concept of political questions may be “more amenable to description by infinite itemization than by generalization” 546 is generally true, although the Court’s development of rationale in Baker v. Carr 547 has changed this fact radically. The doctrine may be approached in two ways, by itemization of the kinds of questions that have been labeled political and by isolation of the factors that have led to the labeling.

**Origins and Development.**—In Marbury v. Madison, 548 Chief Justice Marshall stated: “The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.” 549

But the doctrine was asserted even earlier as the Court in Ware v. Hylton 550 refused to pass on the question whether a treaty had been broken. And in Martin v. Mott, 551 the Court held that the President acting under congressional authorization had exclusive and unreviewable power to determine when the militia should be called out. But it was in Luther v. Borden 552 that the concept was first enunciated as a doctrine separate from considerations of interference with executive functions. This case presented the question of the claims of two competing factions to be the only lawful government of Rhode Island during a period of unrest in 1842. 553

Chief Justice Taney began by saying that the answer was primarily

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546 Id.
548 5 U.S. (1 Cr.) 137, 170 (1803).
549 In Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840), the Court, refusing an effort by mandamus to compel the Secretary of the Navy to pay a pension, said: “The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them.” It therefore follows that mandamus will lie against an executive official only to compel the performance of a ministerial duty, which admits of no discretion, and may not be invoked to control executive or political duties which admit of discretion. See Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).
550 3 U.S. (3 Dall.) 199 (1796).
552 48 U.S. (7 How.) 1 (1849).
a matter of state law that had been decided in favor of one faction by the state courts.\footnote{554}{Luther v. Borden, 48 U.S. (7 How.) 1, 40 (1849).}

Insofar as the Federal Constitution had anything to say on the subject, the Chief Justice continued, that was embodied in the clause empowering the United States to guarantee to every State a republican form of government,\footnote{555}{48 U.S. at 42 (citing Article IV, § 4).} and this clause committed determination of the issue to the political branches of the Federal Government. “Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.”\footnote{556}{48 U.S. at 43.}

Here, the contest had not proceeded to a point where Congress had made a decision, “[y]et the right to decide is placed there, and not in the courts.”\footnote{557}{48 U.S. at 44.}

Moreover, in effectuating the provision in the same clause that the United States should protect them against domestic violence, Congress had vested discretion in the President to use troops to protect a state government upon the application of the legislature or the governor. Before he could act upon the application of a legislature or a governor, the President “must determine what body of men constitute the legislature, and who is the governor . . . .” No court could review the President’s exercise of discretion in this respect; no court could recognize as legitimate a group vying against the group recognized by the President as the lawful government.\footnote{558}{48 U.S. at 43.}

Although the President had not actually called out the militia in Rhode Island, he had pledged support to one of the competing governments, and this pledge of military assistance if it were needed had in fact led to the capitulation of the other faction, thus making an effectual and authoritative determination not reviewable by the Court.\footnote{559}{48 U.S. at 44.}
The Doctrine Before Baker v. Carr.—Over the years, the political question doctrine has been applied to preclude adjudication of a variety of issues. Certain factors appear more or less consistently through most but not all of these cases, and it is perhaps best to indicate the cases and issues deemed political before attempting to isolate these factors.

(1) By far the most consistent application of the doctrine has been in cases in which litigants asserted claims under the republican form of government clause, whether the attack was on the government of the State itself or on some manner in which it had acted, but there have been cases in which the Court has reached the merits.

(2) Although there is language in the cases that would if applied make all questions touching on foreign affairs and foreign policy political, whether the courts have adjudicated a dispute in this area has often depended on the context in which it arises. Thus, the determination by the President whether to recognize the government of a foreign state or who is the de jure or de facto ruler of a foreign state is conclusive on the courts, but in the absence of a definitive executive action the courts will review the record to determine whether the United States has accorded a sufficient degree of recognition to allow the courts to take judicial

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560 Article IV, 4.
561 As it was on the established government of Rhode Island in Luther v. Borden, 48 U.S. (7 How.) 1 (1849). See also Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Taylor v. Beckham, 178 U.S. 548 (1900).
563 All the cases, however, predate the application of the doctrine in Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912). See Attorney General of the State of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905) (legislative creation and alteration of school districts "compatible" with a republican form of government); Forsyth v. City of Hammond, 166 U.S. 506, 519 (1897) (delegation of power to court to determine municipal boundaries does not infringe republican form of government); Minor v. Happersett, 88 U.S. (21 Wall) 162, 175-176 (1875) (denial of suffrage to women no violation of republican form of government).
notice of the existence of the state. Moreover, the courts have often determined for themselves what effect, if any, should be accorded the acts of foreign powers, recognized or unrecognized. Similarly, the Court when dealing with treaties and the treaty power has treated as political questions whether the foreign party had constitutional authority to assume a particular obligation and whether a treaty has lapsed because of the foreign state’s loss of independence or because of changes in the territorial sovereignty of the foreign state, but the Court will not only interpret the domestic effects of treaties, it will at times interpret the effects bearing on international matters. The Court has deferred to the President and Congress with regard to the existence of a state of war and the dates of the beginning and ending and of states of belligerency between foreign powers, but the deference has sometimes been forced.

(3) Ordinarily, the Court will not look behind the fact of certification that the standards requisite for the enactment of legislation or ratification of a constitutional amendment have in fact
been met, although it will interpret the Constitution to determine what the basic standards are, and it will decide certain questions if the political branches are in disagreement.

(4) Prior to Baker v. Carr, cases challenging the distribution of political power through apportionment and districting, weighted voting, and restrictions on political action were held to present nonjusticiable political questions.

From this limited review of the principal areas in which the political question doctrine seemed most established, it is possible to extract some factors that seemingly convinced the courts that the issues presented went beyond the judicial responsibility. These factors, necessarily stated baldly in so summary a fashion, would appear to be the lack of requisite information and the difficulty of obtaining it, the necessity for uniformity of decision and deference to the wider responsibilities of the political departments, and the lack of adequate standards to resolve a dispute. But present in all the political cases was (and is) the most important factor, a "prudential" attitude about the exercise of judicial review, which emphasizes that courts should be wary of deciding on the merits any issue in which claims of principle as to the issue and of expediency as to the power and prestige of courts are in sharp conflict. The political question doctrine was (and is) thus a way of avoiding

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578 Pocket Veto Case, 279 U.S. 655 (1929); Wright v. United States, 302 U.S. 583 (1938).


582 MacDougall v. Green, 335 U.S. 281 (1948) (signatures on nominating petitions must be spread among counties of unequal population).


584 Thus, see, e.g., Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839). Similar considerations underlay the opinion in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), in which Chief Justice Taney wondered how a court decision in favor of one faction would be received with Congress seating the representatives of the other faction and the President supporting that faction with military force.

a principled decision damaging to the Court or an expedient decision damaging to the principle. 586

**Baker v. Carr.**—In *Baker v. Carr*, 587 the Court undertook a major rationalization and formulation of the political question doctrine, which has considerably narrowed its application. Following *Baker*, the whole of the apportionment-districting-election restriction controversy previously immune to federal-court adjudication was considered and decided on the merits, 588 and the Court's subsequent rejection of the doctrine disclosed the narrowing in other areas as well. 589

According to Justice Brennan, who delivered the opinion of the Court, “it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’” 590 Thus, the “nonjusticiability of a political question is primarily a function of the separation of powers.” 591 “Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.” 592 Following a discussion of several areas in which the doctrine had been used, Justice Brennan continued: “It is apparent that several formulations which vary slightly according to the set-

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590 Baker v. Carr, 369 U.S. 186, 210 (1962). This formulation fails to explain cases like Moyer v. Peabody, 212 U.S. 78 (1909), in which the conclusion of the Governor of a State that insurrection existed or was imminent justifying suspension of constitutional rights was deemed binding on the Court. Cf. Sterling v. Constantin, 287 U.S. 378 (1932). The political question doctrine was applied in cases challenging the regularity of enactments of territorial legislatures. Harwood v. Wentworth, 162 U.S. 547 (1896); Lyons v. Woods, 153 U.S. 649 (1894); Clough v. Curtis, 134 U.S. 361 (1890). See also In re Sawyer, 124 U.S. 200 (1888); Walton v. House of Representatives, 265 U.S. 487 (1924).

591 369 U.S. at 210.

592 369 U.S. at 211.
terms in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers.”

“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

**Powell v. McCormack.**—Because *Baker* had apparently restricted the political question doctrine to intrafederal issues, there was no discussion of the doctrine when the Court held that it had power to review and overturn a state legislature’s refusal to seat a member-elect because of his expressed views. But in *Powell v. McCormack*, the Court was confronted with a challenge to the exclusion of a member-elect by the United States House of Representatives. Its determination that the political question doctrine did not bar its review of the challenge indicates the narrowness of application of the doctrine in its present state. Taking Justice Brennan’s formulation in *Baker* of the factors that go to make up a political question,

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593 369 U.S. at 217. It remains unclear after *Baker* whether the political question doctrine is applicable solely to intrafederal issues or only primarily, so that the existence of one or more of these factors in a case involving, say, a State, might still give rise to nonjusticiability. At one point, id. at 210, Justice Brennan says that nonjusticiability of a political question is “primarily” a function of separation of powers but in the immediately preceding paragraph he states that “it is” the intrafederal aspect “and not the federal judiciary’s relationship to the States” that raises political questions. But subsequently, id. at 226, he balances the present case, which involves a State and not a branch of the Federal Government, against each of the factors listed in the instant quotation and notes that none apply. His discussion of why guarantee clause cases are political presents much the same difficulty, id. at 222-26, inasmuch as he joins the conclusion that the clause commits resolution of such issues to Congress with the assertion that the clause contains no “criteria by which a court could determine which form of government was republican,” id. at 222, a factor not present when the equal protection clause is relied on. Id. at 226.


595 *395 U.S. 486 (1969).*

In order to determine whether there was a textual commitment, the Court reviewed the Constitution, the Convention proceedings, and English and United States legislative practice to ascertain what power had been conferred on the House to judge the qualifications of its members; finding that the Constitution vested the House with power only to look at the qualifications of age, residency, and citizenship, the Court thus decided that in passing on Powell’s conduct and character the House had exceeded the powers committed to it and thus judicial review was not barred by this factor of the political question doctrine.

Although this approach accords with the “classicist” theory of judicial review, it circumscribes the political question doctrine severely, inasmuch as all constitutional questions turn on whether a governmental body has exceeded its specified powers, a determination the Court traditionally makes, whereas traditionally the doctrine precluded the Court from inquiring whether the governmental body had exceeded its powers. In short, the political question consideration may now be one on the merits rather than a decision not to decide.

Chief Justice Warren disposed of the other factors present in political question cases in slightly more than a page. Since resolution of the question turned on an interpretation of the Constitution, a judicial function which must sometimes be exercised “at variance with the construction given the document by another branch,” there was no lack of respect shown another branch, nor, because the Court is the “ultimate interpreter of the Constitution,” will there be “multifarious pronouncements by various departments on one question,” nor, since the Court is merely interpreting the Constitution, is there an “initial policy determination” not suitable for courts. Finally, “judicially ... manageable standards” are present in the text of the Constitution. The effect of Powell is to discard all the Baker factors inhering in a political question, with the excep-

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597 395 U.S. at 319.
598 395 U.S. at 519-47. The Court noted, however, that even if this conclusion had not been reached from unambiguous evidence, the result would have followed from other considerations. Id. at 547-48.
599 See H. Wechsler, supra at 11-12. Professor Wechsler believed that congressional decisions about seating members were immune to review. Id. Chief Justice Warren noted that “federal courts might still be barred by the political question doctrine from reviewing the House’s factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution.” Powell v. McCormack, 395 U.S. 486, 521 n.42 (1969). And see id. at 507 n.27 (reservation on limitations that might exist on Congress’ power to expel or otherwise punish a sitting member).
tion of the textual commitment factor, and that was interpreted in such a manner as seldom if ever to preclude a judicial decision on the merits.

The Doctrine Reappears.—Reversing a lower federal court ruling subjecting the training and discipline of National Guard troops to court review and supervision, the Court held that under Article I, § 8, cl. 16, the organizing, arming, and disciplining of such troops are committed to Congress and by congressional enactment to the Executive Branch. “It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.”

The suggestion of the infirmity of the political question doctrine was rejected, since “because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise.” In staying a grant of remedial relief in another case, the Court strongly suggested that the actions of political parties in national nominating conventions may also present issues not meet for judicial resolution. A challenge to the Senate’s interpretation of and exercise of its impeachment powers was held to be nonjusticiable; there was a textually demonstrable commitment of the


602 413 U.S. at 11. Other considerations of justiciability, however, id. at 10, preclude using the case as square precedent on political questions. Notice that in Scheuer v. Rhodes, 416 U.S. 232, 249 (1974), the Court denied that the Gilligan v. Morgan holding barred adjudication of damage actions brought against state officials by the estates of students killed in the course of the conduct that gave rise to both cases.

603 O’Brien v. Brown, 409 U.S. 1 (1972) (granting stay). The issue was mooted by the passage of time and was not thereafter considered on the merits by the Court. Id. at 816 (remanding to dismiss as moot). It was also not before the Court in Cousins v. Wigoda, 419 U.S. 477 (1975), but it was alluded to there. See id. at 483 n.4, and id. at 491 (Justice Rehnquist concurring). See also Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Justices Rehnquist, Stewart, and Stevens, and Chief Justice Burger using political question analysis to dismiss a challenge to presidential action). But see id. at 997, 998 (Justice Powell rejecting analysis for this type of case).
issue to the Senate, and there was a lack of judicially discoverable and manageable standards for resolving the issue.\textsuperscript{604}

Despite the occasional resort to the doctrine, the Court continues to reject its application in language that confines its scope. Thus, when parties challenged the actions of the Secretary of Commerce in declining to certify, as required by statute, that Japanese whaling practices undermined the effectiveness of international conventions, the Court rejected the Government’s argument that the political question doctrine precluded decision on the merits. The Court’s prime responsibility, it said, is to interpret statutes, treaties, and executive agreements; the interplay of the statutes and the agreements in this case implicated the foreign relations of the Nation. “But under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”\textsuperscript{605}

After requesting argument on the issue, the Court held that a challenge to a statute on the ground that it did not originate in the House of Representatives as required by the origination clause was justiciable.\textsuperscript{606} Turning back reliance on the various factors set out in Baker, in much the same tone as in Powell v. McCormack, the Court continued to evidence the view that only questions textually committed to another branch are political questions. Invalidation of a statute because it did not originate in the right House would not demonstrate a “lack of respect” for the House that passed the bill. “[D]isrespect,” in the sense of rejecting Congress’ reading of the Constitution, “cannot be sufficient to create a political question. If it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible.”\textsuperscript{607} That the House of Representatives has the power and incentives to protect its prerogatives by not passing a bill violating the origination clause did not make this case nonjusticiable. “[T]he fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question.”\textsuperscript{608} The Court also rejected the contention that, because the case did not involve

\textsuperscript{604} Nixon v. United States, 506 U.S. 224 (1993). The Court pronounced its decision as perfectly consonant with Powell v. McCormack. Id. at 236-38.


\textsuperscript{607} 495 U.S. at 390 (emphasis in original).

\textsuperscript{608} 495 U.S. at 393.
a matter of individual rights, it ought not be adjudicated. Political questions are not restricted to one kind of claim, but the Court frequently has decided separation-of-power cases brought by people in their individual capacities. Moreover, the allocation of powers within a branch, just as the separation of powers among branches, is designed to safeguard liberty. Finally, the Court was sanguine that it could develop “judicially manageable standards” for disposing of origination clause cases, and, thus, it did not view the issue as political in that context.

In short, the political question doctrine may not be moribund, but it does seem applicable to a very narrow class of cases. Significantly, the Court made no mention of the doctrine while resolving issues arising from Florida’s recount of votes in the closely contested 2000 presidential election, despite the fact that the Constitution vests in Congress the authority to count electoral votes, and further provides for selection of the President by the House of Representatives if no candidate receives a majority of electoral votes.

JUDICIAL REVIEW

The Establishment of Judicial Review

Judicial review is one of the distinctive features of United States constitutional law. It is no small wonder, then, to find that the power of the federal courts to test federal and state legislative enactments and other actions by the standards of what the Constitution grants and withholds is nowhere expressly conveyed. But it is hardly noteworthy that its legitimacy has been challenged from the first, and, while now accepted generally, it still has detractors and its supporters disagree about its doctrinal basis and its application. Although it was first asserted in Marbury v.

609 495 U.S. at 393-95.
610 495 U.S. at 395-96.
612 12th Amendment.
Madison to strike down an act of Congress as inconsistent with the Constitution, judicial review did not spring full-blown from the brain of Chief Justice Marshall. The concept had been long known, having been utilized in a much more limited form by Privy Council review of colonial legislation and its validity under the colonial charters, and there were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.

Practically all of the framers who expressed an opinion on the issue in the Convention appear to have assumed and welcomed the existence of court review of the constitutionality of legislation,
and prior to Marbury the power seems very generally to have been assumed to exist by the Justices themselves. In enacting the Judiciary Act of 1789, Congress explicitly made provision for the exercise of the power, and in other debates questions of constitu-

1799: "On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 412 (F. Wharton ed., 1849).

Madison's subsequent changes of position are striking. His remarks in the Philadelphia Convention, in the Virginia ratifying convention, and in The Federalist, cited above, all unequivocally favor the existence of judicial review. And in Congress arguing in support of the constitutional amendments providing a bill of rights, he observed: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," 1 ANNALS OF CONGRESS 457 (1789); 5 WRITINGS OF JAMES MADISON 385 (G. Hunt ed., 1904). Yet, in a private letter in 1788, he wrote: "In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them; and as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with the final character. This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper." Id. at 294. At the height of the dispute over the Alien and Sedition Acts, Madison authored a resolution ultimately passed by the Virginia legislature, which, though milder, and more restrained than one authored by Jefferson and passed by the Kentucky legislature, asserted the power of the States, though not of one State or of the state legislatures alone, to "interpose" themselves to halt the application of an unconstitutional law. 3 I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION, 1787-1800 460-464, 467-471 (1950); Report on the Resolutions of 1798, 6 WRITINGS OF JAMES MADISON, op. cit., 341-406. Embarrassed by the claim of the nullificationists in later years that his resolution supported their position, Madison distinguished his and their positions and again asserted his belief in judicial review. 6 I. Brant, supra, 481-485, 488-489.

The various statements made and positions taken by the Framers have been culled and categorized and argued over many times. For a recent compilation reviewing the previous efforts, see R. Berger, supra, chs. 3-4.

618 Thus, the Justices on circuit refused to administer a pension act on grounds of its unconstitutionally, see Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), and supra, "Finality of Judgment as an Attribute of Judicial Power". Chief Justice Jay and other Justices wrote that the imposition of circuit duty on Justices was unconstitutional, although they never mailed the letter, supra in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), a feigned suit, the constitutionality of a federal law was argued before the Justices and upheld on the merits, in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1797), a state law was overturned, and dicta in several opinions asserted the principle. See Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Justice Iredell), and several Justices on circuit, quoted in J. Goebel, supra at 589-592.

619 In enacting the Judiciary Act of 1789, 1 Stat. 73, Congress chose not to vest "federal question" jurisdiction in the federal courts but to leave to the state courts the enforcement of claims under the Constitution and federal laws. In § 25, 1 Stat. 85, Congress provided for review by the Supreme Court of final judgments in state courts (1) "... where is drawn in question the validity of a treaty or statute of, or
tionality and of judicial review were prominent. Nonetheless, although judicial review is consistent with several provisions of the Constitution and the argument for its existence may be derived from these provisions, they do not compel the conclusion that the Framers intended judicial review nor that it must exist. It was Chief Justice Marshall's achievement that, in doubtful circumstances and an awkward position, he carried the day for the device, which, though questioned, has expanded and become solidified at the core of constitutional jurisprudence.

Marbury v. Madison.—Chief Justice Marshall's argument for judicial review of congressional acts in *Marbury v. Madison*  had been largely anticipated by Hamilton. For example, he had written: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."  

At the time of the change of Administration from Adams to Jefferson, several commissions of appointment to office had been signed but not delivered and were withheld on Jefferson's express instruction. Marbury sought to compel the delivery of his commission by seeking a writ of mandamus in the Supreme Court in the exercise of its original jurisdiction against Secretary of State Madison. Jurisdiction was based on § 13 of the Judiciary Act of 1789, which Marbury, and ultimately the Supreme Court, interpreted to authorize the Court to issue writs of mandamus in suits in its...
original jurisdiction. Though deciding all the other issues in Marbury’s favor, the Chief Justice wound up concluding that the § 13 authorization was an attempt by Congress to expand the Court’s original jurisdiction beyond the constitutional prescription and was therefore void.

“The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States”; Marshall began his discussion of this final phase of the case, “but, happily, not of an intricacy proportioned to its interest.” First, certain fundamental principles warranting judicial review were noticed. The people had come together to establish a government. They provided for its organization and assigned to its various departments their powers and established certain limits not to be transgressed by those departments. The limits were expressed in a written constitution, which would serve no purpose “if these limits may, at any time, be passed by those intended to be restrained.” Because the Constitution is “a superior paramount law,” it is unchangeable by ordinary legislative means and “a legislative act contrary to the constitution is not law.” “If an act of the legislature, repugnant to the constitution, is void, does it notwithstanding its invalidity, bind the courts, and oblige them to give it effect?” The answer, thought the Chief Justice, was obvious. “It is emphatically the province and duty of the judicial department to say what the law is…. If two laws conflict with each other, the courts must decide on the operation of each.”

“So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding

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625 The section first denominated the original jurisdiction of the Court and then described the Court’s appellate jurisdiction. Following and indeed attached to the sentence on appellate jurisdiction, being separated by a semi-colon, is the language saying “and shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.” The Chief Justice could easily have interpreted the authority to have been granted only in cases under appellate jurisdiction or as authority conferred in cases under both original and appellate jurisdiction when the cases are otherwise appropriate for one jurisdiction or the other. Textually, the section does not compel a reading that Congress was conferring on the Court an original jurisdiction to issue writs of mandamus per se.


627 5 U.S. at 176. One critic has written that by this question Marshall “had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant.” A. Bickel, supra at 3. Marshall, however, soon reached this question, though more by way of assertion than argument. 5 U.S. (1 Cr.) at 177-78.

628 5 U.S. at 176-77.
the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”

“If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.”629 To declare otherwise, Chief Justice Marshall said, would be to permit a legislative body to pass at pleasure the limits imposed on its powers by the Constitution.630

The Chief Justice then turned from the philosophical justification for judicial review as arising from the very concept of a written constitution, to specific clauses of the Constitution. The judicial power, he observed, was extended to “all cases arising under the constitution.”631 It was “too extravagant to be maintained that the Framers had intended that a case arising under the constitution should be decided without examining the instrument under which it arises.”632 Suppose, he said, that Congress laid a duty on an article exported from a State or passed a bill of attainder or an ex post facto law or provided that treason should be proved by the testimony of one witness. Would the courts enforce such a law in the face of an express constitutional provision? They would not, he continued, because their oath required by the Constitution obligated them to support the Constitution and to enforce such laws would violate the oath.633 Finally, the Chief Justice noticed the supremacy clause, which gave the Constitution precedence over laws and treaties and provided that only laws “which shall be made in pursuance of the constitution” are to be the supreme laws of the land.634

The decision in Marbury v. Madison has never been disturbed, although it has been criticized and has had opponents throughout our history. It not only carried the day in the federal courts, but from its announcement judicial review by state courts of local legis-

629 5 U.S. at 177-78.

630 5 U.S. at 178.

631 5 U.S. at 178. The reference is, of course, to the first part of clause 1, § 2, Art. III: “The judicial power shall extend to all Cases ... arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority....” Compare A. Bickel, supra at 5-6, with R. Berger, supra at 189-222.

632 5 U.S. at 179.

633 5 U.S. at 179-80. The oath provision is contained in Art. VI, cl. 3. Compare A. Bickel, supra at 7-8, with R. Berger, supra at 237-244.

634 5 U.S. at 180. Compare A. Bickel, supra at 8-12, with R. Berger, supra at 223-284.
Judicial Review and National Supremacy.—Even many persons who have criticized the concept of judicial review of congressional acts by the federal courts have thought that review of state acts under federal constitutional standards is soundly based in the supremacy clause, which makes the Constitution and constitutional laws and treaties the supreme law of the land, to effectuate which Congress enacted the famous § 25 of the Judiciary Act of 1789. Five years before Marbury v. Madison, the Court held invalid a state law as conflicting with the terms of a treaty, and seven years after Chief Justice Marshall’s opinion a state law was voided as conflicting with the Constitution.

Virginia provided a states’ rights challenge to a broad reading of the supremacy clause and to the validity of § 25 in Martin v. Hunter’s Lessee and in Cohens v. Virginia. In both cases, it was argued that while the courts of Virginia were constitutionally obliged to prefer “the supreme law of the land,” as set out in the supremacy clause, over conflicting state constitutional provisions and laws, it was only by their own interpretation of the supreme law that they as courts of a sovereign State were bound. Furthermore, it was contended that cases did not “arise” under the Constitution unless they were brought in the first instance by someone claiming such a right, from which it followed that “the judicial power of the United States” did not “extend” to such cases unless they were brought in the first instance in the courts of the United States. But answered Chief Justice Marshall: “A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the
construction of either." 

Passing on to the power of the Supreme Court to review such decisions of the state courts, he said: "Let the nature and objects of our Union be considered: let the great fundamental principles on which the fabric stands, be examined: and we think, the result must be, that there is nothing so extravagantly absurd, in giving to the Court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction."

Limitations on the Exercise of Judicial Review

**Constitutional Interpretation.**—Under a written constitution, which is law and is binding on government, the practice of judicial review raises questions of the relationship between constitutional interpretation and the Constitution—the law which is construed. The legitimacy of construction by an unelected entity in a republican or democratic system becomes an issue whenever the construction is controversial, as it was most recently in the 1960s to the present. Full consideration would carry us far afield, in view of the immense corpus of writing with respect to the proper mode of interpretation during this period.

Scholarly writing has identified six forms of constitutional argument or construction that may be used by courts or others in deciding a constitutional issue. These are (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential. The historical argument is largely, though not exclusively, associated with the theory of original intent or original understanding, under which constitutional and legal interpretation is limited to attempting to

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642 19 U.S. at 379.

643 19 U.S. at 422-23. Justice Story traversed much of the same ground in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). In Ableman v. Booth, 62 U.S. (21 How.) 506 (1859), the Wisconsin Supreme Court had declared an act of Congress invalid and disregarded a writ of error from the Supreme Court, raising again the Virginia arguments. Chief Justice Taney emphatically rebuked the assertions on grounds both of dual sovereignty and national supremacy. His emphasis on the indispensability of the federal judicial power to maintain national supremacy, to protect the States from national encroachments, and to make the Constitution and laws of the United States uniform all combine to enhance the federal judicial power to a degree perhaps beyond that envisaged even by Story and Marshall. As late as Williams v. Bruffy, 102 U.S. 248 (1880), the concepts were again thrashed out with the refusal of a Virginia court to enforce a mandate of the Supreme Court. And see Cooper v. Aaron, 358 U.S. 1 (1958).

644 The six forms, or "modalities" as he refers to them, are drawn from P. Bobbitt, Constitutional Fate—Theory of the Constitution (1982); P. Bobbitt, Constitutional Interpretation (1991). Of course, other scholars may have different categories, but these largely overlap these six forms. E.g., Fallon, A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987); Post, Theories of Constitutional Interpretation, in Law and the Order of Culture 13-41 (R. Post ed., 1991).
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discern the original meaning of the words being construed as that meaning is revealed in the intentions of those who created the law or the constitutional provision in question. The textual argument, closely associated in many ways to the doctrine of original intent, concerns whether the judiciary or another is bound by the text of the Constitution and the intentions revealed by that language, or whether it may go beyond the four corners of the constitutional document to ascertain the meaning, a dispute encumbered by the awkward constructions, interpretivism and noninterpretivism.\textsuperscript{645} Using a structural argument, one seeks to infer structural rules from the relationships that the Constitution mandates.\textsuperscript{646} The remaining three modes sound in reasoning not necessarily tied to original intent, text, or structure, though they may have some relationship. Doctrinal arguments proceed from the application of precedents. Prudential arguments seek to balance the costs and benefits of a particular rule. Ethical arguments derive rules from those moral commitments of the American ethos that are reflected in the Constitution.

Although the scholarly writing ranges widely, a much more narrow scope is seen in the actual political-judicial debate. Rare is the judge who will proclaim a devotion to ethical guidelines, such, for example, as natural-law precepts. The usual debate ranges from those adherents of strict construction and original intent to those with loose construction and adaptation of text to modern-day conditions.\textsuperscript{647} However, it is with regard to more general rules of prudence and self-restraint that one usually finds the enunciation and application of limitations on the exercise of constitutional judicial review.

**Prudential Considerations.**—Implicit in the argument of *Marbury v. Madison*\textsuperscript{648} is the thought that with regard to cases


\textsuperscript{646} This mode is most strongly associated with C. Black, *Structure and Relationship in Constitutional Law* (1969).


\textsuperscript{648} 5 U.S. (1 Cr.) 137 (1803).
meeting jurisdictional standards, the Court is obligated to take and decide them. Chief Justice Marshall spelled the thought out in *Cohens v. Virginia*: 649 “It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.” As the comment recognizes, because judicial review grows out of the fiction that courts only declare what the law is in specific cases 650 and are without will or discretion, 651 its exercise is surrounded by the inherent limitations of the judicial process, most basically, of course, by the necessity of a case or controversy and the strands of the doctrine comprising the concept of justiciability. 652 But, although there are hints of Chief Justice Marshall’s activism in some modern cases, 653 the Court has always adhered, at times more strictly than at other times, to several discretionary rules or concepts of restraint in the exercise of judicial review, the practice of which is very much contrary to the quoted dicta from *Cohens*. These rules, it should be noted, are in addition to the vast discretionary power which the Supreme Court has to grant or deny review of judgements in lower courts, a discretion fully authorized with *certiorari* jurisdiction but also evident with some appeals. 654

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652 The political question doctrine is another limitation arising in part out of inherent restrictions and in part from prudential considerations. For a discussion of limitations utilizing both stands, see *Ashwander v. TVA*, 297 U.S. 288, 346-356 (1936) (Justice Brandeis concurring).
654 28 U.S.C. §§ 1254-1257. See F. Frankfurter & J. Landis, supra at ch. 7. “The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court’s appellate jurisdiction, the petitioner has already received one appellate review of his case . . . . If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present ques-
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At various times, the Court has followed more strictly than other times the prudential theorems for avoidance of decision-making when it deemed restraint to be more desirable than activism. 655

The Doctrine of “Strict Necessity”.—The Court has repeatedly declared that it will decide constitutional issues only if strict necessity compels it to do so. Thus, constitutional questions will not be decided in broader terms than are required by the precise state of facts to which the ruling is to be applied, nor if the record presents some other ground upon which to decide the case, nor at the instance of one who has availed himself of the benefit of a statute or who fails to show he is injured by its operation, nor if a construction of the statute is fairly possible by which the question may be fairly avoided. 656

 Speaking of the policy of avoiding the decision of constitutional issues except when necessary, Justice Rutledge wrote: “The policy’s ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.” 657
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Sec. 2—Judicial Power and Jurisdiction

Cl. 1—Cases and Controversies

The Doctrine of Clear Mistake.—A precautionary rule early formulated and at the base of the traditional concept of judicial restraint was expressed by Professor James Bradley Thayer to the effect that a statute could be voided as unconstitutional only “when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”658 Whether phrased this way or phrased so that a statute is not to be voided unless it is unconstitutional beyond all reasonable doubt, the rule is of ancient origin659 and of modern adherence.660 In operation, however, the rule is subject to two influences, which seriously impair its efficacy as a limitation. First, the conclusion that there has been a clear mistake or that there is no reasonable doubt is that drawn by five Justices if a full Court sits. If five Justices of learning and detachment to the Constitution are convinced that a statute is invalid and if four others of equal learning and attachment are convinced it is valid, the convictions of the five prevail over the convictions or doubts of the four. Second, the Court has at times made exceptions to the rule in certain categories of cases. Statutory interferences with “liberty of contract” were once presumed to be unconstitutional until proved to be valid;661 more recently, presumptions of invalidity have expressly or impliedly been applied against statutes alleged to interfere with freedom of expression and of religious freedom, which have been said to occupy a “preferred position” in the constitutional scheme of things.662

Exclusion of Extra-Constitutional Tests.—Another maxim of constitutional interpretation is that courts are concerned only with the constitutionality of legislation and not with its motives,
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policy, or wisdom, or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitution. In various forms this maxim has been repeated to such an extent that it has become trite and has increasingly come to be incorporated in cases in which a finding of unconstitutionality has been made as a reassurance of the Court’s limited review. And it should be noted that at times the Court has absorbed natural rights doctrines into the text of the Constitution, so that it was able to reject natural law per se and still partake of its fruits and the same thing is true of the laissez faire principles incorporated in judicial decisions from about 1890 to 1937.

**Presumption of Constitutionality.**—“It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed,” wrote Justice Bushrod Washington, “to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt.” A corollary of this maxim is that if the constitutional question turns upon circumstances, courts will presume the existence of a state of facts which would justify the legislation that is challenged. It seems apparent, however, that with regard to laws which trench upon First Amendment freedoms and perhaps other rights guaranteed by the Bill of Rights such deference is far less than it would be toward statutory regulation of economic matters.

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663 “We fully understand ...the powerful argument that can be made against the wisdom of this legislation, but on that point we have no concern.” Noble State Bank v. Haskell, 219 U.S. 575, 580 (1911) (Justice Holmes for the Court). See also Trop v. Dulles, 356 U.S. 86, 120 (1958) (Justice Frankfurter dissenting).

A supposedly hallowed tenet is that the Court will not look to the motives of legislators in determining the validity of a statute. Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); United States v. O’Brien, 391 U.S. 367 (1968); Palmer v. Thompson, 403 U.S. 217 (1971). Yet an intent to discriminate is a requisite to finding at least some equal protection violations, Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and a secular or religious purpose is one of the parts of the tripartite test under the establishment clause. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), and id. at 665 (dissent). Other constitutional decisions as well have turned upon the Court’s assessment of purpose or motive. E.g., Gomillion v. Lightfoot, 364 U.S. 339 (1960); Child Labor Tax Case, 259 U.S. 20 (1922).


**Disallowance by Statutory Interpretation.**—If it is possible to construe a statute so that its validity can be sustained against a constitutional attack, a rule of prudence is that it should be so construed, even though in some instances this maxim has caused the Court to read a statute in a manner which defeats or impairs the legislative purpose. Of course, the Court stresses that “[w]e cannot press statutory construction ‘to the point of disingenuous evasion’ even to avoid a constitutional question.” The maxim is not followed if the provision would survive constitutional attack or if the text is clear. Closely related to this principle is the maxim that when part of a statute is valid and part is void, the courts will separate the valid from the invalid and save as much as possible. Statutes today ordinarily expressly provide for separability, but it remains for the courts in the last resort to determine whether the provisions are separable.

**Stare Decisis in Constitutional Law.**—Adherence to precedent ordinarily limits and shapes the approach of courts to decision of a presented question. “Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right .... This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error so fruitful in the physical sciences, is appropriate also in

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69 U.S. 420, 426 (1961). The development of the “compelling state interest” test in certain areas of equal protection litigation also bespeaks less deference to the legislative judgment.


64 Carter v. Carter Coal Co., 298 U.S. 238, 312-16 (1936). See also, id. at 321-24 (Chief Justice Hughes dissenting).
the judicial function.” 675  

Stare decisis is a principle of policy, not a mechanical formula of adherence to the latest decision “however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.” 676  The limitation of stare decisis seems to have been progressively weakened since the Court proceeded to correct “a century of error” in Pollock v. Farmers’ Loan & Trust Co. 677  Since then, more than 200 decisions have been overturned, 678  and the merits of stare decisis seem more often
celebrated in dissents than in majority opinions. Of lesser formal effect than outright overruling but with roughly the same result is a Court practice of "distinguishing" precedents, which often leads to an overturning of the principle enunciated in the case while leaving the actual case more or less alive.

Conclusion.—The common denominator of all these maxims of prudence is the concept of judicial restraint, of judge's restraint. "We do not sit," said Justice Frankfurter, "like kadi under a tree, dispensing justice according to considerations of individual expediency." "[A] jurist is not to innovate at pleasure," wrote Justice Cardozo. "He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life." All Justices will, of course, claim adherence to proper restraint, but in some cases at least, such as Justice Frankfurter's dissent in the Flag Salute Case, the practice can be readily observed. The degree, however, of restraint, the degree to which legislative enactments should be subjected to judicial scrutiny, is a matter of uncertain and shifting opinion.

easily revise those decisions, but compare id. at 175 n.1, with id. at 190-205 (Justice Brennan concurring in the judgment in part and dissenting in part). See also Flood v. Kuhn, 407 U.S. 258 (1972).


680 Notice that in Planned Parenthood v. Casey, 505 U.S. 833 (1992), while the Court purported to uphold and retain the "central meaning" of Roe v. Wade, it overruled several aspects of that case's requirements. And see, e.g., the Court's treatment of Pope v. Williams, 193 U.S. 621 (1904), in Dunn v. Blumstein, 405 U.S. 330, 337, n.7 (1972). And see id. at 361 (Justice Blackmun concurring.)


JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

Cases Arising Under the Constitution, Laws, and Treaties of the United States

Cases arising under the Constitution are cases that require an interpretation of the Constitution for their correct decision. They arise when a litigant claims an actual or threatened invasion of his constitutional rights by the enforcement of some act of public authority, usually an act of Congress or of a state legislature, and asks for judicial relief. The clause furnishes the principal textual basis for the implied power of judicial review of the constitutionality of legislation and other official acts.

Development of Federal Question Jurisdiction.—Almost from the beginning, the Convention demonstrated an intent to create “federal question” jurisdiction in the federal courts with regard to federal laws; such cases involving the Constitution and treaties were added fairly late in the Convention as floor amendments. But when Congress enacted the Judiciary Act of 1789, it did not confer general federal question jurisdiction on the inferior federal courts, but left litigants to remedies in state courts with appeals to the United States Supreme Court if judgment went against federal constitutional claims. Although there were a few jurisdictional provisions enacted in the early years, it was not until the period following the Civil War that Congress, in order to protect newly created federal civil rights and in the flush of nationalist sentiment, first created federal jurisdiction in civil rights cases, and then in 1875 conferred general federal question jurisdiction on the lower federal courts. Since that time, the trend generally has been toward conferral of ever-increasing grants of ju-

686 M. Farrand, supra at 22, 211-212, 220, 244; 2 id. at 146-47, 186-87.
687 Id. at 423-24, 430, 431.
688 1 Stat. 73. The district courts were given cognizance of “suits for penalties and forfeitures incurred, under the laws of the United States” and “of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States . . . .” Id. at 77. Plenary federal question jurisdiction was conferred by the Act of February 13, 1801,§ 11, 2 Stat. 92, but this law was repealed by the Act of March 8, 1802, 2 Stat. 132. On § 25 of the 1789 Act, providing for appeals to the Supreme Court from state court constitutional decisions, see supra.
689 Act of April 10, 1790, § 5, 1 Stat. 111, as amended, Act of February 21, 1793, § 6, 1 Stat. 322 (suits relating to patents). Limited removal provisions were also enacted.
When a Case Arises Under.—The 1875 statute and its present form both speak of civil suits “arising under the Constitution, laws, or treaties of the United States,” the language of the Constitution. Thus, many of the early cases relied heavily upon Chief Justice Marshall’s construction of the constitutional language to interpret the statutory language. The result was probably to accept more jurisdiction than Congress had intended to convey. Later cases take a somewhat more restrictive course.

Determination whether there is federal question jurisdiction is made on the basis of the plaintiff’s pleadings and not upon the response or the facts as they may develop. Plaintiffs seeking access to federal courts on this ground must set out a federal claim which is “well-pleaded” and the claim must be real and substantial and may not be without color of merit. Plaintiffs may not anticipate that defendants will raise a federal question in answer to the action. But what exactly must be pleaded to establish a federal question is a matter of considerable uncertainty in many cases. It is no longer the rule that, when federal law is an ingredient of the claim, there is a federal question.

Many suits will present federal questions because a federal law creates the action. Perhaps Justice Cardozo presented the most
understandable line of definition, while cautioning that “[t]o define broadly and in the abstract ‘a case arising under the Constitution or laws of the United States’ has hazards [approaching futility].” 701

How and when a case arises ‘under the Constitution or laws of the United States’ has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action…. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another…. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto…. 702

It was long evident, though the courts were not very specific about it, that the federal question jurisdictional statute is and always was narrower than the constitutional “arising under” jurisdictional standard. 703 Chief Justice Marshall in Osborn was interpreting the Article III language to its utmost extent, but the courts sometimes construed the statute equivalently, with doubtful results. 704

Removal From State Court to Federal Court.—A limited right to “remove” certain cases from state courts to federal courts was granted to defendants in the Judiciary Act of 1789, 705 and from then to 1872 Congress enacted several specific removal statutes, most of them prompted by instances of state resistance to the enforcement of federal laws through harassment of federal officers. 706 The 1875 Act conferring general federal question jurisdiction on the federal courts provided for removal of such cases by ei-
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Cl. 1—Cases and Controversies

The present statute provides for the removal by a defendant of any civil action which could have been brought originally in a federal district court, with no diversity of citizenship required in “federal question” cases. A special civil rights removal statute permits removal of any civil or criminal action by a defendant who is denied or cannot enforce in the state court a right under any law providing for equal civil rights of persons or who is being proceeded against for any act under color of authority derived from any law providing for equal rights.

The constitutionality of congressional provisions for removal was challenged and readily sustained. Justice Story analogized removal to a form of exercise of appellate jurisdiction, and a later Court saw it as an indirect mode of exercising original jurisdiction and upheld its constitutionality. In Tennessee v. Davis, which involved a state attempt to prosecute a federal internal revenue agent who had killed a man while seeking to seize an illicit distilling apparatus, the Court invoked the right of the National Government to defend itself against state harassment and restraint.

The power to provide for removal was discerned in the necessary and proper clause authorization to Congress to pass laws to carry into execution the powers vested in any other department or officer, here the judiciary. The judicial power of the United States, said the Court, embraces alike civil and criminal cases arising under the Constitution and laws and the power asserted in civil cases may be asserted in criminal cases. A case arising under the Constitution and laws “is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the


710 Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 347-351 (1816). Story was not here concerned with the constitutionality of removal but with the constitutionality of Supreme Court review of state judgments.

711 Chicago & N.W. Ry. v. Whitton’s Administrator, 80 U.S. (13 Wall.) 270 (1872). Removal here was based on diversity of citizenship. See also The Moses Taylor, 71 U.S. (4 Wall.) 411, 429-430 (1867); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1868).

712 100 U.S. 257 (1880).

713 100 U.S. at 263-64.
legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted.

“...The constitutional right of Congress to authorize the removal of civil actions arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of September 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared.”

The Court has broadly construed the modern version of the removal statute at issue in this case so that it covers all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. Other removal statutes, notably the civil rights removal statute, have not been so broadly interpreted.

**Corporations Chartered by Congress.**—In *Osborn v. Bank of the United States*, Chief Justice Marshall seized upon the authorization for the Bank to sue and be sued as a grant by Congress to the federal courts of jurisdiction in all cases to which the bank was a party. Consequently, upon enactment of the 1875 law, the door was open to other federally chartered corporations to seek relief in federal courts. This opportunity was made actual when the Court in the *Pacific Railroad Removal Cases* held that tort actions against railroads with federal charters could be removed to federal courts solely on the basis of federal incorporation. In a se-

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714 100 U.S. at 264-65.
717 U.S. (9 Wheat.) 738 (1824).
718 The First Bank could not sue because it was not so authorized. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cr.) 61 (1809). The language, which Marshall interpreted as conveying jurisdiction, was long construed simply to give a party the right to sue and be sued without itself creating jurisdiction. *Bankers Trust Co. v. Texas & P. Ry.*, 241 U.S. 295 (1916), but in *American National Red Cross v. S. G.*, 505 U.S. 247 (1992), a 5-to-4 decision, the Court held that when a federal statutory charter expressly mentions the federal courts in its “sue and be sued” provision the charter creates original federal-question jurisdiction as well, although a general authorization to sue and be sued in courts of general jurisdiction, including federal courts, without expressly mentioning them, does not confer jurisdiction.
719 115 U.S. 1 (1885).
ries of acts, Congress deprived national banks of the right to sue in federal court solely on the basis of federal incorporation in 1882, deprived railroads holding federal charters of this right in 1915, and finally in 1925 removed from federal jurisdiction all suits brought by federally chartered corporations on the sole basis of such incorporation, except where the United States holds at least half of the stock.

Federal Questions Resulting from Special Jurisdictional Grants.—In the Labor-Management Relations Act of 1947, Congress authorized federal courts to entertain suits for violation of collective bargaining agreements without respect to the amount in controversy or the citizenship of the parties. Although it is likely that Congress meant no more than that labor unions could be sued in law or equity, in distinction from the usual rule, the Court construed the grant of jurisdiction to be more than procedural and to empower federal courts to apply substantive federal law, divined and fashioned from the policy of national labor laws, in such suits. State courts are not disabled from hearing actions brought under the section, but they must apply federal law. Developments under this section illustrate the substantive importance of many jurisdictional grants and indicate how the workload of the federal courts may be increased by unexpected interpretations of such grants.

720 § 4, 22 Stat. 162.
721 § 5, 38 Stat. 803.
724 Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Earlier the Court had given the section a restricted reading in Association of Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955), at least in part because of constitutional doubts that § 301 cases in the absence of diversity of citizenship presented a federal question sufficient for federal jurisdiction. Id. at 449-52, 459-61 (opinion of Justice Frankfurter). In Lincoln Mills, the Court resolved this difficulty by ruling that federal law was at issue in § 301 suits and thus cases arising under § 301 presented federal questions. 353 U.S. at 457. The particular holding of Westinghouse, that no jurisdiction exists under § 301 for suits to enforce personal rights of employees claiming unpaid wages, was overturned in Smith v. Evening News Ass'n, 371 U.S. 195 (1962).
726 Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). State law is not, however, to be totally disregarded. “State law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy …. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.” Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).
727 For example, when federal regulatory statutes create new duties without explicitly creating private federal remedies for their violation, the readiness or unreadiness of the federal courts to infer private causes of action is highly significant. While inference is an acceptable means of judicial enforcement of statutes, e.g., Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916), the Court began broadly to con-
Sec. 2—Judicial Power and Jurisdiction  Cl. 1—Cases and Controversies

Civil Rights Act Jurisdiction.—Perhaps the most important of the special federal question jurisdictional statutes is that conferring jurisdiction on federal district courts to hear suits challenging the deprivation under color of state law or custom of any right, privilege, or immunity secured by the Constitution or by any act of Congress providing for equal rights. Because it contains no ju-


728 28 U.S.C. § 1343(3). The cause of action to which this jurisdictional grant applies is 42 U.S.C. § 1983, making liable and subject to other redress any person who, acting under color of state law, deprives any person of any rights, privileges, or immunities secured by the Constitution and laws of the United States. For discussion of the history and development of these two statutes, see Monroe v. Pape, 365 U.S. 167 (1961); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Maine v. Thiboutot, 448 U.S. 1 (1980). Although the two statutes originally had the same wording in respect to “the Constitution and laws of the United States,” when the substantive and jurisdictional aspects were separated and codified, § 1983 retained the all-inclusive “laws” provision, while § 1343(3) read “any Act of Congress providing for equal rights.” The Court has interpreted the language of the two statutes literally, so that while claims under laws of the United States need not relate to equal rights but may encompass welfare and regulatory laws, Maine v. Thiboutot; but see Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), such suits if they do not spring from an act providing for equal rights may not be brought under § 1343(3). Chapman v. Houston Welfare Rights Org., supra. This was important when there was a jurisdictional amount provision in the federal question statute, but is of little significance today.
risdictional amount provision 729 (while the general federal question statute until recently did) 730 and because the Court has held inapplicable the judicially-created requirement that a litigant exhaust his state remedies before bringing federal action, 731 the statute has been heavily utilized, resulting in a formidable caseload, by plaintiffs attacking racial discrimination, malapportionment and suffrage restrictions, illegal and unconstitutional police practices, state restrictions on access to welfare and other public assistance, and a variety of other state and local governmental practices. 732 Congress has encouraged utilization of the two statutes by providing for attorneys’ fees under § 1983, 733 and by enacting related and specialized complementary statutes. 734 The Court in recent years has generally interpreted § 1983 and its jurisdictional statute broadly but it has also sought to restrict to some extent the kinds of claims that may be brought in federal courts. 735 It should be noted that § 1983 and § 1343(3) need not always go together, inasmuch as § 1983 actions may be brought in state courts. 736

Pendent Jurisdiction.—Once jurisdiction has been acquired through allegation of a federal question not plainly wanting in substance, 737 a federal court may decide any issue necessary to the disposition of a case, notwithstanding that other non-federal ques-

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729 See Hague v. CIO, 307 U.S. 496 (1939). Following Hague, it was argued that only cases involving personal rights, that could not be valued in dollars, could be brought under § 1343(3), and that cases involving property rights, which could be so valued, had to be brought under the federal question statute. This attempted distinction was rejected in Lynch v. Household Finance Corp., 405 U.S. 538, 546-548 (1972). On the valuation of constitutional rights, see Carey v. Piphus, 435 U.S. 247 (1978). And see Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (compensatory damages must be based on injury to the plaintiff, not on some abstract valuation of constitutional rights).


732 Thus, such notable cases as Brown v. Board of Education, 347 U.S. 483 (1954), and Baker v. Carr, 369 U.S. 186 (1962), arose under the statutes.


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tions of fact and law may be involved therein.\textsuperscript{738} “Pendent jurisdiction,” as this form is commonly called, exists whenever the state and federal claims “derive from a common nucleus of operative fact” and are such that a plaintiff “would ordinarily be expected to try them all in one judicial proceeding.”\textsuperscript{739} Ordinarily, it is a rule of prudence that federal courts should not pass on federal constitutional claims if they may avoid it and should rest their conclusions upon principles of state law where possible.\textsuperscript{740} But the federal court has discretion whether to hear the pendent state claims in the proper case. Thus, the trial court should look to “considerations of judicial economy, convenience and fairness to litigants” in exercising its discretion and should avoid needless decisions of state law. If the federal claim, though substantial enough to confer jurisdiction, was dismissed before trial, or if the state claim substantially predominated, the court would be justified in dismissing the state claim.\textsuperscript{741}

A variant of pendent jurisdiction, sometimes called “ancillary jurisdiction,” is the doctrine allowing federal courts to acquire jurisdiction entirely of a case presenting two federal issues, although it might properly not have had jurisdiction of one of the issues if it had been independently presented.\textsuperscript{742} Thus, in an action under a federal statute, a compulsory counterclaim not involving a federal question is properly before the court and should be decided.\textsuperscript{743} The concept has been applied to a claim otherwise cognizable only in admiralty when joined with a related claim on the law side of the federal court, and in this way to give an injured seaman a right to jury trial on all of his claims when ordinarily the claim cog-


\textsuperscript{739} Osborn v. Bank, 22 U.S. at 725. This test replaced a difficult-to-apply test of Hurn v. Oursler, 289 U.S. 238, 245-46 (1933).


\textsuperscript{741} Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909); Greene v. Louisville & Interurban R.R., 244 U.S. 489 (1917); Hagans v. Lavine, 415 U.S. 528, 546-550 (1974). In fact, it may be an abuse of discretion for a federal court to fail to decide on an available state law ground instead of reaching the federal constitutional question. Schmidt v. Oakland Unified School Dist., 457 U.S. 594 (1982) (per curiam). However, narrowing previous law, the Court held in Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), held that when a pendent claim of state law involves a claim that is against a State for purposes of the Eleventh Amendment federal courts may not adjudicate it.

\textsuperscript{742} The initial decision was Freeman v. Howe, 65 U.S. (24 How.) 450 (1861), in which federal jurisdiction was founded on diversity of citizenship.

\textsuperscript{743} Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).
nizable only in admiralty would be tried without a jury. And a colorable constitutional claim has been held to support jurisdiction over a federal statutory claim arguably not within federal jurisdiction. Still another variant is the doctrine of "pendent parties," under which a federal court could take jurisdiction of a state claim against one party if it were related closely enough to a federal claim against another party, even though there was no independent jurisdictional base for the state claim. While the Supreme Court at first tentatively found some merit in the idea, in *Finley v. United States*, by a 5-to-4 vote the Court firmly disapproved of the pendent party concept and cast considerable doubt on the other prongs of pendent jurisdiction as well. Pendent party jurisdiction, Justice Scalia wrote for the Court, was within the constitutional grant of judicial power, but to be operable it must be affirmatively granted by congressional enactment. Within the year, Congress supplied the affirmative grant, adopting not only pendent party jurisdiction but also codifying pendent jurisdiction and ancillary jurisdiction under the name of "supplemental jurisdiction."

Thus, these interrelated doctrinal standards now seem well-grounded.

**Protective Jurisdiction.**—A conceptually difficult doctrine, which approaches the verge of a serious constitutional gap, is the concept of protective jurisdiction. Under this doctrine, it is argued that in instances in which Congress has legislative jurisdiction, it can confer federal jurisdiction, with the jurisdictional statute itself being the "law of the United States" within the meaning of Article III, even though Congress has enacted no substantive rule of decision and state law is to be applied. Put forward in controversial cases, the doctrine has neither been rejected nor accepted by the
Supreme Court. In *Verlinden B. V. v. Central Bank of Nigeria*, the Court reviewed a congressional grant of jurisdiction to federal courts to hear suits by an alien against a foreign state, jurisdiction not within the “arising under” provision of article III. Federal substantive law was not applicable, that resting either on state or international law. Refusing to consider protective jurisdiction, the Court found that the statute regulated foreign commerce by promulgating rules governing sovereign immunity from suit and was a law requiring interpretation as a federal-question matter. That the doctrine does raise constitutional doubts is perhaps grounds enough to avoid reaching it.\footnote{On § 25, see supra, “Judicial Review and National Supremacy”. The present statute is 28 U.S.C. § 1257(a), which provides that review by writ of *certiorari* is available where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. Prior to 1988, there was a right to mandatory appeal in cases in which a state court had found invalid a federal statute or treaty or in which a state court had upheld a state statute contested under the Constitution, a treaty, or a statute of the United States. See the Act of June 25, 1948, 62 Stat. 929. The distinction between *certiorari* and appeal was abolished by the Act of June 27, 1988, Pub. L. 100-352, § 3, 102 Stat. 662.} \footnote{28 U.S.C. § 1257(a). See R. Stern & E. Gressman, *Supreme Court Practice* ch. 3 (6th ed. 1986).}

**Supreme Court Review of State Court Decisions.**—In addition to the constitutional issues presented by § 25 of the Judiciary Act of 1789 and subsequent enactments, questions have continued to arise concerning review of state court judgments which go directly to the nature and extent of the Supreme Court’s appellate jurisdiction. Because of the sensitivity of federal-state relations and the delicate nature of the matters presented in litigation touching upon them, jurisdiction to review decisions of a state court is dependent in its exercise not only upon ascertainment of the existence of a federal question but upon a showing of exhaustion of state remedies and of the finality of the state judgment. Because the application of these standards to concrete facts is neither mechanical nor nondiscretionary, the Justices have often been divided over whether these requisites to the exercise of jurisdiction have been met in specific cases submitted for review by the Court.

The Court is empowered to review the judgments of “the highest court of a State in which a decision could be had.”\footnote{E.g., *Mesa v. California*, 489 U.S. 121, 136-137 (1989) (would present grave constitutional problems).} This will

\footnote{28 U.S.C. § 1257(a).}
ordinarily be the State’s court of last resort, but it could well be an intermediate appellate court or even a trial court if its judgment is final under state law and cannot be reviewed by any state appellate court. The review is of a final judgment below. “It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.” The object of this rule is to avoid piecemeal interference with state court proceedings; it promotes harmony by preventing federal assumption of a role in a controversy until the state court efforts are finally resolved.

For similar reasons, the Court requires that a party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it and she must have raised the issue at the appropriate time below.

When the judgment of a state court rests on an adequate, independent determination of state law, the Court will not review the resolution of the federal questions decided, even though the resolution may be in error. “The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not...
to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion. The Court is faced with two interrelated decisions: whether the state court judgment is based upon a nonfederal ground and whether the nonfederal ground is adequate to support the state court judgment. It is, of course, the responsibility of the Court to determine for itself the answer to both questions.

The first question may be raised by several factual situations. A state court may have based its decision on two grounds, one federal, one nonfederal. It may have based its decision solely on a nonfederal ground but the federal ground may have been clearly raised. Both federal and nonfederal grounds may have been raised but the state court judgment is ambiguous or is without written opinion stating the ground relied on. Or the state court may have decided the federal question although it could have based its ruling on an adequate, independent nonfederal ground. In any event, it is essential for purposes of review by the Supreme Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case, that the federal question was actually decided or that the judgment could not have been rendered without deciding it.

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763 Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).
767 Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206 (1938); Raley v. Ohio, 360 U.S. 423, 434-437 (1959). When there is uncertainty about what the state court did, the usual practice was to remand for clarification. Minnnesota v. National Tea Co., 309 U.S. 551 (1940); California v. Krivda, 409 U.S. 33 (1972). See California Dept. of Motor Vehicles v. Rios, 410 U.S. 425 (1973). Now, however, in a controversial decision, the Court has adopted a presumption that when a state court decision fairly appears to rest on federal law or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court will accept as the most reasonable explanation that the state court decided the case as it did because it believed that federal law required it to do so. If the state court wishes to avoid the presumption it must make clear by a plain statement in its judgment or opinion that discussed federal law did not compel the result, that state law was dispositive. Michigan v. Long, 463 U.S. 1032 (1983). See Harris v. Reed, 489 U.S. 255, 261 n. 7 (1989) (collecting cases); Coleman v. Thompson, 501 U.S. 722 (1991) (applying the rule in a habeas case).
With regard to the second question, in order to preclude Supreme Court review, the nonfederal ground must be broad enough, without reference to the federal question, to sustain the state court judgment,\textsuperscript{768} the nonfederal ground must be independent of the federal question,\textsuperscript{769} and the nonfederal ground must be a tenable one.\textsuperscript{770} Rejection of a litigant's federal claim by the state court on state procedural grounds, such as failure to tender the issue at the appropriate time, will ordinarily preclude Supreme Court review as an adequate independent state ground,\textsuperscript{771} so long as the local procedure does not discriminate against the raising of federal claims and has not been used to stifle a federal claim or to evade vindication of federal rights.\textsuperscript{772}

**Suits Affecting Ambassadors, Other Public Ministers, and Consuls**

The earliest interpretation of the grant of original jurisdiction to the Supreme Court came in the Judiciary Act of 1789, which conferred on the federal district courts jurisdiction of suits to which a consul might be a party. This legislative interpretation was sustained in 1793 in a circuit court case in which the judges held the Congress might vest concurrent jurisdiction involving consuls in the inferior courts, and sustained an indictment against a consul.\textsuperscript{773} Many years later, the Supreme Court held that consuls could be sued in the federal courts,\textsuperscript{774} and in another case in the same year declared sweepingly that Congress could grant concurrent jurisdiction to the inferior courts in cases where the Supreme Court has been invested with original jurisdiction.\textsuperscript{775} Nor does the grant of original jurisdiction to the Supreme Court in cases affect-


\textsuperscript{769} Enterprise Irrigation Dist. v. Farmers’ Mutual Canal Co., 243 U.S. 157, 164 (1917); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 280 (1958).


\textsuperscript{773} United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C. Pa. 1793).

\textsuperscript{774} Bors v. Preston, 111 U.S. 252 (1884).

\textsuperscript{775} Ames v. Kansas ex rel. Johnston, 111 U.S. 449, 469 (1884).
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ing ambassadors and consuls of itself preclude suits in state courts against consular officials. The leading case is Ohio ex rel. Popovici v. Agler,776 in which a Rumanian vice-consul contested an Ohio judgment against him for divorce and alimony.

A number of incidental questions arise in connection with the phrase “affecting ambassadors and consuls.” Does the ambassador or consul to be affected have to be a party in interest, or is a mere indirect interest in the outcome of the proceeding sufficient? In United States v. Ortega,777 the Court ruled that a prosecution of a person for violating international law and the laws of the United States by offering violence to the person of a foreign minister was not a suit “affecting” the minister but a public prosecution for vindication of the laws of nations and the United States. Another question concerns the official status of a person claiming to be an ambassador or consul.

The Court has refused to review the decision of the Executive with respect to the public character of a person claiming to be a public minister and has laid down the rule that it has the right to accept a certificate from the Department of State on such a question.778 A third question was whether the clause included ambassadors and consuls accredited by the United States to foreign governments. The Court held that it includes only persons accredited to the United States by foreign governments.779 However, in matters of especial delicacy, such as suits against ambassadors and public ministers or their servants, where the law of nations permits such suits, and in all controversies of a civil nature in which a State is a party, Congress until recently made the original jurisdiction of the Supreme Court exclusive of that of other courts.780 By its compliance with the congressional distribution of exclusive and concurrent original jurisdiction, the Court has tacitly sanctioned the power of Congress to make such jurisdiction exclusive or concurrent as it may choose.

Cases of Admiralty and Maritime Jurisdiction

The admiralty and maritime jurisdiction of the federal courts had its origins in the jurisdiction vested in the courts of the Admiral of the English Navy. Prior to independence, vice-admiralty courts were created in the Colonies by commissions from the

778 In re Baix, 135 U.S. 403, 402 (1890).
779 Ex parte Gruber, 269 U.S. 302 (1925).
English High Court of Admiralty. After independence, the States established admiralty courts, from which at a later date appeals could be taken to a court of appeals set up by Congress under the Articles of Confederation.\footnote{G. Gilmore & C. Black, The Law of Admiralty ch. 1 (1957).} Since one of the objectives of the Philadelphia Convention was the promotion of commerce through removal of obstacles occasioned by the diverse local rules of the States, it was only logical that it should contribute to the development of a uniform body of maritime law by establishing a system of federal courts and granting to these tribunals jurisdiction over admiralty and maritime cases.\footnote{Nothing really appears in the records of the Convention which sheds light on the Framers' views about admiralty. The present clause was contained in the draft of the Committee on Detail. 2 M. Farrand, supra at 186-187. None of the plans presented to the Convention, with the exception of an apparently authentic Charles Pinckney plan, 3 id. at 601-04, 608, had mentioned an admiralty jurisdiction in national courts. See Putnam, How the Federal Courts Were Given Admiralty Jurisdiction, 10 CORNELL L.Q. 460 (1925).}

The Constitution uses the terms “admiralty and maritime jurisdiction” without defining them. Though closely related, the words are not synonyms. In England the word “maritime” referred to the cases arising upon the high seas, whereas “admiralty” meant primarily cases of a local nature involving police regulations of shipping, harbors, fishing, and the like. A long struggle between the admiralty and common law courts had, however, in the course of time resulted in a considerable curtailment of English admiralty jurisdiction. A much broader conception of admiralty and maritime jurisdiction existed in the United States at the time of the framing of the Constitution than in the Mother Country.\footnote{G. Gilmore & C. Black, supra at ch. 1. In DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass 1815), Justice Story delivered a powerful historical and jurisprudential argument against the then-restrictive English system. See also Waring v. Clarke, 46 U.S. (5 How.) 441, 451-459 (1847); New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 34, 385-390 (1848).} At the very beginning of government under the Constitution, Congress conferred on the federal district courts exclusive original cognizance “of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; ...”\footnote{§ 9, 1 Stat. 77 (1789), now 28 U.S.C. § 1333 in only slightly changed fashion. For the classic exposition, see Black, Admiralty Jurisdiction: Critique and Suggestions, 50 COLUM. L. REV. 259 (1950).} This broad legislative interpretation of admiralty and maritime jurisdiction soon won the...
approval of the federal circuit courts, which ruled that the extent
of admiralty and maritime jurisdiction was not to be determined by
English law but by the principles of maritime law as respected by
maritime courts of all nations and adopted by most, if not by all,
of them on the continent of Europe. 785

Although a number of Supreme Court decisions had earlier
sustained the broader admiralty jurisdiction on specific issues,786 it
was not until 1848 that the Court ruled squarely in its favor, which
it did by declaring that “whatever may have been the doubt, origin-
ally, as to the true construction of the grant, whether it had refer-
ence to the jurisdiction in England, or to the more enlarged one
that existed in other maritime countries, the question has become
settled by legislative and judicial interpretation, which ought not
now to be disturbed.” 787 The Court thereupon proceeded to hold
that admiralty had jurisdiction in personam as well as in rem over
controversies arising out of contracts of affreightment between New
York and Providence.

**Power of Congress To Modify Maritime Law.**—The Con-
stitution does not identify the source of the substantive law to be
applied in the federal courts in cases of admiralty and maritime ju-
risdiction. Nevertheless, the grant of power to the federal courts in
Article III necessarily implies the existence of a substantive mari-
time law which, if they are required to do so, the federal courts can
fashion for themselves. 788 But what of the power of Congress in
this area? In *The Lottawanna*, 789 Justice Bradley undertook a de-
finitive exposition of the subject. No doubt, the opinion of the Court
notes, there exists “a great mass of maritime law which is the same
in all commercial countries,” still “the maritime law is only so far

Story); The Seneca, 21 Fed. Cas. 1801 (No. 12670) C.C.E.D.Pa. 1829) (Justice Wash-
ington).

786 The Vengeance, 3 U.S. (3 Dall.) 297 (1796); The Schooner Sally, 6 U.S. (2 Cr.)
406 (1805); The Schooner Betsy, 8 U.S. (4 Cr.) 443 (1808); The Samuel, 14 U.S. (1
Wheat.) 9 (1816); The Octavig, 14 U.S. (1 Wheat.) 20 (1816).

787 New Jersey Steam Navigation Co. v. Merchants’ Bank of Boston, 47 U.S. (6
How.) 334, 386 (1848); see also Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

788 Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684, 690,
691 (1950); Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282,
285 (1952); Romero v. International Terminal Operating Co., 358 U.S. 354, 360-361
(1959). For a recent example, see Moragne v. States Marine Lines, 398 U.S. 375
Lottawanna, 88 U.S. (21 Wall.) 558, 576-577 (1875) (“But we must always remember
that the court cannot make the law, it can only declare it. If, within its proper
scope, any change is desired in its rules, other than those of procedure, it must be
made by the legislative department”). States can no more override rules of judicial
origin than they can override acts of Congress. Wilburn Boat Co. v. Firemen’s Fund

789 88 U.S. (21 Wall.) 558 (1875).
operative as law in any country as it is adopted by the laws and usages of that country.” 790 “The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend ‘to all cases of admiralty and maritime jurisdiction.’ But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it . . . .” 791

“One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.” 791

“It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.” 792 That Congress’ power to enact substantive maritime law was conferred by the commerce clause was assumed in numerous opinions, 793 but later opinions by Justice Bradley firmly established that the source of power was the admiralty grant itself, as supplemented by the second prong of the necessary and proper clause. 794 Thus, “as the Constitution extends the judicial power of the United States to ‘all cases of admiralty and maritime jurisdiction,’ and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures.” 795 Rejecting an attack on a maritime statute as an infringement of intrastate commerce, Justice Bradley wrote: “It is unnecessary to invoke the power given the

790 88 U.S. at 572.
791 88 U.S. at 574-75.
792 88 U.S. at 577.
794 Butler v. Boston & S. S.S. Co., 130 U.S. 527 (1889); In re Garnett, 141 U.S. 1 (1891). The second prong of the necessary and proper clause is the authorization to Congress to enact laws to carry into execution the powers vested in other departments of the Federal Government. See Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42 (1934).
Congress to regulate commerce in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.”

The law administered by federal courts in admiralty is therefore an amalgam of the general maritime law insofar as it is acceptable to the courts, modifications of that law by congressional amendment, the common law of torts and contracts as modified to the extent constitutionally possible by state legislation, and international prize law. This body of law is at all times subject to modification by the paramount authority of Congress acting in pursuance of its powers under the admiralty and maritime clause and the necessary and proper clause and, no doubt, the commerce clause, now that the Court’s interpretation of that clause has become so expansive. Of this power there has been uniform agreement among the Justices of the Court.

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797 Thus, Justice McReynolds’ assertion of the paramountcy of congressional power in Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917), was not disputed by the four dissenters in that case and is confirmed in subsequent cases critical of Jensen which in effect invite congressional modification of maritime law. E.g., Davis v. Department of Labor and Industries, 317 U.S. 249 (1942). The nature of maritime law has excited some relevant controversy. In American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 516, 545 (1828), Chief Justice Marshall declared that admiralty cases do not “arise under the Constitution or laws of the United States” but “are as old as navigation itself; and the law, admiralty and maritime as it has existed for ages, is applied by our Courts to the cases as they arise.” In Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), the plaintiff sought a jury trial in federal court on a seaman’s suit for personal injury on an admiralty claim, contending that cases arising under the general maritime law are “civil actions” that arise “under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Five Justices in an opinion by Justice Frankfurter disagreed. Maritime cases do not arise under the Constitution or laws of the United States for federal question purposes and must, absent diversity, be instituted in admiralty where there is no jury trial. The dissenting four, Justice Brennan for himself and Chief Justice Warren and Justices Black and Douglas, contended that maritime law, although originally derived from international sources, is operative within the United States only by virtue of having been accepted and adopted pursuant to Article III, and accordingly judicially originated rules formulated under authority derived from that Article are “laws” of the United States to the same extent as those enacted by Congress.
Admiralty and Maritime Cases.—Admiralty and maritime jurisdiction comprises two types of cases: (1) those involving acts committed on the high seas or other navigable waters, and (2) those involving contracts and transactions connected with shipping employed on the seas or navigable waters. In the first category, which includes prize cases and torts, injuries, and crimes committed on the high seas, jurisdiction is determined by the locality of the act, while in the second category subject matter is the primary determinative factor. Specifically, contract cases include suits by seamen for wages, cases arising out of marine insurance policies, actions for towage or pilotage charges, actions on bottomry or respondentia bonds, actions for repairs on a vessel.

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In Kossick v. United Fruit Co., 365 U.S. 731 (1961), an oral agreement between a seaman and a shipowner whereby the latter in consideration of the seaman’s forbearance to press his maritime right to maintenance and cure promised to assume the consequences of improper treatment of the seaman at a Public Health Service Hospital was held to be a maritime contract.

See also Archawski v. Hanioti, 350 U.S. 532 (1956).


803 The Grapeshot, 76 U.S. (9 Wall.) 129 (1870); O’Brien v. Miller, 168 U.S. 287 (1897); The Aurora, 14 U.S. (1 Wheat.) 94 (1816); Delaware Mut. Safety Ins. Co. v. Gossler, 96 U.S. 645 (1877). But ordinary mortgages even though the securing property is a vessel, its gear, or cargo are not considered maritime contracts. Bogart v. The Steamboat John Jay, 58 U.S. (17 How.) 399 (1854); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 32 (1934).
already used in navigation,\textsuperscript{804} contracts of affreightment,\textsuperscript{805} compensation for temporary wharfage,\textsuperscript{806} agreements of consortship between the masters of two vessels engaged in wrecking,\textsuperscript{807} and surveys of damaged vessels.\textsuperscript{808} That is, admiralty jurisdiction "extends to all contracts, claims and services essentially maritime."\textsuperscript{809} But the courts have never enunciated an unambiguous test which would enable one to determine in advance whether a given case is a maritime one or not.\textsuperscript{810} The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract. . . .\textsuperscript{811}

Maritime torts include injuries to persons,\textsuperscript{812} damages to property arising out of collisions or other negligent acts,\textsuperscript{813} and violent dispossession of property.\textsuperscript{814} The Court has expressed a willingness to "recogniz[e] products liability, including strict liability, as part of the general maritime law,"\textsuperscript{815} Unlike contract cases, maritime tort jurisdiction historically depended exclusively upon the commission


\textsuperscript{805} New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344 (1848).

\textsuperscript{806} Ex parte Easton, 95 U.S. 68 (1877).

\textsuperscript{807} Andrews v. Wall, 44 U.S. (3 How.) 568 (1845).


\textsuperscript{811} Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961).


\textsuperscript{813} The Raithmoor, 241 U.S. 166 (1916); Erie R.R. v. Erie Transportation Co., 204 U.S. 220 (1907).

\textsuperscript{814} L'Invincible, 14 U.S. (1 Wheat.) 238 (1816); In re Fassett, 142 U.S. 479 (1892).

\textsuperscript{815} East River Steamship Corp. v. Transamerica Delaval, 476 U.S. 858 (1986) (holding, however, that there is no products liability action in admiralty for purely economic injury to the product itself, unaccompanied by personal injury, and that such actions should be based on the contract law of warranty).
of the wrongful act upon navigable waters, regardless of any connection or lack of connection with shipping or commerce.\footnote{DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); Philadelphia, W. & B. R.R. v. Philadelphia & Havre De Grace Steam Towboat Co., 64 U.S. (23 How.) 209, 215 (1859); The Plymouth, 70 U.S. (3 Wall.) 20, 33-34 (1865); Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 476 (1922).} The Court has now held, however, that in addition to the requisite situs a significant relationship to traditional maritime activity must exist in order for the admiralty jurisdiction of the federal courts to be invoked.\footnote{Executive Jet Aviation v. City of Cleveland, 409 U.S. 209 (1972) (plane crash in which plane landed wholly fortuitously in navigable waters off the airport runway not in admiralty jurisdiction). However, so long as there is maritime activity and a general maritime commercial nexus, admiralty jurisdiction exists. Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) (collision of two pleasure boats on navigable waters is within admiralty jurisdiction); Sisson v. Ruby, 497 U.S. 358 (1990) (fire on pleasure boat docked at marina on navigable water). And see Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), a tort claim arising out of damages allegedly caused by negligently driving piles from a barge into the riverbed, which weakened a freight tunnel that allowed flooding of the tunnel and the basements of numerous buildings along the Chicago River. The Court found that admiralty jurisdiction could be invoked. The location test was satisfied, because the barge, even though fastened to the river bottom, was a “vessel” for admiralty tort purposes; the two-part connection test was also satisfied, inasmuch as the incident had a potential to disrupt maritime commerce and the conduct giving rise to the incident had a substantial relationship to traditional maritime activity.} From the earliest days of the Republic, the federal courts sitting in admiralty have been held to have exclusive jurisdiction of
prize cases.\textsuperscript{819} Also, in contrast to other phases of admiralty jurisdiction, prize law as applied by the British courts continued to provide the basis of American law so far as practicable,\textsuperscript{820} and so far as it was not modified by subsequent legislation, treaties, or executive proclamations. Finally, admiralty and maritime jurisdiction includes the seizure and forfeiture of vessels engaged in activities in violation of the laws of nations or municipal law, such as illicit trade,\textsuperscript{821} infraction of revenue laws,\textsuperscript{822} and the like.\textsuperscript{823}

\textbf{Admiralty Proceedings.}—Procedure in admiralty jurisdiction differs in few respects from procedure in actions at law, but the differences that do exist are significant.\textsuperscript{824} Suits in admiralty traditionally took the form of a proceeding \textit{in rem} against the vessel, and, with exceptions to be noted, such proceedings \textit{in rem} are confined exclusively to federal admiralty courts, because the grant of exclusive jurisdiction to the federal courts by the Judiciary Act of 1789 has been interpreted as referring to the traditional admiralty action, the \textit{in rem} action, which was unknown to the common law.\textsuperscript{825} The savings clause in that Act under which a state court may entertain actions by suitors seeking a common-law remedy preserves to the state tribunals the right to hear actions at law where a common-law remedy or a new remedy analogous to a common-law remedy exists.\textsuperscript{826} Concurrent jurisdiction thus exists for the adjudication of \textit{in personam} maritime causes of action against

\textsuperscript{819}Jennings v. Carson, 8 U.S. (4 Cr.) 2 (1807); Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858).
\textsuperscript{820}Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cr.) 191 (1815); The Siren, 80 U.S. (13 Wall.) 389, 393 (1871).
\textsuperscript{821}Hudson v. Guester, 8 U.S. (4 Cr.) 293 (1808).
\textsuperscript{822}The Vengeance, 3 U.S. (3 Dall.) 297 (1796); Church v. Hubbard, 6 U.S. (2 Cr.) 187 (1804); The Schooner Sally, 6 U.S. (2 Cr.) 406 (1805).
\textsuperscript{823}The Brig Ann, 13 U.S. (9 Cr.) 289 (1815); The Sarah, 21 U.S. (8 Wheat.) 391 (1823); Maul v. United States, 274 U.S. 501 (1927).
\textsuperscript{824}Gilmore & Black, supra at 30-33. There are no longer separate rules of procedure governing admiralty, unification of civil admiralty procedures being achieved in 1966. 7 A J. Moore's Federal Practice § .01 et seq (New York: 1971).
\textsuperscript{825}The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866); The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867). \textit{But see} Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858). In Madruga v. Superior Court, 346 U.S. 556 (1954), the jurisdiction of a state court over a partition suit at the instance of the majority shipowners was upheld on the ground that the cause of action affected only the interest of the defendant minority shipowners and therefore was \textit{in personam}. Justice Frankfurter's dissent argued: "If this is not an action against the thing, in the sense which that has meaning in the law, then the concepts of a \textit{res} and an \textit{in rem} proceeding have an esoteric meaning that I do not understand." Id. at 564.
\textsuperscript{826}After conferring "exclusive" jurisdiction in admiralty and maritime cases on the federal courts, § 9 of the Judiciary Act of 1789, 1 Stat. 77, added "saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it; ..." Fixing the concurrent federal-state line has frequently been a source of conflict within the court. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
the owner of the vessel, and a plaintiff may ordinarily choose whether to bring his action in a state court or a federal court.

Forfeiture to the crown for violation of the laws of the sovereign was in English law an exception to the rule that admiralty has exclusive jurisdiction over in rem maritime actions and was thus considered a common-law remedy. Although the Supreme Court sometimes has used language that would confine all proceedings in rem to admiralty courts, such actions in state courts have been sustained in cases of forfeiture arising out of violations of state law.

Perhaps the most significant admiralty court difference in procedure from civil courts is the absence of a jury trial in admiralty actions, with the admiralty judge trying issues of fact as well as of law. Indeed, the absence of a jury in admiralty proceedings appears to have been one of the principal reasons why the English government vested a broad admiralty jurisdiction in the colonial vice-admiralty courts, since they provided a forum where the English authorities could enforce the Navigation Laws without “the obstinate resistance of American juries.”

**Territorial Extent of Admiralty and Maritime Jurisdiction.**—Although he was a vigorous exponent of the expansion of admiralty jurisdiction, Justice Story for the Court in *The Steamboat Thomas Jefferson* adopted a restrictive English rule confining admiralty jurisdiction to the high seas and upon rivers as far as the ebb and flow of the tide extended. The demands of commerce on western waters led Congress to enact a statute extending admiralty jurisdiction over the Great Lakes and connecting wa-

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831 23 U.S. (10 Wheat.) 428 (1825). On the political background of this decision, see 1 C. Warren, supra at 633-35.
832 The tidal ebb and flow limitation was strained in some of its applications. Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).
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ters, and in *The Gensessee Chief v. Fitzhugh* Chief Justice Taney overruled *The Thomas Jefferson* and dropped the tidal ebb and flow requirement. This ruling laid the basis for subsequent judicial extension of jurisdiction over all waters, salt or fresh, tidal or not, which are navigable in fact. Some of the older cases contain language limiting jurisdiction to navigable waters which form some link in an interstate or international waterway or some link in commerce, but these date from the time when it was thought the commerce power furnished the support for congressional legislation in this field.

**Admiralty and Federalism.**—Extension of admiralty and maritime jurisdiction to navigable waters within a State does not, however, of its own force include general or political powers of government. Thus, in the absence of legislation by Congress, the States through their courts may punish offenses upon their navigable waters and upon the sea within one marine league of the shore.

Determination of the boundaries of admiralty jurisdiction is a judicial function, and “no State law can enlarge it, nor can an act of Congress or a rule of court make it broader than the judicial power may determine to be its true limits.” But, as with other jurisdictions of the federal courts, admiralty jurisdiction can only be exercised under acts of Congress vesting it in federal courts.

The boundaries of federal and state competence, both legislative and judicial, in this area remain imprecise, and federal judicial determinations have notably failed to supply definiteness. During the last century, the Supreme Court generally permitted two overlapping systems of law to coexist in an uneasy relationship. The

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833 5 Stat. 726 (1845).
834 53 U.S. (12 How.) 443 (1851).
835 Some of the early cases include *The Magnolia*, 61 U.S. (20 How.) 296 (1857); *The Eagle*, 75 U.S. (8 Wall.) 15 (1868); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). The fact that the body of water is artificial presents no barrier to admiralty jurisdiction. *Ex parte Boyer*, 109 U.S. 629 (1884); *The Robert W. Parsons*, 191 U.S. 17 (1904). In *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940), it was made clear that maritime jurisdiction extends to include waterways which by reasonable improvement can be made navigable. “It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country.” *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 41 (1942).
838 *The Steamer St. Lawrence*, 66 U.S. (1 Bl.) 522, 527 (1862).
federal courts in admiralty applied the general maritime law, supplemented in some instances by state law which created and defined certain causes of action. Because the Judiciary Act of 1789 saved to suitors common-law remedies, persons suing in state courts or in federal courts in diversity of citizenship actions could look to common-law and statutory doctrines for relief in maritime-related cases in which the actions were noticeable. In *Southern Pacific Co. v. Jensen*, a sharply divided Court held that New York could not constitutionally apply its workmen's compensation system to employees injured or killed on navigable waters. For the Court, Justice McReynolds reasoned “that the general maritime law, as accepted by the federal courts, constituted part of our national law, applicable to matters within the admiralty and maritime jurisdiction.” Recognizing that “it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation,” still it was certain that “no such legislation is valid if it works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations.” The “savings to suitors” clause was unavailing because the workmen’s compensation statute created a remedy “of a character wholly unknown to the common law, incapable of enforcement by the ordinary process of any court, and is not saved to suitors from the grant of exclusive jurisdiction.”


*Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). The worker here had been killed, but the same result was reached in a case of nonfatal injury. Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917). In *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918), the *Jensen* holding was applied to preclude recovery in a negligence action against the injured party’s employer under state law. Under The Osceola, 189 U.S. 158 (1903), the employee had a maritime right to wages, maintenance, and cure.


*Southern Pacific Co. v. Jensen*, 244 U.S. at 216.

*Southern Pacific Co. v. Jensen*, 244 U.S. at 218. There were four dissenters, Justices Holmes, Brandeis, Clarke, and Pitney. The *Jensen* dissent featured such Holmesian epigrams as: “Judges do and must legislate, but they can do so only interstitially: they are confined from molar to molecular motions,” id. at 221, and the famous statement sup-
Congress required three opportunities to legislate to meet the problem created by the decision, the lack of remedy for maritime workers to recover for injuries resulting from the negligence of their employers. First, Congress enacted a statute saving to claimants their rights and remedies under state workmen’s compensation laws. The Court invalidated it as an unconstitutional delegation of legislative power to the States. “The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations.” Second, Congress reenacted the law but excluded masters and crew members of vessels from those who might claim compensation for maritime injuries.

The Court found this effort unconstitutional as well, since “the manifest purpose [of the statute] was to permit any state to alter the maritime law, and thereby introduce conflicting requirements.” Finally, Congress passed the Longshoremen’s and Harbor Workers’ Compensation Act, which provided accident compensation for injuries, including those resulting in death, sustained on navigable waters by employees, other than members of the crew, whenever “recovery . . . may not validly be provided by State law.”

With certain exceptions, the federal-state conflict since Jensen has taken place with regard to three areas: (1) the interpretation of maritime law had to come from state law inasmuch as “the common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. It always is the law of some state.” Id. at 222.

448 Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920). The decision was again five-to-four with the same dissenters.
449 42 Stat. 634 (1922).
JENSON, though much criticized, is still the touchstone of the decisional process in this area with its emphasis on the general maritime law. E.g., Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). In Askew v. American Waterways Operators, 411 U.S. 325, 337-344 (1973), the Court, in holding that the States may constitutionally exercise their police powers respecting maritime activities concurrently with the Federal Government, such as by providing for liability for oil spill damages, noted that JENSON and its progeny, while still possessing vitality, have been confined to their facts; thus, it is only with regard “to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews” that state law is proscribed. Id. at 344. See also Sun Ship v. Pennsylvania, 447 U.S. 715 (1980).


was a “twilight zone,” a “shadowy area,” in which recovery under either the federal law or a state law could be justified, and held that in such a “twilight zone” the injured party should be enabled to recover under either.\textsuperscript{858} Then, in \textit{Calbeck v. Travelers Ins. Co.},\textsuperscript{859} the Court virtually read out of the Act its inapplicability when compensation would be afforded by state law and held that Congress’ intent in enacting the statute was to extend coverage to all workers who sustain injuries while on navigable waters of the United States whether or not a particular injury was also within the constitutional reach of a state workmen’s compensation law or other law. By the 1972 amendments to the LHWCA, Congress extended the law shoreward by refining the tests of “employee” and “navigable waters,” so as to reach piers, wharfs, and the like in certain circumstances.\textsuperscript{860}

(2) The passage of the Jones Act\textsuperscript{861} gave seamen a statutory right of recovery for negligently inflicted injuries on which they could sue in state or federal courts. Because injured parties could obtain a jury trial in Jones Act suits, there was little attempted recourse under the savings clause\textsuperscript{862} to state law claims and thus no need to explore the line between applicable and inapplicable state law. But in the 1940s personal injury actions based on unseaworthiness\textsuperscript{863} were given new life by Court decisions for seamen;\textsuperscript{864} and the right was soon extended to longshoremen who were injured while on board ship or while working on the dock if the injury could be attributed either to the ship’s gear or its

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\textsuperscript{859} 370 U.S. 114 (1962). In the 1972 amendments, § 2, 86 Stat. 1251, amending 33 U.S.C. § 903(a), Congress ratified Calbeck by striking out “if recovery … may not validly be provided by State law."


\textsuperscript{861} 41 Stat. 1007 (1920), 46 U.S.C. § 688. For the prior-Jones Act law, \textit{see} The Osceola, 189 U.S. 158 (1903).

\textsuperscript{862} Supra, "Cases of Admiralty and Maritime Jurisdiction."

\textsuperscript{863} Unseaworthiness “is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character…. [T]he owner’s duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care.” Mitchell v. Trawler Racer, 362 U.S. 539, 549 (1960).

\end{footnotesize}
While these actions could have been brought in state court, federal law supplanted state law even with regard to injuries sustained in state territorial waters. \(^{865}\) The 1972 LHWCA amendments, however, eliminated unseaworthiness recoveries by persons covered by the Act and substituted a recovery for injuries caused by negligence under the LHWCA itself. \(^{867}\)

(3) In *The Harrisburg*, \(^{868}\) the Court held that maritime law did not afford an action for wrongful death, a position to which the Court adhered until 1970. \(^{869}\) The Jones Act, \(^{870}\) the Death on the High Seas Act, \(^{871}\) and the Longshoremen’s and Harbor Workers’ Compensation Act \(^{872}\) created causes of action for wrongful death, but for cases not falling within one of these laws the federal courts looked to state wrongful death and survival statutes. \(^{873}\) Thus, in *The Tungus v. Skougaard*, \(^{874}\) the Court held that a state wrongful death statute encompassed claims both for negligence and unseaworthiness in the instance of a land-based worker killed when on board ship in navigable water; the Court divided five-to-four, however, in holding that the standards of the duties to furnish a seaworthy vessel and to use due care were created by the state law as well and not furnished by general maritime con-


\(^{870}\) 41 Stat. 1007 (1920). 46 U.S.C. § 688. Recovery could be had if death resulted from injuries because of negligence but not from unseaworthiness.

\(^{871}\) 41 Stat. 537 (1920), 46 U.S.C. §§ 761 et seq. The Act applies to deaths caused by negligence occurring on the high seas beyond a marine league from the shore of any State. In *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), a unanimous Court held that this Act did not apply in cases of deaths on the artificial islands created on the continental shelf for oil drilling purposes but that the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. § 1331 et seq., incorporated the laws of the adjacent State, so that Louisiana law governed. *See also* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981). However, in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), the Court held that the Act is the exclusive wrongful death remedy in the case of OCS platform workers killed in a helicopter crash 35 miles off shore en route to shore from a platform.


Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, argued that the extent of the duties owed the decedent while on board ship should be governed by federal maritime law, though the cause of action originated in a state statute, just as would have been the result had decedent survived his injuries. See also United N.Y. & N.J. Sandy Hooks Pilot Ass'n v. Halecki, 358 U.S. 613 (1959).

The four Tungus dissenters joined two of the Tungus majority solely "under compulsion" of the Tungus ruling; the other three majority Justices dissented on the ground that application of the state statute unacceptably disrupted the uniformity of maritime law.

Thus did matters stand until 1970, when the Court, in a unanimous opinion in Moragne v. States Marine Lines, overruled its earlier cases and held that a right of recovery for wrongful death is sanctioned by general maritime law and that no statute is needed to bring the right into being. The Court was careful to note that the cause of action created in Moragne would not, like the state wrongful death statutes in Gillespie, be held precluded by the Jones Act, so that the survivor of a seaman killed in navigable waters within a State would have a cause of action for negligence under the Jones Act or for unseaworthiness under the general maritime law.

And in Hess v. United States, embracing a suit under the Federal Tort Claims Act for recovery for a death by drowning in a navigable Oregon river of an employee of a contractor engaged in repairing the federally-owned Bonneville Dam, a divided Court held that liability was to be measured by the standard of care expressed in state law, notwithstanding that the standard was higher than that required by maritime law. One area existed, however, in which beneficiaries of a deceased seaman were denied recovery.

The Jones Act provided a remedy for wrongful death resulting from negligence, but not for one caused by unseaworthiness alone; in Gillespie v. United States Steel Corp., the Court held that the survivors of a seaman drowned while working on a ship docked in an Ohio port could not recover under the state wrongful death statute even though the act recognized unseaworthiness as a basis for recovery, the Jones Act having superseded state laws.

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The decision was based on dictum in Lindgren v. United States, 281 U.S. 38 (1930), to the effect that the Jones Act remedy was exclusive. 379 U.S. 148 (1964). For development of the law under Moragne, see Sea-Land Services v. Gaudet, 414 U.S. 573 (1974); Miles v. Apex Marine Corp., 498 U.S. 19 (1990); and Norfolk Shipbuilding and Drydock Co. v. Garris, 532 U.S. 811 (2001) (maritime cause of action for death caused by violation of the duty of seaworthiness is equally applicable to death resulting from negligence). But, in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), a case involving a death in territorial waters from a jet ski accident, the Court held that Moragne does not provide the exclusive remedy in cases involving the death in territorial waters of a "nonseafarer"—a person who is neither a seaman covered by the Jones Act nor a longshore worker covered by the LHWCA.
Cases to Which the United States Is a Party

Right of the United States to Sue.—In the first edition of his Treatise, Justice Story noted that while “an express power is no where given in the constitution,” the right of the United States to sue in its own courts “is clearly implied in that part respecting the judicial power. . . . Indeed, all the usual incidents appertaining to a personal sovereign, in relation to contracts, and suing, and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns.”

As early as 1818, the Supreme Court ruled that the United States could sue in its own name in all cases of contract without congressional authorization of such suits. Later, this rule was extended to other types of actions. In the absence of statutory provisions to the contrary, such suits are initiated by the Attorney General in the name of the United States.

By the Judiciary Act of 1789, and subsequent amendments thereof, Congress has vested in the federal district courts jurisdiction to hear all suits of a civil nature at law or in equity brought by the United States as party plaintiff. As in other judicial proceedings, the United States, like any party plaintiff, must have an interest in the subject matter and a legal right to the remedy sought. Under the long settled principle that the courts have the power to abate public nuisances at the suit of the Government, the provision in § 208(2) of the Labor Management Relations Act of 1949, authorizing federal courts to enjoin strikes which imperil national health or safety was upheld for the reason that the statute entrusts the courts with the determination of a “case or con-

\[880\] J. Story, Commentaries on the Constitution of the United States (1833), (emphasis in original).

\[883\] 28 U.S.C. § 1345. By virtue of the fact that the original jurisdiction of the Supreme Court extends only to those cases enumerated in the Constitution, jurisdiction over suits brought by the United States against persons or corporations is vested in the lower federal courts. But suits by the United States against a State may be brought in the Supreme Court's original jurisdiction, 28 U.S.C. § 1251(b)(2), but may as well be brought in the district court. Case v. Bowles, 327 U.S. 92, 97 (1946).

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Controversy” on which the judicial power can operate and does not impose any legislative, executive, or non-judicial function. Moreover, the fact that the rights sought to be protected were those of the public in unimpeded production in industries vital to public health, as distinguished from the private rights of labor and management, was held not to alter the adversary (“case or controversy”) nature of the litigation instituted by the United States as the guardian of the aforementioned rights.885 Also, by reason of the highest public interest in the fulfillment of all constitutional guarantees, “including those that bear ... directly on private rights, ... it [is] perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief.”886

Suits Against States.—Controversies to which the United States is a party include suits brought against States as party defendants. The first such suit occurred in United States v. North Carolina,887 which was an action by the United States to recover upon bonds issued by North Carolina. Although no question of jurisdiction was raised, in deciding the case on its merits in favor of the State, the Court tacitly assumed that it had jurisdiction of such cases. The issue of jurisdiction was directly raised by Texas a few years later in a bill in equity brought by the United States to determine the boundary between Texas and the Territory of Oklahoma, and the Court sustained its jurisdiction over strong arguments by Texas to the effect that it could not be sued by the United States without its consent and that the Supreme Court’s original jurisdiction did not extend to cases to which the United States is a party.888 Stressing the inclusion within the judicial power of cases to which the United States and a State are parties, the elder Justice Harlan pointed out that the Constitution made no exception of suits brought by the United States. In effect, therefore, consent to be sued by the United States “was given by Texas when admitted to the Union upon an equal footing in all respects with the other States.”889

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886 United States v. Raines, 362 U.S. 17, 27 (1960), upholding jurisdiction of the federal court as to an action to enjoin state officials from discriminating against African-American citizens seeking to vote in state elections. See also Oregon v. Mitchell, 400 U.S. 112 (1970), in which two of the four cases considered were actions by the United States to enjoin state compliance with the Voting Rights Act Amendments of 1970.
887 136 U.S. 211 (1890).
888 United States v. Texas, 143 U.S. 621 (1892).
889 143 U.S. at 642-46. This suit, it may be noted, was specifically authorized by the Act of Congress of May 2, 1890, providing for a temporary government for the Oklahoma territory to determine the ownership of Greer County. 26 Stat. 81, 92, § 25. See also United States v. Louisiana, 339 U.S. 699, 701-02 (1950).
Suits brought by the United States have, however, been infrequent. All of them have arisen since 1889, and they have become somewhat more common since 1926. That year the Supreme Court decided a dispute between the United States and Minnesota over land patents issued to the State by the United States in breach of its trust obligations to the Indian.\footnote{United States v. Minnesota, 270 U.S. 181 (1926).} In \textit{United States v. West Virginia},\footnote{In \textit{United States v. West Virginia}, the Court refused to take jurisdiction of a suit in equity brought by the United States to determine the navigability of the New and Kanawha Rivers on the ground that the jurisdiction in such suits is limited to cases and controversies and does not extend to the adjudication of mere differences of opinion between the officials of the two governments.} a few years earlier, however, it had taken jurisdiction of a suit by the United States against Utah to quiet title to land forming the beds of certain sections of the Colorado River and its tributaries with the States.\footnote{In \textit{United States v. Utah}, 283 U.S. 64 (1931).} Similarly, it took jurisdiction of a suit brought by the United States against California to determine the ownership of and paramount rights over the submerged land and the oil and gas thereunder off the coast of California between the low-water mark and the three-mile limit.\footnote{Like suits were decided against Louisiana and Texas in 1950.} Immunity of the United States From Suit.—Pursuant to the general rule that a sovereign cannot be sued in its own courts, it follows that the judicial power does not extend to suits against the United States unless Congress by general or special enactment consents to suits against the Government. This rule first emanated in embryonic form in an \textit{obiter dictum} by Chief Justice Jay in \textit{Chisolm v. Georgia}, where he indicated that a suit would not lie against the United States because “there is no power which the courts can call to their aid.”\footnote{In \textit{Chisolm v. Georgia}, also by way of dictum, Chief Justice Marshall asserted, “the universally received opinion is that no suit can be commenced or prosecuted against the United States.”} The issue was more directly in question in \textit{United States v. Clarke},\footnote{Where Chief Justice Marshall stated that as the United States is “not suable of common right, the party who institutes such suit must bring his case within the authority of courts having jurisdiction of the same subject matter.”} where Chief Justice Marshall stated that the United States is “not suable of common right, the party who institutes such suit must bring his case within the authority of courts having jurisdiction of the same subject matter.”
of some act of Congress, or the court cannot exercise jurisdiction
over it." He thereupon ruled that the act of May 26, 1830, for the
final settlement of land claims in Florida condoned the suit. The
doctrine of the exemption of the United States from suit was re-
peated in various subsequent cases, without discussion or examina-
tion. Indeed, it was not until United States v. Lee that the
Court examined the rule and the reasons for it, and limited its ap-
lication accordingly.

Since suits against the United States can be maintained only
by permission, it follows that they can be brought only in the
manner prescribed by Congress and subject to the restrictions im-
posed. Only Congress can take the necessary steps to waive the
immunity of the United States from liability for claims, and hence
officers of the United States are powerless by their actions either

898 United States v. McLemore, 45 U.S. (4 How.) 286 (1846); Hill v. United
States, 50 U.S. (9 How.) 386, 389 (1850); De Groot v. United States, 72 U.S. (5
Wall.) 419, 431 (1867); United States v. Eckford, 73 U.S. (6 Wall.) 484, 488 (1868);
The Siren, 74 U.S. (7 Wall.) 152, 154 (1869); Nichols v. United States, 74 U.S. (7
Wall.) 122, 126 (1869); The Davia, 77 U.S. (10 Wall.) 15, 20 (1870); Carr v. United
States, 98 U.S. 433, 437-439 (1879). It is also clear that the Federal Government,
in the absence of its consent, is not liable in tort for the negligence of its agents
or employees. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1869); Peabody
v. United States, 231 U.S. 530, 539 (1913); Koekuk & Hamilton Bridge Co. v. United
States, 260 U.S. 125, 127 (1922). The reason for such immunity as stated by Mr.
Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), is because
“there can be no legal right as against the authority that makes the law on which
the right depends.” See also the Western Maid, 257 U.S. 419, 433 (1922). As the
Housing Act does not purport to authorize suits against the United States as such,
the question is whether the Authority—which is clearly an agency of the United
States—partakes of this sovereign immunity. The answer must be sought in the in-
tention of the Congress. Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549,
570 (1922); Federal Land Bank v. Priddy, 295 U.S. 229, 231 (1935). This involves
a consideration of the extent to which other Government-owned corporations have
been held liable for their wrongful acts. 39 Ops. Atty. Gen. 559, 562 (1938).

899 106 U.S. 196 (1882).

900 Lonergan v. United States, 303 U.S. 33 (1938). Waivers of immunity must
sion that “the United States shall be liable for costs the same as a private person"
sufficient to waive immunity from awards of interest). The result in Shaw was
1079, § 113, amending 42 U.S.C. § 2000e-16. Immunity was waived, with limita-
tions, for contracts and takings claims in the Tucker Act, 28 U.S.C. § 1346(a)(2).
Immunity of the United States for the negligence of its employees was waived, again
with limitations, in the Federal Tort Claims Act. 28 U.S.C. § 1346(b). For recent
waivers of sovereign immunity, see Pub. L. 94-574, § 1, 90 Stat. 2721 (1976), amend-
ing 5 U.S.C. § 702 (waiver for nonstatutory review in all cases save for suits for
money damages); Pub. L. 87-748, § 1(a), 76 Stat. 744 (1962), 28 U.S.C. § 1361 (giv-
ing district courts jurisdiction of mandamus actions to compel an officer or employee
of the United States to perform a duty owed to plaintiff); Westfall Act, 102 Stat.
immunity; but a Bivens implied cause of action for constitutional torts cannot be used
directly against FSLIC).
to waive such immunity or to confer jurisdiction on a federal court. Even when authorized, suits can be brought only in designated courts. These rules apply equally to suits by States against the United States. Although an officer acting as a public instrumentality is liable for his own torts, Congress may grant or withhold immunity from suit on behalf of government corporations.

**Suits Against United States Officials.**—*United States v. Lee*, a five-to-four decision, qualified earlier holdings that a judgment affecting the property of the United States was in effect against the United States, by ruling that title to the Arlington estate of the Lee family, then being used as a national cemetery, was not legally vested in the United States but was being held illegally by army officers under an unlawful order of the President. In its examination of the sources and application of the rule of sovereign immunity, the Court concluded that the rule “if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the rights of plaintiff when the United States is not a defendant or a necessary party to the suit.”

Except, nevertheless, for an occasional case like *Kansas v. United States*, which held that a State cannot sue the United States, most of the cases involving sovereign immunity from suit since 1883 have been cases against officers, agencies, or corporations of the United States where the United States has not been named as a party defendant. Thus, it has been held that a suit against the Secretary of the Treasury to review his decision on the rate of duty to be exacted on imported sugar would disturb the whole revenue system of the Government and would in effect be a suit against the United States. Even

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902 United States v. Shaw, 309 U.S. 495 (1940). Any consent to be sued will not be held to embrace action in the federal courts unless the language giving consent is clear. Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).
903 Minnesota v. United States, 305 U.S. 382 (1939). The United States was held here to be an indispensable party defendant in a condemnation proceeding brought by a State to acquire a right of way over lands owned by the United States and held in trust for Indian allottees. See also Block v. North Dakota, 461 U.S. 273 (1983).
906 204 U.S. 331 (1907).
907 Louisiana v. McAdoo, 234 U.S. 627, 628 (1914).
more significant is *Stanley v. Schwalby*, which resembled without paralleling *United States v. Lee*, where it was held that an action of trespass against an army officer to try title in a parcel of land occupied by the United States as a military reservation was a suit against the United States because a judgment in favor of the plaintiffs would have been a judgment against the United States.

Subsequent cases repeat and reaffirm the rule of *United States v. Lee* that where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority. Contrariwise, the rule that a suit in which the judgment would affect the United States or its property is a suit against the United States has also been repeatedly approved and reaffirmed. But, as the Court has pointed out, it is not "an easy matter to reconcile all of the decisions of the court in this class of cases." and, as Justice Frankfurter quite justifiably stated in a dissent, "the subject is not free from casuistry." Justice Douglas' characterization of *Land v. Dollar*, "this is the type of case where the question of jurisdiction is dependent on decision of the merits," is frequently applicable.

The case of *Larson v. Domestic & Foreign Corp.*, illuminates these obscurities somewhat. A private company sought to enjoin the Administrator of the War Assets in his official capacity from selling surplus coal to others than the plaintiff who had originally bought the coal, only to have the sale cancelled by the Administrator because of the company's failure to make an advance payment. Chief Justice Vinson and a majority of the Court looked upon the suit as one brought against the Administrator in his official capacity, acting under a valid statute and therefore a suit against the United States. It held that although an officer in such a situation

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908 162 U.S. 255 (1896). Justice Gray endeavored to distinguish between this case and Lee. Id. at 271. It was Justice Gray who spoke for the dissenters in Lee.


912 Larson, 337 U.S. at 708. Justice Frankfurter's dissent also contains a useful classification of immunity cases and an appendix listing them.


914 337 U.S. 682 (1949).
is not immune from suits for his own torts, yet his official action, though tortious, cannot be enjoined or diverted, since it is also the action of the sovereign. The Court then proceeded to repeat the rule that "the action of an officer of the sovereign (be it holding, taking, or otherwise legally affecting the plaintiff's property) can be regarded as so individual only if it is not within the officer's statutory powers, or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void." The Court rejected the contention that the doctrine of sovereign immunity should be relaxed as inapplicable to suits for specific relief as distinguished from damage suits, saying: "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right."

Suits against officers involving the doctrine of sovereign immunity have been classified by Justice Frankfurter in a dissenting opinion into four general groups. First, there are those cases in which the plaintiff seeks an interest in property which belongs to

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915 337 U.S. at 689-97.
916 337 U.S. at 701-02. This rule was applied in Goldberg v. Daniels, 231 U.S. 218 (1913), which also involved a sale of government surplus property. After the Secretary of the Navy rejected the highest bid, plaintiff sought mandamus to compel delivery. This suit was held to be against the United States. See also Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), which held that prospective bidders for contracts derive no enforceable rights against a federal official for an alleged misinterpretation of his government's authority on the ground that an agent is answerable only to his principal for misconstruction of instructions, given for the sole benefit of the principal. In Larson the Court not only refused to follow Goltra v. Weeks, 271 U.S. 536 (1926), but in effect overruled it. The Goltra case involved an attempt of the Government to repossess barges which it had leased under a contract reserving the right to repossess in certain circumstances. A suit to enjoin repossession was held not to be a suit against the United States on the ground that the actions were personal and in the nature of a trespass. Also decided in harmony with the Larson decision are the following, wherein the suit was barred as being against the United States: (1) Malone v. Bowdoin, 369 U.S. 643 (1962), a suit to eject a Forest Service Officer from land occupied by him in his official capacity under a claim of title from the United States; and (2) Hawaii v. Gordon, 373 U.S. 57 (1963), an original action by Hawaii against the Director of the Budget for an order directing him to determine whether a parcel of federal land could be conveyed to that State. In Dugan v. Rank, 372 U.S. 669 (1963), the Court ruled that inasmuch as the storing and diverting of water at the Friant Dam resulted, not in a trespass, but in a partial, although a casual day-by-day, taking of water rights of claimants along the San Joaquin River below the dam, a suit to enjoin such diversion by Federal Bureau of Reclamation officers was an action against the United States, for grant of the remedy sought would force abandonment of a portion of a project authorized and financed by Congress, and would prevent fulfillment of contracts between the United States and local Water Utility Districts. Damages were recoverable in a suit under the Tucker Act. 28 U.S.C. § 1346.

917 337 U.S. at 703-704. Justice Frankfurter, dissenting, would have applied the rule of the Lee case. See Pub. L. 94-574, 1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702 (action seeking relief, except for money damages, against officer, employee, or agency not to be dismissed as action against United States).
the Government or calls “for an assertion of what is unquestionably official authority.” Such suits, of course, cannot be maintained. Second, cases in which action adverse to the interests of a plaintiff is taken under an unconstitutional statute or one alleged to be so. In general these suits are maintainable. Third, cases involving injury to a plaintiff because the official has exceeded his statutory authority. In general these suits are maintainable. Fourth, cases in which an officer seeks immunity behind statutory authority or some other sovereign command for the commission of a common law tort. This category of cases presents the greatest difficulties since these suits can as readily be classified as falling into the first group if the action directly or indirectly is one for specific performance or if the judgment would affect the United States.

**Suits Against Government Corporations.**—The multiplication of government corporations during periods of war and depression has provided one motivation for limiting the doctrine of sovereign immunity. In *Keifer & Keifer v. RFC*, the Court held that the Government does not become a conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. Nor does the creation of a government corporation confer upon it legal immunity. Whether Congress endows a public corporation with governmental immunity in a specific instance is a matter of ascertaining the congressional will. Moreover, it has been held that waivers of governmental immunity in the case of federal instrumentalities and corporations should be construed liberally. On the other hand, Indian nations are exempt from suit without further congressional authorization; it is as though their former im-

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920 Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939) (holding that one threatened with direct and special injury by the act of an agent of the Government under a statute may challenge the constitutionality of the statute in a suit against the agent).
923 306 U.S. 381 (1939).
924 FHA v. Burr, 309 U.S. 242 (1940). Nonetheless, the Court held that a congressional waiver of immunity in the case of a governmental corporation did not mean that funds or property of the United States can be levied on to pay a judgment obtained against such a corporation as the result of waiver of immunity.
Suits Between Two or More States

The extension of federal judicial power to controversies between States and the vesting of original jurisdiction in the Supreme Court of suits to which a State is a party had its origin in experience. Prior to independence, disputes between colonies claiming charter rights to territory were settled by the Privy Council. Under the Articles of Confederation, Congress was made “the last resort on appeal” to resolve “all disputes and differences ... between two or more States concerning boundary, jurisdiction, or any other cause whatever,” and to constitute what in effect were ad hoc arbitral courts for determining such disputes and rendering a final judgment therein. When the Philadelphia Convention met in 1787, serious disputes over boundaries, lands, and river rights involved ten States. \textsuperscript{926} It is hardly surprising, therefore, that during its first sixty years the only state disputes coming to the Supreme Court were boundary disputes\textsuperscript{927} or that such disputes constitute the largest single number of suits between States. Since 1900, however, as the result of the increasing mobility of population and wealth and the effects of technology and industrialization, other types of cases have occurred with increasing frequency.

Boundary Disputes: The Law Applied.—Of the earlier examples of suits between States, that between New Jersey and New York\textsuperscript{928} is significant for the application of the rule laid down earlier in \textit{Chisholm v. Georgia} that the Supreme Court may proceed \textit{ex parte} if a State refuses to appear when duly summoned. The long drawn out litigation between Rhode Island and Massachusetts is of even greater significance for its rulings, after the case had been pending for seven years, that though the Constitution does not extend the judicial power to all controversies between States, yet it does not exclude any,\textsuperscript{929} that a boundary dispute is a justiciable and not a political question,\textsuperscript{930} and that a prescribed rule of decision is unnecessary in such cases. On the last point, Justice

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    \item \textsuperscript{925} United States v. United States Fidelity Co., 309 U.S. 506 (1940).
    \item \textsuperscript{926} Warren, \textit{The Supreme Court and Disputes Between States}, 34 BULL. OF WILLIAM AND MARY, NO. 4 (1940), 7-11. For a more comprehensive treatment of background as well as the general subject, see C. Warren, \textit{The Supreme Court and the Sovereign States} (1924).
    \item \textsuperscript{927} Id. at 13. However, only three such suits were brought in this period, 1789-1849. During the next 90 years, 1849-1939, at least twenty-nine such suits were brought. Id. at 13, 14.
    \item \textsuperscript{928} New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1931).
    \item \textsuperscript{929} Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).
    \item \textsuperscript{930} 37 U.S. at 736-37.
\end{itemize}
Baldwin stated: “The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires.”

**Modern Types of Suits Between States.**—Beginning with *Missouri v. Illinois & Chicago District*, which sustained jurisdiction to entertain an injunction suit to restrain the discharge of sewage into the Mississippi River, water rights, the use of water resources, and the like, have become an increasing source of suits between States. Such suits have been especially frequent in the western States, where water is even more of a treasure than elsewhere, but they have not been confined to any one region. In *Kansas v. Colorado*, the Court established the principle of the equitable division of river or water resources between conflicting state interests. In *New Jersey v. New York*, where New Jersey sought to enjoin the diversion of waters into the Hudson River watershed for New York in such a way as to diminish the flow of the Delaware River in New Jersey, injure its shad fisheries, and increase harmfully the saline contents of the Delaware, Justice Holmes stated for the Court: “A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not

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931 37 U.S. at 737. Chief Justice Taney dissented because of his belief that the issue was not one of property in the soil, but of sovereignty and jurisdiction, and hence political. Id. at 752-53. For different reasons, it should be noted, a suit between private parties respecting soil or jurisdiction of two States, to which neither State is a party, does not come within the original jurisdiction of the Supreme Court. *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411 (1790). For recent boundary cases, see United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985); United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93 (1985); United States v. Maine, 475 U.S. 89 (1986); Georgia v. South Carolina, 497 U.S. 336 (1990); Mississippi v. Louisiana, 506 U.S. 73 (1992).


934 283 U.S. 336 (1931).
be tolerated. And, on the other hand, equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the river that must be reconciled as best they may be."  

Other types of interstate disputes of which the Court has taken jurisdiction include suits by a State as the donee of the bonds of another to collect thereon, by Virginia against West Virginia to determine the proportion of the public debt of the original State of Virginia which the latter owed the former, by Arkansas to enjoin Texas from interfering with the performance of a contract by a Texas foundation to contribute to the construction of a new hospital in the medical center of the University of Arkansas, of one State against another to enforce a contract between the two, of a suit in equity between States for the determination of a decedent's domicile for inheritance tax purposes, and of a suit by two States to restrain a third from enforcing a natural gas measure which purported to restrict the interstate flow of natural gas from the State in the event of a shortage.

In Texas v. New Jersey, the Court adjudicated a multistate dispute about which State should be allowed to escheat intangible property consisting of uncollected small debts held by a corpora-

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935 283 U.S. at 342. See also Nebraska v. Wyoming, 325 U.S. 589 (1945); Idaho ex rel. Evana v. Oregon, 462 U.S. 1017 (1983). In Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court held it had jurisdiction of a suit by a State against citizens of other States to abate a nuisance allegedly caused by the dumping of mercury into streams that ultimately run into Lake Erie, but it declined to permit the filing because the presence of complex scientific issues made the case more appropriate for first resolution in a district court. See also Texas v. New Mexico, 462 U.S. 554 (1983); Nevada v. United States, 463 U.S. 110 (1983).


937 Virginia v. West Virginia, 220 U.S. 1 (1911).


940 Texas v. Florida, 306 U.S. 398 (1939). In California v. Texas, 437 U.S. 601 (1978), the Court denied a State leave to file an original action against another State to determine the contested domicile of a decedent for death tax purposes, with several Justices of the view that Texas v. Florida had either been wrongly decided or was questionable. But after determining that an interpleader action by the administrator of the estate for a determination of domicile was barred by the Eleventh Amendment, Cory v. White, 457 U.S. 85 (1982), the Court over dissent permitted filing of the original action. California v. Texas, 457 U.S. 164 (1982).

941 Pennsylvania v. West Virginia, 262 U.S. 553 (1923). The Court, in Maryland v. Louisiana, 451 U.S. 725 (1981), over strong dissent, relied on this case in permitting suit contesting a tax imposed on natural gas, the incidence of which fell on the suing State's consuming citizens. And in Wyoming v. Oklahoma, 502 U.S. 437 (1992), the Court permitted a State to sue another to contest a law requiring that all in-state utilities burn a mixture containing at least 10% in-state coal, the plaintiff State having previously supplied 100% of the coal to those utilities and thus suffering a loss of coal-severance tax revenues.

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tion. Emphasizing that the States could not constitutionally provide a rule of settlement and that no federal statute governed the matter, the Court evaluated the possible rules and chose the one easiest to apply and least likely to lead to continuing disputes.

In general, in taking jurisdiction of these suits, along with those involving boundaries and the diversion or pollution of water resources, the Supreme Court proceeded upon the liberal construction of the term “controversies between two or more States” enunciated in Rhode Island v. Massachusetts, and fortified by Chief Justice Marshall’s dictum in Cohens v. Virginia, concerning jurisdiction because of the parties to a case, that “it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union.”

**Cases of Which the Court Has Declined Jurisdiction.**—In other cases, however, the Court, centering its attention upon the elements of a case or controversy, has declined jurisdiction. Thus, in Alabama v. Arizona, where Alabama sought to enjoin nineteen States from regulating or prohibiting the sale of convict-made goods, the Court went far beyond holding that it had no jurisdiction, and indicated that jurisdiction of suits between States will be exercised only when absolutely necessary, that the equity requirements in a suit between States are more exacting than in a suit between private persons, that the threatened injury to a plaintiff State must be of great magnitude and imminent, and that the burden on the plaintiff State to establish all the elements of a case is greater than that generally required by a petitioner seeking an injunction suit in cases between private parties.

Pursuing a similar line of reasoning, the Court declined to take jurisdiction of a suit brought by Massachusetts against Missouri and certain of its citizens to prevent Missouri from levying inheritance taxes upon intangibles held in trust in Missouri by resident

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944 19 U.S. (6 Wheat.) 264 (1821).
946 291 U.S. 286 (1934). The Court in recent years, with a significant caseload problem, has been loath to permit filings of original actions where the parties might be able to resolve their disputes in other courts, even in cases in which the jurisdiction over the particular dispute is exclusively original. Arizona v. New Mexico, 425 U.S. 784 (1976) (dispute subject of state court case brought by private parties); California v. West Virginia, 454 U.S. 1027 (1981). But in Mississippi v. Louisiana, 506 U.S. 73 (1992), the Court’s reluctance to exercise original jurisdiction ran afoul of the “uncompromising language” of 28 U.S.C. § 1251(a) giving the Court “original and exclusive jurisdiction” of these kinds of suits.
trustees. In holding that the complaint presented no justiciable controversy, the Court declared that to constitute such a controversy, the complainant State must show that it "has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to ... the common law or equity systems of jurisprudence."\(^\text{947}\) The fact that the trust property was sufficient to satisfy the claims of both States and that recovery by either would not impair any rights of the other distinguished the case from *Texas v. Florida*,\(^\text{948}\) where the contrary situation obtained. Furthermore, the Missouri statute providing for reciprocal privileges in levying inheritance taxes did not confer upon Massachusetts any contractual right. The Court then proceeded to reiterate its earlier rule that a State may not invoke the original jurisdiction of the Supreme Court for the benefit of its residents or to enforce the individual rights of its citizens.\(^\text{949}\) Moreover, Massachusetts could not invoke the original jurisdiction of the Court by the expedient of making citizens of Missouri parties to a suit not otherwise maintainable.\(^\text{950}\) Accordingly, Massachusetts was held not to be without an adequate remedy in Missouri's courts or in a federal district court in Missouri.

**The Problem of Enforcement: Virginia v. West Virginia.**—A very important issue in interstate litigation is the enforcement of the Court's decree, once it has been entered. In some types of suits, this issue may not arise, and if it does, it may be easily met. Thus, a judgment putting a State in possession of disputed territory is ordinarily self-executing. But if the losing State should oppose execution, refractory state officials, as individuals, would be liable to civil suits or criminal prosecutions in the federal courts. Likewise an injunction may be enforced against state officials as individuals by civil or criminal proceedings. Those judgments, on the other hand, which require a State in its governmental capacity to perform some positive act present the issue of enforcement in more serious form. The issue arose directly in the long and much litigated case between Virginia and West Virginia over the propor-


\(^\text{948}\) 306 U.S. 398 (1939).

\(^\text{949}\) 308 U.S. at 17, citing *Oklahoma* v. *Atchison*, T. & S.F. Ry., 220 U.S. 277, 286 (1911), and *Oklahoma* ex rel. *Johnson* v. *Cook*, 304 U.S. 387, 394 (1938). *See also* *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*, 108 U.S. 76 (1883), which held that a State cannot bring a suit on behalf of its citizens to collect on bonds issued by another State, and *Louisiana* v. *Texas*, 176 U.S. 1 (1900), which held that a State cannot sue another to prevent maladministration of quarantine laws.

\(^\text{950}\) 308 U.S. at 17, 19.
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The various litigations of Virginia v. West Virginia are to be found in 206 U.S. 290 (1907); 209 U.S. 514 (1908); 220 U.S. 1 (1911); 222 U.S. 17 (1911); 231 U.S. 89 (1913); 234 U.S. 117 (1914); 238 U.S. 202 (1915); 241 U.S. 531 (1916); 246 U.S. 565 (1918).

246 U.S. at 591.

246 U.S. at 600.

246 U.S. at 565 (1918).

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The suit was begun in 1906, and a judgment was rendered against West Virginia in 1915. Finally, in 1917, Virginia filed a suit against West Virginia to show cause why, in default of payment of the judgment, an order should not be entered directing the West Virginia legislature to levy a tax for payment of the judgment. Starting with the rule that the judicial power essentially involves the right to enforce the results of its exertion, the Court proceeded to hold that it applied with the same force to States as to other litigants and to consider appropriate remedies for the enforcement of its authority. In this connection, Chief Justice White declared: “As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers and, comprehensively considered, are sustained by every authority of the federal government, judicial, legislative, or executive, which may be appropriately exercised.”

The Court, however, left open the question of its power to enforce the judgment under existing legislation and scheduled the case for reargument at the next term, but in the meantime West Virginia accepted the Court’s judgment and entered into an agreement with Virginia to pay it.

Controversies Between a State and Citizens of Another State

The decision in *Chisholm v. Georgia* that this category of cases included those where a State was a party defendant provoked the proposal and ratification of the Eleventh Amendment, and since then controversies between a State and citizens of another State have included only those cases where the State has been a party plaintiff or has consented to be sued. As a party plaintiff, a State may bring actions against citizens of other States to protect its legal rights or in some instances as *parens patriae* to protect the health and welfare of its citizens. In general, the Court has tended to construe strictly this grant of judicial power, which simulta-
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Jurisdiction Confined to Civil Cases.—In _Cohens v. Virginia_, there is a dictum to the effect that the original jurisdiction of the Supreme Court does not include suits between a State and its own citizens. Long afterwards, the Supreme Court dismissed an action for want of jurisdiction because the record did not show that the corporation against which the suit was brought was chartered in another State. Subsequently, the Court has ruled that it will not entertain an action by a State to which its citizens are either parties of record or would have to be joined because of the effect of a judgment upon them. In his dictum in _Cohens v. Virginia_, Chief Justice Marshall also indicated that perhaps no jurisdiction existed over suits by States to enforce their penal laws. Sixty-seven years later, the Court wrote this dictum into law in _Wisconsin v. Pelican Ins. Co._ Wisconsin sued a Louisiana corporation to recover a judgment rendered in its favor by one of its own courts. Relying partly on the rule of international law that the courts of no country execute the penal laws of another, partly upon the 13th section of the Judiciary Act of 1789, which vested the Supreme Court with exclusive jurisdiction of controversies of a civil nature where a State is a party, and partly on Justice Iredell’s dissent in _Chisholm v. Georgia_, where he confined the term “controversies” to civil suits, Justice Gray ruled for the Court that for purposes of original jurisdiction, “controversies between a State and citizens of another State” are confined to civil suits.

The State’s Real Interest.—Ordinarily, a State may not sue in its name unless it is the real party in interest with real inter-

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961 19 U.S. (6 Wheat.) 264, 398-399 (1821).
964 19 U.S. (6 Wheat.) at 398-399.
965 127 U.S. 265 (1888).
966 2 U.S. (2 Dall.) 419, 431-432 (1793).
967 127 U.S. at 289-300.
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Ests. It can sue to protect its own property interests, and if it sues for its own interest as owner of another State’s bonds, rather than as an assignee for collection, jurisdiction exists. Where a State in order to avoid the limitation of the Eleventh Amendment by statute provided for suit in the name of the State to collect on the bonds of another State held by one of its citizens, it was refused the right to sue. Nor can a State sue on behalf of its own citizens the citizens of other States to collect claims.

The State as Parens Patriae.—The distinction between suits brought by States to protect the welfare of its citizens as a whole and suits to protect the private interests of individual citizens is not easily drawn. Thus, in Oklahoma v. Atchison, T. & S.F. Ry., the State was refused permission to sue to enjoin unreasonable rate charges by a railroad on the shipment of specified commodities, inasmuch as the State was not engaged in shipping these commodities and had no proprietary interest in them. But in Georgia v. Pennsylvania R.R., a closely divided Court accepted a suit by the State, suing as parens patriae and in its proprietary capacity, the latter being treated by the Court as something of a makeweight, seeking injunctive relief against twenty railroads on allegations that the rates were discriminatory against the State and its citizens and their economic interests and that the rates had been fixed through coercive action by the northern roads against the southern lines in violation of the Clayton Antitrust Act. For the Court, Justice Douglas observed that the interests of a State for purposes of invoking the original jurisdiction of the Court were not to be confined to those which are proprietary but rather “embrace the so called ‘quasi-sovereign’ interests which . . . are ‘independent of and behind the titles of its citizens, in all the earth and air within its domain.’”

Discriminatory freight rates, the Justice continued, may cause a blight no less serious than noxious gases in that they may arrest

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972 220 U.S. 277 (1911).
973 324 U.S. 439 (1945).
974 324 U.S. at 447-48 (quoting from Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), in which the State was permitted to sue parens patriae to enjoin defendant from emitting noxious gases from its works in Tennessee which caused substantial damage in nearby areas of Georgia). In Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607-608 (1982), the Court attempted to enunciate the standards by which to recognize permissible parens patriae assertions. See also Maryland v. Louisiana, 451 U.S. 725, 737-739 (1981).
the development of a State and put it at a competitive disadvantage. “Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia’s interest is not remote; it is immediate. If we denied Georgia as parens patriae the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction.”

The continuing vitality of this case is in some doubt, inasmuch as the Court has limited it in a similar case. But the ability of States to act as parens patriae for their citizens in environmental pollution cases seems established, although as a matter of the Supreme Court's original jurisdiction such suits are not in favor. One clear limitation had seemed to be solidly established until recent litigation cast doubt on its foundation. It is no part of a State’s “duty or power,” said the Court in Massachusetts v. Mellon, “to enforce [her citizens’] rights in respect to their relations with the Federal Government. In that field, it is the United States and not the State which represents them as parens patriae when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as

976 In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Court, five-to-two, held that the State could not maintain an action for damages parens patriae under the Clayton Act and limited the previous case to instances in which injunctive relief is sought. Hawaii had brought its action in federal district court. The result in Hawaii was altered by Pub. L. 94-435, 90 Stat. 1383 (1976), 15 U.S.C. § 15c et seq., but the decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), reduced in importance the significance of the law.  
977 Most of the cases, but see Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), concern suits by one State against another. Missouri v. Illinois, 180 U.S. 208 (1901); New York v. New Jersey, 256 U.S. 296 (1921); North Dakota v. Minnesota, 263 U.S. 385 (1923). While recognizing that original jurisdiction exists when a State sues a political subdivision of another State or a private party as parens patriae for its citizens and on its own proprietary interests to abate environmental pollution, the Court has held that because of the technical complexities of the issues and the inconvenience of adjudicating them on its original docket the cases should be brought in the federal district court under federal question jurisdiction founded on the federal common law. Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Washington v. General Motors Corp., 406 U.S. 109 (1972). The Court had earlier thought the cases must be brought in state court. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).  
978 262 U.S. 447, 486 (1923).
flow from that status.” But in *South Carolina v. Katzenbach,*979 while holding that the State lacked standing under *Massachusetts v. Mellon* to attack the constitutionality of the Voting Rights Act of 1965980 under the Fifth Amendment’s due-process clause and under the bill-of-attainder clause of Article I,981 the Court proceeded to decide on the merits the State’s claim that Congress had exceeded its powers under the Fifteenth Amendment.982 Was the Court here *sub silentio* permitting it to assert its interest in the execution of its own laws, rather than those enacted by Congress, or its interest in having Congress enact only constitutional laws for application to its citizens, an assertion which is contrary to a number of supposedly venerated cases.983 Either alternative possibility would be significant in a number of respects.984

**Contrversies Between Citizens of Different States**

The records of the Federal Convention are silent with regard to the reasons the Framers included in the judiciary article jurisdiction in the federal courts of controversies between citizens of dif-

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979 383 U.S. 301 (1966). The State sued the Attorney General of the United States as a citizen of New Jersey, thus creating the requisite jurisdiction, and avoiding the problem that the States may not sue the United States without its consent. Minnesota v. Hitchcock, 185 U.S. 373 (1902); Oregon v. Hitchcock, 202 U.S. 60 (1906); Kansas v. United States, 204 U.S. 321 (1907). The expedient is, of course, the same device as is used to avoid the Eleventh Amendment prohibition against suing a State by suing its officers. Ex parte Young, 209 U.S. 123 (1908).


981 The Court first held that neither of these provisions were restraints on what the Federal Government might do with regard to a State. It then added: “Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parents patriae of every American citizen.” *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

982 The Court did not indicate on what basis South Carolina could raise the issue. At the beginning of its opinion, the Court did note the “original jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the constitution. *See Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439.” Id. at 307 But surely this did not have reference to that case’s *parens patriae* holding.

983 *See Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Florida v. Mellon*, 273 U.S. 12 (1927); *Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944). *See especially Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), four original actions were consolidated and decided. Two were actions by the United States against States, but the other two were suits by States against the Attorney General, as a citizen of New York, seeking to have the Voting Rights Act Amendments of 1970 voided as unconstitutional. *South Carolina v. Katzenbach* was uniformly relied on by all parties as decisive of the jurisdictional question, and in announcing the judgment of the Court Justice Black simply noted that no one raised jurisdictional or justiciability questions. Id. at 117 n.1. *And see id.* at 152 n.1 (Justice Harlan concurring in part and dissenting in part). *See also South Carolina v. Baker*, 485 U.S. 505 (1988); *South Carolina v. Regan*, 465 U.S. 367 (1984).

ferent States, but since the Judiciary Act of 1789 “diversity jurisdiction” has been bestowed statutorily on the federal courts.

The traditional explanation remains that offered by Chief Justice Marshall. “However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.” Other explanations have been offered and controverted, but diversity cases constitute a large bulk of cases on the dockets of the federal courts today, though serious proposals for restricting access to federal courts in such cases have been before Congress for some time. The essential difficulty with this type of jurisdiction is that it requires federal judges to decide issues of local import on the basis of their reading of how state judges would decide them, an oftentimes laborious process, which detracts from the time and labor needed to resolve issues of federal import.

**The Meaning of “State” and the District of Columbia Problem.**—In *Hepburn v. Ellzey*, Chief Justice Marshall for the Court confined the meaning of the word “State” as used in the Constitution to “the members of the American confederacy” and ruled that a citizen of the District of Columbia could not sue a citizen of Virginia on the basis of diversity of citizenship. Marshall noted that it was “extraordinary that the courts of the United States,

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986 1 Stat. 78, 11. The statute also created alienage jurisdiction of suits between a citizen of a State and an alien. See Holt, *The Origins of Alienage Jurisdiction*, 14 Okla. City L. Rev. 547 (1989). Subject to a jurisdictional amount, now $50,000, 28 U.S.C. § 1332, the statute conferred diversity jurisdiction when the suit was between a citizen of the State in which the suit was brought and a citizen of another State. The Act of March 3, 1875, § 1, 18 Stat. 470, first established the language in the present statute, 28 U.S.C. § 1332(a)(1), merely requiring diverse citizenship, so that a citizen of Maryland could sue a citizen of Delaware in federal court in New Jersey, Snyder v. Harris, 394 U.S. 332 (1969), held that in a class action in diversity the individual claims could not be aggregated to meet the jurisdictional amount. Zahn v. International Paper Co., 414 U.S. 291 (1974), extended Snyder in holding that even though the named plaintiffs had claims of more than $10,000 they could not represent a class in which many of the members had claims for less than $10,000.


989 The principal proposals are those of the American Law Institute. Id. at 123-34.

990 6 U.S. (2 Cr.) 445 (1805).
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which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration." 991 The same rule was subsequently applied to citizens of the territories of the United States. 992

Whether the Chief Justice had in mind a constitutional amendment or a statute when he spoke of legislative consideration remains unclear. Not until 1940, however, did Congress attempt to meet the problem by statutorily conferring on federal district courts jurisdiction of civil actions, not involving federal questions, "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska and any State or Territory." 993 In National Mutual Ins. Co. v. Tidewater Transfer Co., 994 this act was upheld in a five-to-four decision but for widely divergent reasons by a coalition of Justices. Two Justices thought that Chief Justice Marshall’s 1804 decision should be overruled, but the other seven Justices disagreed; however, three of the seven thought the statute could be sustained under Congress’ power to enact legislation for the inhabitants of the District of Columbia, but the remaining four plus the other two rejected this theory. The statute was upheld because a total of five Justices voted to sustain it, although of the two theories relied on, seven Justices rejected one and six the other. The result, attributable to "conflicting minorities in combination," 995 means that Hepburn v. Ellzey is still good law insofar as it holds that the District of Columbia is not a State, but is overruled insofar as it holds that District citizens may not utilize federal diversity jurisdiction. 996

Citizenship of Natural Persons.—For purposes of diversity jurisdiction, state citizenship is determined by the concept of domicile 997 rather than of mere residence. 998 That is, while the Court’s definition has varied throughout the cases, 999 a person is a citizen of the State in which he has his true, fixed, and permanent home and principal establishment and to which he intends to return

991 6 U.S. at 453.
992 City of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816).
993 54 Stat. 143 (1940), as revised, 28 U.S.C. § 1332(d).
994 337 U.S. 582 (1948).
995 337 U.S. at 655 (Justice Frankfurter dissenting).
whenever he is absent from it. Acts may disclose intention more clearly and decisively than declarations. One may change his domicile in an instant by taking up residence in the new place and by intending to remain there indefinitely and one may obtain the benefit of diversity jurisdiction by so changing for that reason alone, provided the change is more than a temporary expediency.

If the plaintiff and the defendant are citizens of different States, diversity jurisdiction exists regardless of the State in which suit is brought. Chief Justice Marshall early established that in multiparty litigation, there must be complete diversity, that is, that no party on one side could be a citizen of any State of which any party on the other side was a citizen. It has now apparently been decided that this requirement flows from the statute on diversity rather than from the constitutional grant and that therefore minimal diversity is sufficient. The Court has also placed some issues beyond litigation in federal courts in diversity cases, apparently solely on policy grounds.

Citizenship of Corporations.—In Bank of the United States v. Deveaux, Chief Justice Marshall declared: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate

1000 Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).
1005 Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).
1006 In State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-531 (1967), holding that congressional provision in the interpleader statute of minimal diversity, 28 U.S.C. § 1332(a)(1), was valid, the Court said of Strawbridge. "Chief Justice Marshall there purported to construe only 'The words of the act of Congress,' not the Constitution itself. And in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." Of course, the diversity jurisdictional statute not having been changed, complete diversity of citizenship, outside the interpleader situation, is still required. In class actions, only the citizenship of the named representatives is considered and other members of the class can be citizens of the same State as one or more of the parties on the other side. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Snyder v. Harris, 394 U.S. 332, 340 (1969).
1007 In domestic relations cases and probate matters, the federal courts will not act, though diversity exists. Barber v. Barber, 62 U.S. (21 How.) 582 (1858); Ex parte Burrus, 136 U.S. 586 (1890); In re Broderick's Will, 88 U.S. (21 Wall.) 503 (1875). These cases merely enunciated the rule, without justifying it; when the Court squarely faced the issue quite recently, it adhered to the rule, citing justifications. Ankenbrandt v. Richards, 504 U.S. 689 (1992).
1008 9 U.S. (5 Cr.) 61, 86 (1809).
Deveaux was overruled in 1844, when after elaborate argument a divided Court held that “a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person.” Ten years later, the Court abandoned this rationale, but it achieved the same result by creating a conclusive presumption that all of the stockholders of a corporation are citizens of the State of incorporation. Through this fiction, substantially unchanged today, the Court was able to hold that a corporation cannot be a citizen for diversity purposes and that the citizenship of its stockholders controls but to provide corporations access to federal courts in diversity in every State except the one in which it is incorporated. The right of foreign corporations to resort to federal courts in diversity is not one which the States may condition as a qualification for doing business in the State.

Unincorporated associations, such as partnerships, joint stock companies, labor unions, governing boards of institutions, and the like, do not enjoy the same privilege as a corporation; the actual

1010 Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).
1013 § 2, 72 Stat. 415 (1958), amending 28 U.S.C. § 1332(c), provided that a corporation is to be deemed a citizen of any State in which it has been incorporated and of the State in which it has its principal place of business. 78 Stat. 445 (1964), amending 28 U.S.C. § 1332(c), was enacted to correct the problem revealed by Lumbermen’s Mutual Casualty Co. v. Elbert, 348 U.S. 48 (1954).
1014 In Terral v. Burke Construction Co., 257 U.S. 529 (1922), the Court resolved two conflicting lines of cases and voided a state statute which required the cancellation of the license of a foreign corporation to do business in the State upon notice that the corporation had removed a case to a federal court.

**Manufactured Diversity.**—One who because of diversity of citizenship can choose whether to sue in state or federal court will properly consider where the advantages and disadvantages balance; one who perceives the balance clearly favoring the federal forum where no diversity exists will no doubt often attempt to create diversity. In the Judiciary Act of 1789, Congress exempted from diversity jurisdiction suits on choses of action in favor of an assignee unless the suit could have been brought in federal court if no assignment had been made.\footnote{§ 11, 1 Stat. 78, sustained in Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799), and Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). The present statute, 28 U.S.C. § 1359, provides that no jurisdiction exists in a civil action ''in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.''} One could create diversity by a \textit{bona fide} change of domicile even with the sole motive of creating domicile.\footnote{See Kramer v. Carribean Mills, 394 U.S. 823 (1969).} Similarly, one could create diversity, or defeat it, by choosing a personal representative of the requisite citizenship.\footnote{Williamson v. Osenton, 232 U.S. 619 (1914); Morris v. Gilmer, 129 U.S. 315 (1889).}

By far, the greatest number of attempts to manufacture or create diversity have concerned corporations. A corporation cannot get into federal court by transferring its claim to a subsidiary incorporated in another State,\footnote{E.g., Southern Realty Co. v. Walker, 211 U.S. 603 (1909).} and for a time the Supreme Court tended to look askance at collusory incorporations and the creation of dummy corporations for purposes of creating diversity.\footnote{Miller & Lux v. East Side Canal & Irrigation Co., 211 U.S. 293 (1908).} But in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,\footnote{276 U.S. 518 (1928).} it became highly important to the plaintiff company to bring its suit in federal court rather than in a state court. Thus, Black & White, a Kentucky corporation, dissolved itself and obtained a charter as a Tennessee corporation; the only change made was the State of incorporation, the name, officers, shareholders, and location of the business remaining the same. A majority of the Court, over a strong dissent by Justice Holmes,\footnote{276 U.S. at 532 (joined by Justices Brandeis and Stone). Justice Holmes here presented his view that Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), had been wrongly decided, but he preferred not to overrule it, merely “not allow it to spread … into new fields.”}
saw no collusion and upheld diversity, meaning that the company won whereas it would have lost had it sued in the state court. *Black & White Taxicab* probably more than anything led to a reexamination of the decision on the choice of law to be applied in diversity litigation.

**The Law Applied in Diversity Cases.**—By virtue of § 34 of the Judiciary Act of 1789, state law expressed in constitutional and statutory form was regularly applied in federal courts in diversity actions to govern the disposition of such cases. But in *Swift v. Tyson*, Justice Story for the Court ruled that state court decisions were not laws within the meaning of § 34 and though entitled to respect were not binding on federal judges, except with regard to matters of a “local nature,” such as statutes and interpretations thereof pertaining to real estate and other immovables, in contrast to questions of general commercial law as to which the answers were dependent not on “the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence.” The course of decision over the period of almost one hundred years was toward an expansion of the areas in which federal judges were free to construct a federal common law and a concomitant contraction of the definition of “local” laws. Although

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1024 The section provided that “the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.” 1 Stat. 92. With only insubstantial changes, the section now appears as 28 U.S.C. § 1652. For a concise review of the entire issue, see C. Wright, Handbook of the Law of Federal Courts ch. 9 (4th ed. 1983).

1025 41 U.S. (16 Pet.) 1 (1842). The issue in the case was whether a pre-existing debt was good consideration for an indorsement of a bill of exchange so that the endorsee would be a holder in due course.

1026 41 U.S. at 19. The Justice concluded this portion of the opinion: “The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in great measure, not the law of a single country only, but of the commercial world. *Nun erit alia lex Romae, alia Athenis; alia munie, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtenebit.*” Id. The thought that the same law should prevail in Rome as in Athens was used by Justice Story in DeLovio v. Boit, 7 Fed. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815). For a modern utilization, see United States v. Jefferson County Board of Education, 372 F.2d 836, 861 (5th Cir. 1966); 380 F.2d 365, 388 (5th Cir. 1967) (dissenting opinion).

1027 The expansions included: Lane v. Vick, 44 U.S. (3 How.) 464 (1845) (wills); City of Chicago v. Robbins, 67 U.S. (2 Bl.) 418 (1862), and Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368 (1893) (torts); Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497 (1870) (real estate titles and rights of riparian owners); Kuhn v. Fairmont Coal Co., 255 U.S. 349 (1910) (mineral conveyances); Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847) (contracts); Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893). It was strongly contended that uniformity, the goal of Justice Story’s formulation, was not being achieved, in great part because state courts followed their own rules of decision even when prior federal decisions were contrary. Frankfurter, Distribution of Judicial Power Between Federal and State Courts, 13 Cornell L.Q. 499, 529 n.
dissatisfaction with *Swift v. Tyson* was almost always present, within and without the Court,\(^\text{1028}\) it was the Court’s decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,\(^\text{1029}\) which brought disagreement to the strongest point and perhaps precipitated the overruling of *Swift v. Tyson* in *Erie Railroad Co. v. Tompkins*\(^\text{1030}\).

“It is impossible to overstate the importance of the *Erie* decision. It announces no technical doctrine of procedure or jurisdiction, but goes to the heart of the relations between the federal government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government.”\(^\text{1031}\) *Erie* was remarkable in a number of ways aside from the doctrine it announced. It reversed a 96-year-old precedent, which counsel had specifically not questioned, it reached a constitu-

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150 (1928). Moreover, the Court held that while state court interpretations of state statutes or constitutions were to be followed, federal courts could ignore them if they conflicted with earlier federal constructions of the same statute or constitutional provision, Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847), or if they had been rendered after the case had been tried in federal court, Burgess v. Seligman, 107 U.S. 20 (1883), thus promoting lack of uniformity. See also Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Pease v. Peck, 59 U.S. (18 How.) 595 (1856); Watson v. Tarpley, 59 U.S. (18 How.) 517 (1856).

1028 Extensions of the scope of *Tyson* frequently were rendered by a divided Court over the strong protests of dissenters. E.g., Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Lane v. Vick, 44 U.S. (3 How.) 463 (1845); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910). In Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 401-404 (1893), Justice Field dissented in an opinion in which he expressed the view that Supreme Court disregarding of state court decisions was unconstitutional, a view endorsed by Justice Holmes in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (dissenting opinion), and adopted by the Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Numerous proposals were introduced in Congress to change the rule.

1029 276 U.S. 518 (1928). B. & W. had contracted with a railroad to provide exclusive taxi service at its station. B. & Y. began operating taxis at the same station and B. & W. wanted to enjoin the operation, but it was a settled rule by judicial decision in Kentucky courts that such exclusive contracts were contrary to public policy and were unenforceable in court. Therefore, B. & W. dissolved itself in Kentucky and reincorporated in Tennessee, solely in order to create diversity of citizenship and enable itself to sue in federal court. It was successful and the Supreme Court ruled that diversity was present and that the injunction should issue. In *Mutual Life Ins. Co. v. Johnson*, 293 U.S. 335 (1934), the Court, in an opinion by Justice Cardozo, appeared to retreat somewhat from its extensions of *Tyson*, holding that state law should be applied, through a “benign and prudent comity,” in a case “balanced with doubt,” a concept first used by Justice Bradley in *Burgess v. Seligman*, 107 U.S. 20 (1883).

1030 304 U.S. 64 (1938). Judge Friendly has written: “Having served as the Justice’s [Brandeis’s] law clerk the year *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* came before the Court, I have little doubt he was waiting for an opportunity to give *Swift v. Tyson* the happy dispatch he thought it deserved.” H. Friendly, BENCHMARKS 20 (1967).


tional decision when a statutory interpretation was available though perhaps less desirable, and it marked the only time in United States constitutional history when the Court has held that it had undertaken an unconstitutional action.\footnote{1032}

Tompkins was injured by defendant’s train while he was walking along the tracks. He was a citizen of Pennsylvania, and the railroad was incorporated in New York. Had he sued in a Pennsylvania court, state decisional law was to the effect that inasmuch as he was a trespasser, the defendant owed him only a duty not to injure him through wanton or willful misconduct;\footnote{1033} the general federal law treated him as a licensee who could recover for negligence. Tompkins sued and recovered in federal court in New York and the railroad presented the issue to the Supreme Court as one covered by “local” law within the meaning of \textit{Swift v. Tyson}. Justice Brandeis for himself and four other Justices, however, chose to overrule the early case.

First, it was argued that \textit{Tyson} had failed to bring about uniformity of decision and that its application discriminated against citizens of a State by noncitizens. Justice Brandeis cited recent researches\footnote{1034} indicating that § 34 of the 1789 Act included court decisions in the phrase “laws of the several States.” “If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.”\footnote{1035} For a number of reasons, it would not have been wise to have overruled \textit{Tyson} on the basis of arguable new discoveries.\footnote{1036}

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\item \footnote{1032} 304 U.S. at 157-164, 171 n.71.
\item \footnote{1033} This result was obtained in retrial in federal court on the basis of Pennsylvania law. Tompkins v. Erie Railroad Co., 98 F. 49 (3d Cir.), cert. denied, 305 U.S. 637 (1938).
\item \footnote{1035} 304 U.S. at 77-78 (footnote citations omitted).
\item \footnote{1036} Congress had re-enacted § 34 as § 721 of the Revised Statutes, citing \textit{Swift v. Tyson} in its annotation, thus presumably accepting the gloss placed on the words by that ruling. But note that Justice Brandeis did not think even the re-enacted statute was unconstitutional. 304 U.S. at 79-80. \textit{See} H. \textit{Friendly, Benchmarks} 161-163 (1967). Perhaps a more compelling reason of policy was that stated by Justice Frankfurter rejecting for the Court a claim that the general grant of federal question jurisdiction to the federal courts in 1875 made maritime suits cognizable on the law side of the federal courts. “Petitioner now asks us to hold that no student of the jurisdiction of the federal courts or of admiralty, no judge, and none of the learned and alert members of the admiralty bar were able, for seventy-five years, to discern the drastic change now asserted to have been contrived in admiralty jurisdiction by the Act of 1875. In light of such impressive testimony from the past
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Second, the decision turned on the lack of power vested in Congress to have prescribed rules for federal courts in state cases. “There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts. No clause in the Constitution purports to confer such a power upon the federal courts.” But having said this, Justice Brandeis made it clear that the unconstitutional assumption of power had been made not by Congress but by the Court itself. “[W]e do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.”

Third, the rule of Erie replacing Tyson is that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. Whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”

Since 1938, the effect of Erie has first increased and then diminished, as the nature of the problems presented changed. Thus, the Court at first indicated that not only were the decisions of the highest court of a State binding on a federal court in diversity, but also decisions of intermediate appellate courts and courts of...
first instance, even where the decisions bound no other state judge except as they were persuasive on their merits. It has now retreated from this position, concluding that federal judges are to give careful consideration to lower state court decisions and to old, perhaps outmoded decisions, but that they must find for themselves the state law if the State’s highest court has not spoken definitively within a period which would raise no questions about the continued viability of the decision. In the event of a state supreme court reversal of an earlier decision, the federal courts are, of course, bound by the later decision, and a judgment of a federal district court, correct when rendered, must be reversed on appeal if the State’s highest court in the meantime has changed the applicable law. In diversity cases which present conflicts of law problems, the Court has reiterated that the district court is to apply the law of the State in which it sits, so that in a case in State A in which the law of State B is applicable, perhaps because a contract was made there or a tort was committed there, the federal court is to apply State A’s conception of State B’s law.

The greatest difficulty in applying the *Erie* doctrine has been in cases in which issues of procedure were important. The process was initiated in 1945 when the Court held that a state statute of limitations, which would have barred suit in state court, would bar it in federal court, although as a matter of federal law the case still could have been brought in federal court. The Court regarded the substance-procedure distinction as immaterial. “[S]ince

1041 Fidelity Union Trust Co., v. Field, 311 U.S. 169 (1940).
1042 King v. Order of Commercial Travelers of America, 333 U.S. 153 (1948); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 205 (1956) (1910 decision must be followed in absence of confusion in state decisions since there were “no developing line of authorities that cast a shadow over established ones, no dicta, doubts or ambiguities . . . , no legislative development that promises to undermine the judicial rule”). See also Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).
1045 Interestingly enough, 1938 marked what seemed to be a switching of positions vis-a-vis federal and state courts of substantive law and procedural law. Under *Tyson*, federal courts in diversity actions were free to formulate a federal common law, while they were required by the Conformity Act, § 5, 17 Stat. 196 (1872), to conform their procedure to that of the State in which the court sat. *Erie* then ruled that state substantive law was to control in federal court diversity actions, while by implication matters of procedure in federal court were subject to congressional governance. Congress authorized the Court to promulgate rules of civil procedure, 48 Stat. 1064 (1934), which it did in 1938, a few months after *Erie* was decided. 302 U.S. 783.
a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." The standard to be applied was compelled by the "intent" of the *Erie* decision, which "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." The Court’s application of this standard created substantial doubt that the Federal Rules of Civil Procedure had any validity in diversity cases.


Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). The decision was five-to-four, so that the precedent may or may not be stable for future application.

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1047 326 U.S. at 108-09.
1048 326 U.S. at 109.
1051 Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). The decision was five-to-four, so that the precedent may or may not be stable for future application.
between state and federal damage awards depending whether the state or the federal approach was applied; it then followed the mode of analysis exemplified by those cases emphasizing the importance of federal courts reaching the same outcome as would the state courts, rather than what had been the prevailing standard, in which the Court balanced state and federal interests to determine which law to apply. Emphasis upon either approach to considerations of applying state or federal law reflects a continuing difficulty of accommodating "the constitutional power of the states to regulate the relations among their citizens . . . [and] the constitutional power of the federal government to determine how its courts are to be operated." Additional decisions will be required to determine which approach, if either, prevails. The latter ruling simplified the matter greatly. *Erie* is not to be the proper test when the question is the application of one of the Rules of Civil Procedure; if the rule is valid when measured against the Enabling Act and the Constitution, it is to be applied regardless of state law to the contrary.

Although it seems clear that *Erie* applies in nondiversity cases in which the source of the right sued upon is state law, it is equally clear that *Erie* is not applicable always in diversity cases whether the nature of the issue be substantive or procedural. Thus, it may be that there is an overriding federal interest which compels national uniformity of rules, such as a case in which the issue is the appropriate rule for determining the liability of a bank which had guaranteed a forged federal check, in which the issue is the appropriate rule for determining whether a tortfeasor is liable to the United States for hospitalization of a soldier and loss of his

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services, and in which the issue is the appropriate rule for determining the validity of a defense raised by a federal officer sued for having libeled one in the course of his official duties. In such cases, when the issue is found to be controlled by federal law, common or otherwise, the result is binding on state courts as well as on federal. Despite, then, Justice Brandeis' assurance that there is no "federal general common law," there is a common law existing and developing in the federal courts, even in diversity cases, which will sometimes control decision.

Controversies Between Citizens of the Same State Claiming Land Under Grants of Different States

The genesis of this clause was in the report of the Committee of Detail which vested the power to resolve such land disputes in the Senate, but this proposal was defeated in the Convention, which then added this clause to the jurisdiction of the federal judiciary without reported debate. The motivation for this clause was the existence of boundary disputes affecting ten States at the time the Convention met. With the adoption of the Northwest Ordinance of 1787, the ultimate settlement of the boundary disputes, and the passing of land grants by the States, this clause, never productive of many cases, became obsolete.

Controversies Between a State, or the Citizens Thereof, and Foreign States, Citizens, or Subjects

The scope of this jurisdiction has been limited both by judicial decisions and the Eleventh Amendment. By judicial application of the law of nations, a foreign state is immune from suit in the fed-
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eral courts without its consent, an immunity which extends to suits brought by States of the American Union. Conversely, the Eleventh Amendment has been construed to bar suits by foreign states against a State of the United States. Consequently, the jurisdiction conferred by this clause comprehends only suits brought by a State against citizens or subjects of foreign states, by foreign states against American citizens, citizens of a State against the citizens or subjects of a foreign state, and by aliens against citizens of a State.

**Suits by Foreign States.**—The privilege of a recognized foreign state to sue in the courts of another state upon the principle of comity is recognized by both international law and American constitutional law. To deny a sovereign this privilege “would manifest a want of comity and friendly feeling.” Although national sovereignty is continuous, a suit in behalf of a national sovereign can be maintained in the courts of the United States only by a government which has been recognized by the political branches of our own government as the authorized government of the foreign state. As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit. Once a foreign government avails itself of the

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1068 292 U.S. at 330.
1069 But in the absence of a federal question, there is no basis for jurisdiction between the subjects of a foreign State. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). The Foreign Sovereign Immunities Act of 1976, Pub. L. 94-538, 90 Stat. 2891, amending various sections of title 28 U.S.C., comprehensively provided jurisdictional bases for suits by and against foreign states and appears as well to comprehend suits by an alien against a foreign state which would be beyond the constitutional grant. However, in the only case in which that matter has been an issue before it, the Court has construed the Act as creating a species of federal question jurisdiction. Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).
1070 The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1871).
1071 78 U.S. at 167 This case also held that a change in the person of the sovereign does not affect the continuity or rights of national sovereignty, including the right to bring suit or to continue one that has been brought.
1072 Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938), citing Jones v. United States, 137 U.S. 202, 212 (1890); Matter of Lehigh Valley R.R., 265 U.S. 573 (1924). Whether a government is to be regarded as the legal representative of a foreign state is, of course, a political question.
1073 Ex parte Peru, 318 U.S. 578, 589 (1943), distinguishing Compania Espanola v. The Navemar, 303 U.S. 68 (1938), which held that where the Executive Department neither recognizes nor disallows the claim of immunity, the court is free to examine that question for itself. Under the latter circumstances, however, a claim that a foreign vessel is a public ship and immune from suit must be substantiated to the satisfaction of the federal court.
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privilege of suing in the courts of the United States, it subjects itself to the procedure and rules of decision governing those courts and accepts whatever liabilities the court may decide to be a reasonable incident of bringing the suit.\textsuperscript{1074} The rule that a foreign nation instituting a suit in a federal district court cannot invoke sovereign immunity as a defense to a counterclaim growing out of the same transaction has been extended to deny a claim of immunity as a defense to a counterclaim extrinsic to the subject matter of the suit but limited to the amount of the sovereign’s claim.\textsuperscript{1075} Moreover, certain of the benefits extending to a domestic sovereign do not extend to a foreign sovereign suing in the courts of the United States. A foreign state does not receive the benefit of the rule which exempts the United States and its member States from the operation of the statute of limitations, because those considerations of public policy back of the rule are regarded as absent in the case of the foreign sovereign.\textsuperscript{1076}

\textbf{Indian Tribes}.—Within the terms of Article III, an Indian tribe is not a foreign state and hence cannot sue in the courts of the United States. This rule was applied in the case of Cherokee Nation v. Georgia,\textsuperscript{1077} where Chief Justice Marshall conceded that the Cherokee Nation was a state, but not a foreign state, being a part of the United States and dependent upon it. Other passages of the opinion specify the elements essential of a foreign state for purposes of jurisdiction, such as sovereignty and independence.

\textbf{Narrow Construction of the Jurisdiction}.—As in cases of diversity jurisdiction, suits brought to the federal courts under this category must clearly state in the record the nature of the parties. As early as 1809, the Supreme Court ruled that a federal court could not take jurisdiction of a cause where the defendants were described in the record as “late of the district of Maryland,” but were not designated as citizens of Maryland, and plaintiffs were described as aliens and subjects of the United Kingdom.\textsuperscript{1078} The meticulous care manifested in this case appeared twenty years later...
when the Court narrowly construed § 11 of the Judiciary Act of 1789, vesting the federal courts with jurisdiction when an alien was a party, in order to keep it within the limits of this clause. The judicial power was further held not to extend to private suits in which an alien is a party, unless a citizen is the adverse party.\(^{1079}\) This interpretation was extended in 1870 by a holding that if there is more than one plaintiff or defendant, each plaintiff or defendant must be competent to sue or liable to suit.\(^{1080}\) These rules, however, do not preclude a suit between citizens of the same State if the plaintiffs are merely nominal parties and are suing on behalf of an alien.\(^{1081}\)

Clause 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

**THE ORIGINAL JURISDICTION OF THE SUPREME COURT**

From the beginning, the Supreme Court has assumed that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by Congress.\(^{1082}\) In *Chisholm v. Georgia*,\(^{1083}\) the Court entertained an action of assumpsit against Georgia by a citizen of another State. Congress in § 3 of the Judiciary Act of 1789\(^ {1084}\) purported to invest the Court with original jurisdiction in suits between a State and citizens of another State, but it did not authorize actions of assumpsit in such cases nor did it prescribe forms of process for the exercise of original jurisdiction.\(^{1085}\)

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\(^{1080}\) Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1871). See, however, Lacassagne v. Chapuis, 144 U.S. 119 (1892), which held that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties were new and were both aliens.

\(^{1081}\) Browne v. Strode, 9 U.S. (5 Cr.) 303 (1809).

\(^{1082}\) But in § 13 of the Judiciary Act of 1789, 1 Stat. 80, Congress did so purport to convey the jurisdiction and the statutory conveyance exists today. 28 U.S.C. § 1251. It does not, however, exhaust the listing of the Constitution.

\(^{1083}\) 2 U.S. (2 Dall.) 419 (1793). In an earlier case, the point of jurisdiction was not raised. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792).

\(^{1084}\) 1 Stat. 80.
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nal jurisdiction. Over the dissent of Justice Iredell, the Court, in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments. The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment, which did not, however, affect the direct flow of original jurisdiction to the Court, although those cases to which States were parties were now limited to States as party plaintiffs, to two or more States disputing, or to United States suits against States. On the Eleventh Amendment, see infra.

By 1861, Chief Justice Taney could confidently enunciate, after review of the precedents, that in all cases where original jurisdiction is given by the Constitution, the Supreme Court has authority “to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.”

Although Chief Justice Marshall apparently assumed the Court had exclusive jurisdiction of cases within its original jurisdiction, Congress from 1789 on gave the inferior federal courts concurrent jurisdiction in some classes of such cases. Sustained in the early years on circuit, this concurrent jurisdiction was finally approved by the Court itself. The Court has also relied on the first Congress’ interpretation of the meaning of Article III in declining original jurisdiction of an action by a State to enforce a judgment for a precuminary penalty awarded by one of its own courts. Noting that § 13 of the Judiciary Act had referred to “controversies of a civil nature,” Justice Gray declared that it “was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning.”

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1085 On the Eleventh Amendment, see infra.
1088 In § 3 of the 1789 Act. The present division is in 28 U.S.C. § 1251.
1092 127 U.S. at 297. See also the dictum in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 398-99 (1821); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431-32 (1793).
However, another clause of § 13 of the Judiciary Act of 1789 was not accorded the same presumption by Chief Justice Marshall, who, interpreting it as giving the Court power to issue a writ of mandamus on an original proceeding, declared that as Congress could not restrict the original jurisdiction neither could it enlarge it and pronounced the clause void.\footnote{Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).} While the Chief Justice's interpretation of the meaning of the clause may be questioned, no one has questioned the constitutional principle thereby proclaimed. Although the rule deprives Congress of power to expand or contract the jurisdiction, it allows a considerable latitude of interpretation to the Court itself. In some cases, as in \textit{Missouri v. Holland},\footnote{252 U.S. 416 (1920). See also \textit{South Carolina v. Katzenbach}, 383 U.S. 301 (1966), and \textit{Oregon v. Mitchell}, 400 U.S. 112 (1970).} the Court has manifested a tendency toward a liberal construction of its original jurisdiction, but the more usual view is that "our original jurisdiction should be invoked sparingly."\footnote{Utah v. United States, 394 U.S. 89, 95 (1968).} Original jurisdiction "is limited and manifestly to be sparingly exercised, and should not be expanded by construction."\footnote{California v. Southern Pacific Co., 157 U.S. 229, 261 (1895). Indeed, the use of the word "sparingly" in this context is all but ubiquitous. \textit{E.g.}, \textit{Wyoming v. Oklahoma}, 502 U.S. 437, 450 (1992); \textit{Maryland v. Louisiana}, 451 U.S. 725, 739 (1981); \textit{United States v. Nevada}, 412 U.S. 534, 538 (1973).} Exercise of its original jurisdiction is not obligatory on the Court but discretionary, to be determined on a case-by-case basis on grounds of practical necessity.\footnote{Texas v. New Mexico, 462 U.S. 554, 570 (1983).} It is to be honored "only in appropriate cases. And the question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."\footnote{Illinois v. City of Milwaukee, 406 U.S. 91, 93-94 (1972). In this case, and in \textit{Washington v. General Motors Corp.}, 406 U.S. 109 (1972), and \textit{Ohio v. Wyandotte Chemicals Corp.}, 401 U.S. 493 (1971), the Court declined to permit adjudication of environmental pollution cases manifestly within its original jurisdiction because the


3 U.S. (3 Dall.) 321 (1796).

Judiciary Act of 1789, § 22, 1 Stat. 84.
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cided that admiralty cases were “civil actions” and thus reviewable; in the course of decision, it was said that “[i]f Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it.”

Much the same thought was soon to be expressed by Chief Justice Marshall, although he seems to have felt that in the absence of congressional authorization, the Court's appellate jurisdiction would have been measured by the constitutional grant. “Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished.”

“The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.” Later Justices viewed the matter differently than had Marshall. “By the constitution of the United States,” it was said in one opinion, “the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress.” In order for a case to come within its appellate jurisdiction, the Court has said, “two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority.” Moreover, “it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation.”

This congressional power, conferred by the language of Article III, § 2, cl. 2, which provides that all jurisdiction not original is to

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1103 Wiscard v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796). The dissent thought that admiralty cases were not “civil actions” and thus that there was no appellate review. Id. at 326-27. See also Clarke v. Bazadone, 5 U.S. (1 Cr.) 212 (1803); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799).


1106 Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865) (case held nonreviewable because certificate of division in circuit did not set forth questions in dispute as provided by statute.)
be appellate, “with such Exceptions, and under such Regulations as the Congress shall make,” has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. In *Ex parte McCardle*,


Congress had authorized appeals to the Supreme Court from circuit court decisions denying habeas corpus. Previous to this statute, the Court’s jurisdiction to review habeas corpus decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. *Compare* United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795), *and* Ex parte Burford, 7 U.S. (3 Cr.) 448 (1806), *with* Ex parte Bollman, 8 U.S. (4 Cr.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885. 23 Stat. 437.

*74 U.S. At 514.*

Although *McCardle* grew out of the stresses of Reconstruction, the principle there applied has been similarly affirmed and applied in later cases.

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*1108* By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying habeas corpus. Previous to this statute, the Court’s jurisdiction to review habeas corpus decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. *Compare* United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795), *and* Ex parte Burford, 7 U.S. (3 Cr.) 448 (1806), *with* Ex parte Bollman, 8 U.S. (4 Cr.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885. 23 Stat. 437.

*1109* Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). In the course of the opinion, Chief Justice Chase speculated about the Court’s power in the absence of any legislation in tones reminiscent of Marshall’s comments. Id. at 513.

*1110* 74 U.S. At 514.

*1111* Thus, see Justice Frankfurter’s remarks in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948) (dissenting): “Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice.*” In The Francis Wright, 105 U.S. 381, 385-386 (1882), upholding Congress’ power to confine Supreme Court review in admiralty cases to questions of law, the Court said: “[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe… What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects
Jurisdiction of the Inferior Federal Courts.—The Framers, as we have seen, divided with regard to the necessity of courts inferior to the Supreme Court, simply authorized Congress to create such courts, in which, then, judicial power “shall be vested” and to which nine classes of cases and controversies “shall extend.” While Justice Story deemed it imperative of Congress to create inferior federal courts and, when they had been created, to vest them with all the jurisdiction they were capable of receiving, the First Congress acted upon a wholly different theory. Inferior courts were created, but jurisdiction generally over cases involving the Constitution, laws, and treaties of the United States was not given them, diversity jurisdiction was limited by a minimal jurisdictional amount requirement and by a prohibition on creation of diversity through assignments, equity jurisdiction was limited to those cases where a “plain, adequate, and complete remedy” could not be had at law. This care for detail in conferring jurisdiction upon the inferior federal courts bespoke a conviction by Members of Congress that it was within their power to confer or to withhold jurisd-

1112 Supra, “One Supreme Court” and “Inferior Courts”.  
1113 Article III, § 1, cl. 2.  
1114 Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 374 (1816). For an effort to reframe Justice Story’s position in modern analytical terms, see the writings of Professors Amar and Clinton, supra and infra.  
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diction at their discretion. The cases have generally sustained this view.

Thus, in *Turner v. Bank of North America*, the issue was the jurisdiction of the federal courts in a suit to recover on a promissory note between two citizens of the same State but in which the note had been assigned to a citizen of a second State so that suit could be brought in federal court under its diversity jurisdiction, a course of action prohibited by § 11 of the Judiciary Act of 1789. Counsel for the bank argued that the grant of judicial power by the Constitution was a direct grant of jurisdiction, provoking from Chief Justice Ellsworth a considered doubt and from Justice Chase a firm rejection. “The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution: but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.” Applying § 11, the Court held that the circuit court had lacked jurisdiction.

Chief Justice Marshall himself soon made similar assertions, and the early decisions of the Court continued to be sprinkled with assumptions that the power of Congress to create inferior federal courts necessarily implied “the power to limit jurisdiction of those Courts to particular objects.” In *Cary v. Curtis*, a statute making final the decision of the Secretary of the Treasury in certain tax disputes was challenged as an unconstitu-

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1116 4 U.S. (4 Dall.) 8 (1799).
1117 "[N]or shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.
1120 In *Ex parte Bollman*, 8 U.S. (4 Cr.) 75, 93 (1807), Marshall observed that “courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.”
1121 United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812). Justice Johnson continued: “All other Courts [beside the Supreme Court] created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.” *See also* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721-722 (1838).
1122 44 U.S. (3 How.) 236 (1845).
tional deprivation of the judicial power of the courts. The Court decided otherwise. "[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." 1123 Five years later, the validity of the assignee clause of the Judiciary Act of 1789 1124 was placed in issue in Sheldon v. Sill, 1125 in which diversity of citizenship had been created by assignment of a negotiable instrument. It was argued that inasmuch as the right of a citizen of any State to sue citizens of another flowed directly from Article III, Congress could not restrict that right. Unanimously, the Court rejected these contentions and held that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the enumerated cases and controversies in Article III. The case and the principle has been cited and reaffirmed numerous times, 1126 and has been quite recently applied. 1127

Congressional Control Over Writs and Processes.—The Judiciary Act of 1789 contained numerous provisions relating to the times and places for holding court, even of the Supreme Court, to times of adjournment, appointment of officers, issuance of writs,

1123 44 U.S. at 244-45. Justices McLean and Story dissented, arguing that the right to construe the law in all matters of controversy is of the essence of judicial power. Id. at 264.
1124 Supra.
1125 49 U.S. (8 How.) 441 (1850).
The power to enjoin governmental and private action has frequently been curbed by Congress, especially as the action has involved the power of taxation at either the federal or state level. Though the courts have variously interpreted these restrictions, they have not denied the power to impose them.

Reacting to judicial abuse of injunctions in labor disputes, Congress in 1932 enacted the Norris-La Guardia Act which forbade the issuance of injunctions in labor disputes except through compliance with a lengthy hearing and fact-finding process which required the district judge to determine that only through the injunctive process could irremediable harm through illegal conduct be prevented. The Court seemingly experienced no difficulty upholding the Act, and it has liberally applied it through the years.

Congress’ power to confer, withhold, and restrict jurisdiction is clearly revealed in the Emergency Price Control Act of 1942 and in the cases arising from it. Fearful that the price control program might be nullified by injunctions, Congress provided for a special court in which persons could challenge the validity of price regulations issued by the Government with appeal from the Emergency Court of Appeals to the Supreme Court. The basic constitutionality of the Act was sustained in *Lockerty v. Phillips*. In *Yakus v. United States*, the Court upheld the provision of the Act which conferred exclusive jurisdiction on the special court to hear challenges to any order or regulation and foreclosed a plea of invalidity of any such regulation or order as a defense to a criminal conviction.

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1133 In *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), the Court simply declared: “There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”
1135 56 Stat. 23 (1942).
1136 319 U.S. 182 (1943).
proceeding under the Act in the regular district courts. Although Justice Rutledge protested in dissent that this provision conferred jurisdiction on district courts from which essential elements of the judicial power had been abstracted,1138 Chief Justice Stone for the Court declared that the provision presented no novel constitutional issue.

The Theory Reconsidered

Despite the breadth of the language of many of the previously cited cases, the actual holdings constitute something less than an affirmation of plenary congressional power to do anything desired by manipulation of jurisdiction, and indeed the cases reflect certain limitations. Setting to one side various formulations, such as mandatory vesting of jurisdiction,1139 inherent judicial power,1140 and a theory, variously expressed, that the Supreme Court has “essential constitutional functions” of judicial review that Congress may

1138 321 U.S. at 468. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), purportedly in reliance on Yakus and other cases, the Court held that a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order had been denied. A statutory scheme similar to that in Yakus was before the Court in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), but statutory construction enabled the Court to pass by constitutional issues that were not perceived to be insignificant. See esp. id. at 289 (Justice Powell concurring). See also Harrison v. PPG Industries, 446 U.S. 578 (1980), and id. at 594 (Justice Powell concurring).

1139 This was Justice Story’s theory propounded in Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 329-336 (1816). Nevertheless, Story apparently did not believe that the constitutional bestowal of jurisdiction was self-executing and accepted the necessity of statutory conferral. White v. Fenner, 29 Fed. Cas. 1015 (No. 17,547) (C.C.D.R.I. 1818) (Justice Story). In the present day, it has been argued that the presence in the jurisdictional-grant provisions of Article III of the word “all” before the subject-matter grants—federal question, admiralty, public ambassadors—mandates federal court review at some level of these cases, whereas congressional discretion exists with respect to party-defined jurisdiction—such as diversity. Amar, A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205 (1985); Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499 (1990). Rebuttal articles include Meltzer, The History and Structure of Article III, id. at 1569; Redish, Text, Structure, and Common Sense in the Interpretation of Article III, id. at 1633; and a response by Amar, id. at 1651. An approach similar to Professor Amar’s is Clinton, A Mandatory View of Federal Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741 (1984); Clinton, Early Implementation and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515 (1986). Though perhaps persuasive as an original interpretation, both theories confront a large number of holdings and dicta as well as the understandings of the early Congresses revealed in their actions. See Casto, The First Congress’ Understanding of its Authority over the Federal Court’s Jurisdiction, 26 B.C. L. Rev. 1101 (1985).

1140 Justice Brewer in his opinion for the Court in United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), came close to asserting an independent, inherent power of the federal courts, at least in equity. See also Paine Lumber Co. v. Neal, 244 U.S. 459, 473, 475-476 (1917) (Justice Pitney dissenting). The acceptance by the Court of the limitations of the Norris-LaGuardia Act, among other decisions, contradicts these assertions.
not impair through jurisdictional limitations, which lack textual and subsequent judicial support, one can see nonetheless the possibilities of restrictions on congressional power flowing from such basic constitutional underpinnings as express prohibitions, separation of powers, and the nature of the judicial function. Whether because of the plethora of scholarly writing contesting the existence of unlimited congressional power or because of another reason, the Court of late has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues, and to construing statutes so as not to deny jurisdiction.

Ex parte McCordle marks the farthest advance of congressional imposition of its will on the federal courts, and it is significant because the curb related to the availability of the writ of *habeas corpus*, which is marked out with special recognition by the Constitution.

But how far did McCordle actually reach? In concluding its opinion, the Court carefully observed: “Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not exempt from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was pre-

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1142 Whether because of the plethora of scholarly writing contesting the existence of unlimited congressional power or because of another reason, the Court of late has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues, and to construing statutes so as not to deny jurisdiction.


1144 *Ex parte McCordle* marks the farthest advance of congressional imposition of its will on the federal courts, and it is significant because the curb related to the availability of the writ of *habeas corpus*, which is marked out with special recognition by the Constitution.


1145 Article I, § 9, cl. 2.
A year later, in *Ex parte Yerger*, the Court held that it did have authority under the Judiciary Act of 1789 to review on certiorari a denial by a circuit court of a petition for writ of habeas corpus on behalf of one held by the military in the South. It thus remains unclear whether the Court would have followed its language suggesting plenary congressional control if the effect had been to deny absolutely an appeal from a denial of a writ of habeas corpus.

Another Reconstruction Congress attempt to curb the judiciary failed in *United States v. Klein*, in which a statute, couched in jurisdictional terms, which attempted to set aside both the effect of a presidential pardon and the judicial effectuation of such a pardon, was voided. The statute declared that no pardon was to be admissible in evidence in support of any claim against the United

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1146 Ex parte McCordale, 74 U.S. (7 Wall.) 506, 515 (1869). A restrained reading of *McCordale* is strongly suggested by Felker v. Turpin, 518 U.S. 651 (1996). A 1996 statute giving to federal courts of appeal a ''gate-keeping'' function over the filing of second or successive habeas petitions limited further review, including denying the Supreme Court appellate review of circuit court denials of motions to file second or successive habeas petitions. Pub. L. 104-132, § 106, 110 Stat. 1214, 1220, amending 28 U.S.C. § 2244(b). Upholding the limitation, which was nearly identical to the congressional action at issue in *McCordale* and *Yerger*, the Court held that its jurisdiction to hear appellate cases had been denied, but just as in *Yerger* the statute did not annul the Court’s jurisdiction to hear habeas petitions filed as original matters in the Supreme Court. No constitutional issue was thus presented.

1147 75 U.S. (8 Wall.) 85 (1869).

1148 Cf. *Eisentrager v. Forrestal*, 174 F. 2d 961, 966 (D.C.Cir. 1949), rev’d on other grounds sub nom. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Justice Douglas, with whom Justice Black joined, said in *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (dissenting opinion): “There is a serious question whether the *McCordale* case could command a majority view today.” Justice Harlan, however, cited *McCordale* with apparent approval of its holding, id. at 567-68, while noting that Congress’ “authority is not, of course, unlimited.” Id. at 568. *McCordale* was cited approvingly in *Bruner v. United States*, 343 U.S. 112, 117 n.8 (1952), as illustrating the rule “that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law…”


1150 Congress by the Act of July 17, 1862, §§ 5, 13, authorized the confiscation of property of those persons in rebellion and authorized the President to issue pardons on such conditions as he deemed expedient, the latter provision being unnecessary in light of Article II, § 2, cl. 1. The President’s pardons all provided for restoration of property, except slaves, and in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), the Court held the claimant entitled to the return of his property on the basis of his pardon. Congress thereupon enacted the legislation in question. 16 Stat. 235 (1870).
States in the Court of Claims for the return of confiscated property of Confederates nor, if already put in evidence in a pending case, should it be considered on behalf of the claimant by the Court of Claims or by the Supreme Court on appeal. Proof of loyalty was required to be made according to provisions of certain congressional enactments, and when judgment had already been rendered on other proof of loyalty the Supreme Court on appeal should have no further jurisdiction and should dismiss for want of jurisdiction. Moreover, it was provided that the recitation in any pardon which had been received that the claimant had taken part in the rebellion was to be taken as conclusive evidence that the claimant had been disloyal and was not entitled to regain his property.

The Court began by reaffirming that Congress controlled the existence of the inferior federal courts and the jurisdiction vested in them and the appellate jurisdiction of the Supreme Court. “But the language of this provision shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end…. It is evident … that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.”

“It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.” The statute was void for two reasons; it “infringed[ed] the constitutional power of the Executive,” and it “prescribed[ed] a rule for the decision of a cause in a particular way.” Klein thus stands for the proposition that Congress may not violate the principle of separation of powers and that it may not accomplish certain forbidden substantive acts by casting them in jurisdictional terms.

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1152 80 U.S. at 147.
1153 80 U.S. at 146.
1154 For an extensive discussion of Klein, see United States v. Sioux Nation, 448 U.S. 371, 391-405 (1980), and id. at 424, 427-34 (Justice Rehnquist dissenting). See also Pope v. United States, 323 U.S. 1, 8-9 (1944); Glidden Co. v. Zdanok, 370 U.S. 530, 568 (1962) (Justice Harlan). In Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), the 9th Circuit had held unconstitutional under Klein a statute that it construed to deny the federal courts power to construe the law, but the Supreme Court held that Congress had changed the law that the courts were to apply. The Court declined to consider whether Klein was properly to be read as voiding a law “because it directed decisions in pending cases without amending any law.” Id. at 441.
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Other restraints on congressional power over the federal courts may be gleaned from the opinion in the much-disputed Crowell v. Benson.\textsuperscript{1156} In an 1856 case, the Court distinguished between matters of private right which from their nature were the subject of a suit at the common law, equity, or admiralty and which cannot be withdrawn from judicial cognizance, and those matters of public right which, though susceptible of judicial determination, did not require it and which might or might not be brought within judicial cognizance.\textsuperscript{1157} What this might mean was elaborated in Crowell v. Benson,\textsuperscript{1158} involving the finality to be accorded administrative findings of jurisdictional facts in compensation cases. In holding that an employer was entitled to a trial \textit{de novo} of the constitutional jurisdictional facts of the matter of the employer-employee relationship and of the occurrence of the injury in interstate commerce, Chief Justice Hughes fused the due process clause of the Fifth Amendment and Article III but emphasized that the issue ultimately was "rather a question of the appropriate maintenance of the Federal judicial power" and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency … for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." The answer was stated broadly. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of law and fact, necessary to the performance of that supreme function…. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."\textsuperscript{1159}

It is not at all clear that, in this respect, Crowell v. Benson remains good law. It has never been overruled, and it has been cited


\textsuperscript{1157} Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

\textsuperscript{1158} 285 U.S. 22 (1932). Justices Brandeis, Stone, and Roberts dissented.

\textsuperscript{1159} 285 U.S. at 56, 60, 64.
by several Justices approvingly, but the Court has never applied the principle to control another case.

Express Constitutional Restrictions on Congress.—“[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution.” The Supreme Court has had no occasion to deal with this principle in the context of Congress’ power over its jurisdiction and the jurisdiction of the inferior federal courts, but the passage of the Portal-to-Portal Act presented the lower courts such an opportunity. The Act extinguished back-pay claims growing out of several Supreme Court interpretations of the Fair Labor Standards Act; it also provided that no court should have jurisdiction to enforce any claim arising from these decisions. While some district courts sustained the Act on the basis of the withdrawal of jurisdiction, this action was disapproved by the Courts of Appeals, which indicated that the withdrawal of jurisdiction would be ineffective if the extinguishment of the claims as a substantive matter was invalid. “We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.”

See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76-87 (1982) (plurality opinion), and id. at 100-03, 109-11 (Justice White dissenting) (discussing the due process/Article III basis of Crowell). Both the plurality and the dissent agreed that later cases had “undermined” the constitutional/jurisdictional fact analysis. Id. at 82, n. 34; 110 n.12. For other discussions, see Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (Justice Brennan announcing judgment of the Court, joined by Justice Goldberg); Pickering v. Board of Education, 391 U.S. 563, 578-79 (1968); Agosto v. INS, 436 U.S. 748, 753 (1978); United States v. Raddatz, 447 U.S. 667, 682-84 (1980), and id. at 707-12 (Justice Marshall dissenting).


Williams v. Rhodes, 393 U.S. 23, 29 (1968) (opinion of the Court.) The elder Justice Harlan perhaps had the same thought in mind when he said that, with regard to Congress’ power over jurisdiction, “what such exceptions and regulations should be it is for Congress, in its wisdom to establish, having of course due regard to all the Constitution.” United States v. Bitty, 208 U.S. 393, 399-400 (1908).


Battaglia v. General Motors Corp., 169 F. 2d 254, 257 (2d Cir.), cert. den. 335 U.S. 887 (1948) (Judge Chase). See also Seese v. Bethlehem Steel Co., 168
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Conclusion.—There thus remains a measure of doubt that Congress' power over the federal courts is as plenary as some of the Court's language suggests it is. Congress has a vast amount of discretion in conferring and withdrawing and structuring the original and appellate jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court; so much is clear from the practice since 1789 and the holdings of many Court decisions. That its power extends to accomplishing by means of its control over jurisdiction actions which it could not do directly by substantive enactment is by no means clear from the text of the Constitution or from the cases.

FEDERAL-STATE COURT RELATIONS

Problems Raised by Concurrency

The Constitution established a system of government in which total power, sovereignty, was not unequivocally lodged in one level of government. In Chief Justice Marshall's words, "our complex system [presents] the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union...." Naturally, in such a system, "contests respecting power must arise." Contests respecting power may frequently arise in a federal system with dual structures of courts exercising concurrent jurisdiction in a number of classes of cases. Too, the possibilities of frictions grow out of the facts that one set of courts may interfere directly or indirectly with the other through injunctive and declaratory processes, through the use of habeas corpus and removal to release persons from the custody of the other set, and through the refusal by state courts to be bound by decisions of the United States Supreme Court. The relations between federal and state courts are governed in part by constitutional law, with respect, say, to state court interference with federal courts and state court refusal to comply with the judgments of federal tribunals; in part by statutes, with respect to the federal law generally enjoining federal-court interference with pending state court proceedings; and in part by self-imposed rules of comity and restraint, such as

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1165 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204-05 (1824).
the abstention doctrine, all applied to avoid unseemly conflicts, which, however, have at times occurred.

Subject to congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except suits between States, those to which the United States is a party, those to which a foreign state is a party, and those within the traditional admiralty jurisdiction.\footnote{1166} Even within this last category, however, state courts, though unable to prejudice the harmonious operation and uniformity of general maritime law,\footnote{1167} have concurrent jurisdiction over cases that occur within the maritime jurisdiction when such litigation assumes the form of a suit at common law.\footnote{1168} Review of state court decisions by the United States Supreme Court is intended to protect the federal interest and promote uniformity of law and decision relating to the federal interest.\footnote{1169} The first category of conflict surfaces here. The second broader category arises from the fact that state interests, actions, and wishes, all of which may at times be effectuated through state courts, are variously subject to restraint by federal courts. Although the possibility always existed,\footnote{1170} it became much more significant and likely when, in the wake of the Civil War, Congress bestowed general federal question jurisdiction on the federal courts,\footnote{1171} enacted a series of civil rights statutes and conferred jurisdiction on the federal courts.

\footnote{1166} See 28 U.S.C. §§ 1251, 1331 et seq. Indeed, the presumption is that state courts enjoy concurrent jurisdiction, and Congress must explicitly or implicitly confine jurisdiction to the federal courts to oust the state courts. See Gulf Offshore Co. v. Mohel Oil Corp., 453 U.S. 473, 477-484 (1981); Tafflin v. Levitt, 493 U.S. 455 (1990); Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990). Federal courts have exclusive jurisdiction of the federal antitrust laws, even though Congress has not spoken expressly or impliedly. See General Investment Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261, 287 (1922). Justice Scalia has argued that, inasmuch as state courts have jurisdiction generally because federal law is law for them, Congress can provide exclusive federal jurisdiction only by explicit and affirmative statement in the text of the statute, Tafflin v. Levitt, 493 U.S. at 469, but as can be seen that is not now the rule.

\footnote{1167} Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).


\footnote{1170} E.g., by a suit against a State by a citizen of another State directly in the Supreme Court, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which was overturned by the Eleventh Amendment; by suits in diversity or removal from state courts where diversity existed, 1 Stat. 78, 79; by suits by aliens on treaties, 1 Stat. 77, and, subsequently, by removal from state courts of certain actions. 3 Stat. 198. And for some unknown reason, Congress passed in 1793 a statute prohibiting federal court injunctions against state court proceedings. See Toucey v. New York Life Ins. Co., 314 U.S. 118, 120-132 (1941).

\footnote{1171} Act of March 3, 1875, 18 Stat. 470.
to enforce them, and most important proposed and saw to the ratification of the three constitutional amendments, especially the Fourteenth, which made an ever-increasing number of state actions subject to federal scrutiny.

The Autonomy of State Courts

Noncompliance With and Disobedience of Supreme Court Orders by State Courts.—The United States Supreme Court when deciding cases on review from the state courts usually remands the case to the state court when it reverses for “proceedings not inconsistent” with the Court’s opinion. This disposition leaves open the possibility that unresolved issues of state law will be decided adversely to the party prevailing in the Supreme Court or that the state court will so interpret the facts or the Court’s opinion to the detriment of the party prevailing in the Supreme Court. When it is alleged that the state court has deviated from the Supreme Court’s mandate, the party losing below may appeal again or she may presumably apply for mandamus to compel compliance. Statutorily, the Court may attempt to overcome state recalcitrance by a variety of specific forms of judgment. If, however, the state courts simply defy the mandate of the Court,
difficult problems face the Court, extending to the possibility of contempt citations.\footnote{1178}{See 18 U.S.C. § 401. In United States v. Shipp, 203 U.S. 563 (1906), 214 U.S. 386 (1909); 215 U.S. 580 (1909), on action by the Attorney General, the Court appointed a commissioner to take testimony, rendered judgment of conviction, and imposed sentence on a state sheriff who had conspired with others to cause the lynching of a prisoner in his custody after the Court had allowed an appeal from a circuit court’s denial of a writ of habeas corpus. A question whether a probate judge was guilty of contempt of an order of the Court in failing to place certain candidates on the ballot was certified to the district court, over the objections of Justices Douglas and Harlan, who wished to follow the Shipp practice. In re Herndon, 394 U.S. 399 (1969). See In re Herndon, 325 F. Supp. 779 (M.D. Ala. 1971).}

The most spectacular disobedience of federal authority arose out of the conflict between the Cherokees and the State of Georgia, which was seeking to remove them and seize their lands with the active support of President Jackson.\footnote{1179}{See 18 U.S.C. § 401. In United States v. Shipp, 203 U.S. 563 (1906), 214 U.S. 386 (1909); 215 U.S. 580 (1909), on action by the Attorney General, the Court appointed a commissioner to take testimony, rendered judgment of conviction, and imposed sentence on a state sheriff who had conspired with others to cause the lynching of a prisoner in his custody after the Court had allowed an appeal from a circuit court’s denial of a writ of habeas corpus. A question whether a probate judge was guilty of contempt of an order of the Court in failing to place certain candidates on the ballot was certified to the district court, over the objections of Justices Douglas and Harlan, who wished to follow the Shipp practice. In re Herndon, 394 U.S. 399 (1969). See In re Herndon, 325 F. Supp. 779 (M.D. Ala. 1971).}

In the first instance, after the Court had issued a writ of error to the Georgia Supreme Court to review the murder conviction of a Cherokee, Corn Tassel, and after the writ was served, Corn Tassel was executed on the day set for the event, contrary to the federal law that a writ of error superseded sentence until the appeal was decided.\footnote{1180}{Two years later, Georgia again defied the Court when in Worcester v. Georgia,\footnote{1181}{It set aside the conviction of two missionaries for residing among the Indians without a license. Despite the issuance of a special mandate to a local court to discharge the missionaries, they were not released, and the State’s governor loudly proclaimed resistance. Consequently, the two remained in jail until they agreed to abandon further efforts for their discharge by federal authority and to leave the State, whereupon the governor pardoned them.}

Use of State Courts in Enforcement of Federal Law.—Although the states-rights proponents in the Convention and in the First Congress wished to leave to the state courts the enforcement of federal law and rights rather than to create inferior federal courts,\footnote{1182}{It was not long before they or their successors began to argue that state courts could not be required to adjudicate cases based on federal law. The practice in the early years was to make the jurisdiction of federal courts generally concurrent with that of state courts, and early Congresses imposed positive duties on state courts to enforce federal laws.\footnote{1183}{Judiciary Act of 1789, §§ 9, 11, 1 Stat. 76, 78, and see id. at § 25, 1 Stat, 85.}} it was not long before they or their successors began to argue that state courts could not be required to adjudicate cases based on federal law. The practice in the early years was to make the jurisdiction of federal courts generally concurrent with that of state courts,\footnote{1184}{Judiciary Act of 1789, §§ 9, 11, 1 Stat. 76, 78, and see id. at § 25, 1 Stat, 85.} and early Congresses imposed positive duties on state courts to enforce federal laws.\footnote{1185}{E.g., Carriage Tax Act, 1 Stat. 373 (1794); License Tax on Wine & Spirits Act, 1 Stat. 376 (1794); Fugitive Slave Act, 1 Stat. 302 (1794); Naturalization Act}
tility to the Embargo Acts, the Fugitive Slave Law, and other measures,1185 and in Prigg v. Pennsylvania,1186 involving the Fugitive Slave Law, the Court indicated that the States could not be compelled to enforce federal law. After a long period, however, Congress resumed its former practice,1187 which the Court sustained,1188 and it went even further in the Federal Employers' Liability Act by not only giving state courts concurrent jurisdiction but also by prohibiting the removal of cases begun in state courts to the federal courts.1189

When Connecticut courts refused to enforce an FELA claim on the ground that to do so was contrary to the public policy of the State, the Court held on the basis of the Supremacy Clause that when Congress enacts a law and declares a national policy, that policy is as much Connecticut's and every other State's as it is of the collective United States.1190 The Court's suggestion that the Act could be enforced "as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion,"1191 leaving the impression that state practice might in some instances preclude enforcement in state courts, was given body when the Court upheld New York's refusal to adjudicate an FELA claim which fell in a class of cases in which claims under state law would not be entertained.1192 "[T]here is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse."1193 However, "[a]n excuse that

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is inconsistent with or violates federal law is not a valid excuse..."  

In *Testa v. Katt*, the Court unanimously held that state courts, at least in regard to claims and cases analogous to claims and cases enforceable in those courts under state law, are as required to enforce penal laws of the United States as they are to enforce remedial laws. Respecting Rhode Island’s claim that one sovereign cannot enforce the penal laws of another, Justice Black observed that the assumption underlying this claim flew “in the face of the fact that the States of the Union constitution a nation” and the fact of the existence of the Supremacy Clause.

**State Interference with Federal Jurisdiction.**—It seems settled, though not without dissent, that state courts have no power to enjoin proceedings or effectuation of judgments of the federal courts, with the exception of cases in which a state court has custody of property in proceedings *in rem* or *quasi in rem*, where the state court has exclusive jurisdiction to proceed and may enjoin parties from further action in federal court.


1197 Donovan v. City of Dallas, 377 U.S. 408 (1964), and cases cited. Justices Harlan, Clark, and Stewart dissented, arguing that a State should have power to enjoin vexatious, duplicative litigation which would have the effect of thwarting a state-court judgment already entered. See also Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 56 (1941) (Justice Frankfurter dissenting). In Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868), the general rule was attributed to the complete independence of state and federal courts in their spheres of action, but federal courts, of course may under certain circumstances enjoin actions in state courts.

1198 McKim v. Voorhies, 11 U.S. (7 Cr.) 279 (1812); Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868).

Conflicts of Jurisdiction: Rules of Accommodation

Federal courts primarily interfere with state courts in three ways: by enjoining proceedings in them, by issuing writs of habeas corpus to set aside convictions obtained in them, and by adjudicating cases removed from them. With regard to all three but particularly with regard to the first, there have been developed certain rules plus a statutory limitation designed to minimize needless conflict.

**Comity.**—“[T]he notion of ‘comity,’” Justice Black asserted, is composed of “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism’….” Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. It is not a rule of law but “one of practice, convenience, and expediency” which persuades but does not command.

**Abstention.**—Perhaps the fullest expression of the concept of comity may be found in the abstention doctrine. The abstention doctrine instructs federal courts to abstain from exercising jurisdiction if applicable state law, which would be dispositive of the controversy, is unclear and a state court interpretation of the state law question might obviate the necessity of deciding a federal constitutional issue.

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1202 C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 13 (4th ed. 1983). The basic doctrine was formulated by Justice Frankfurter for the Court in Railroad Comm’n v. Pullman Co., 312 U.S. 496 (1941). Other strands of the doctrine are that a federal court should refrain from exercising jurisdiction in order to avoid needless conflict with the administration by a State of its own affairs, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Alabama Public Service Comm’n v. Southern Ry., 341 U.S.
evant state law is settled, or where it is clear that the state statute or action challenged is unconstitutional no matter how the state court construes state law. Federal jurisdiction is not ousted by abstention; rather it is postponed. Federal-state tensions would be ameliorated through federal-court deference to the concept that state courts are as adequate a protector of constitutional liberties as the federal courts and through the minimization of the likelihood that state programs would be thwarted by federal intercession. Federal courts would benefit because time and effort would not be expended in decision of difficult constitutional issues which might not require decision.

During the 1960s, the abstention doctrine was in disfavor with the Supreme Court, suffering rejection in numerous cases, most of

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1205 American Trial Lawyers Ass’n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973); Harrison v. NAACP, 360 U.S. 167 (1959). Dismissal may be necessary if the state court will not accept jurisdiction while the case is pending in federal court. Harris County Comm’rs v. Moore, 420 U.S. 77, 88 n.14 (1975).

them civil rights and civil liberties cases. Time-consuming delays and piecemeal resolution of important questions were cited as a too-costly consequence of the doctrine. Actions brought under the civil rights statutes seem not to have been wholly subject to the doctrine, and for awhile cases involving First Amendment expression guarantees seemed to be sheltered as well, but this is no longer the rule. Abstention developed robustly with Younger v. Harris, and its progeny.

**Exhaustion of State Remedies.**—A complainant will ordinarily be required, as a matter of comity, to exhaust all available state legislative and administrative remedies before seeking relief in federal court. To do so may make unnecessary federal-court adjudication. The complainant will ordinarily not be required, however, to exhaust his state judicial remedies, inasmuch as it is a litigant’s choice to proceed in either state or federal courts when the alternatives exist and a question for judicial adjudication is present. But when a litigant is suing for protection of federally-guaranteed civil rights, he need not exhaust any kind of state remedy.

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1212 401 U.S. 37 (1971). There is room to argue whether the Younger line of cases represents the abstention doctrine at all, but the Court continues to refer to it in those terms. E.g., Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992).

1213 The rule was formulated in Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), and Bacon v. Rutland R.R., 232 U.S. 134 (1914).


1215 Patsy v. Board of Regents, 457 U.S. 496 (1982). Where there are pending administrative proceedings that fall within the Younger rule, a litigant must ex-
Anti-Injunction Statute.—For reasons unknown,\(^{1216}\) Congress in 1793 enacted a statute to prohibit the issuance of injunctions by federal courts to stay state court proceedings.\(^{1217}\) Over time, a long list of exceptions to the statutory bar was created by judicial decision,\(^{1218}\) but in *Toucey v. New York Life Ins. Co.*,\(^{1219}\) the Court in a lengthy opinion by Justice Frankfurter announced a very liberal interpretation of the anti-junction statute so as to do away with practically all the exceptions that had been created. Congress’ response was to redraft the statute and to indicate that it was restoring the pre- *Toucey* interpretation.\(^{1220}\) Considerable disagreement exists over the application of the statute, however, and especially with regard to the exceptions permissible under its language. The present tendency appears to be to read the law expansively and the exceptions restrictively in the interest of preventing conflict with state courts.\(^{1221}\) Nonetheless, some exceptions do exist, either expressly or implicitly in statutory language\(^{1222}\) or

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\(^{1217}\) See *Love v. Pullman Co.*, 404 U.S. 522 (1972). And under the Civil Rights of Institutionalized Persons Act, there is a requirement of exhaustion, where States have federally-approved procedures. See *Patsy*, 457 U.S. at 507-13.


\(^{1220}\) "A Court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Reviser’s Note is appended to the statute, stating intent.


\(^{1222}\) The greatest difficulty is with the "expressly authorized by Act of Congress" exception. No other Act of Congress expressly refers to § 2283 and the Court has indicated that no such reference is necessary to create a statutory exception. Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 516 (1955). Compare Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954). Rather, "in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 237 (1972). Applying this test, the Court in *Mitchum* held that a 42 U.S.C. § 1983 suit is an exception to § 2283 and that persons suing under this authority may, if they satisfy the requirements of comity, obtain an injunction against state court proceedings. The exception is, of course, highly constrained by the comity principle. On the difficulty of applying the test, see *Vendo Co. v. Lektco-Vend Corp.*, 433 U.S. 623
through Court interpretation. The Court’s general policy of application, however, seems to a considerable degree to effectuate what is now at least the major rationale of the statute, deference to state court adjudication of issues presented to them for decision.

Res Judicata.—Both the Constitution and a contemporaneously-enacted statute require federal courts to give “full faith and credit” to state court judgments, to give, that is, preclusive effect to state court judgments when those judgments would be given preclusive effect by the courts of that State. The present Court views the interpretation of “full faith and credit” in the overall context of deference to state courts running throughout this section. “Thus, res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.” The Court in this case, after reviewing enactment of the statute that is now 42 U.S.C. § 1983, held that § 1983 is not an exception to the mandate of the res judicata statute. An exception to § 1738 “will not be recognized unless a later statute contains an express or implied partial repeal.” Thus, a claimant who pursued his employment discrimination remedies through state administrative procedures, as the federal law requires her to do (within limits), and then ap-

(1977) (fragmented Court on whether Clayton Act authorization of private suits for injunctive relief is an “expressly authorized” exception to § 2283).

On the interpretation of the § 2283 exception for injunctions to protect or effectuate a federal-court judgment, see Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988).


1225 Article IV, § 1, of the Constitution; 28 U.S.C. § 1738.


1227 449 U.S. at 96-105. There were three dissenters. Id. at 105 (Justices Blackmun, Brennan, and Marshall). In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), the Court held that when parties are compelled to go to state court under Pullman abstention, either party may reserve the federal issue and thus be enabled to return to federal court without being barred by res judicata.

pealed an adverse state agency decision to state court will be precluded from bringing her federal claim to federal court, since the federal court is obligated to give the state court decision “full faith and credit.” 1229

Three-Judge Court Act.—When the Court in Ex parte Young 1230 held that federal courts were not precluded by the Eleventh Amendment from restraining state officers from enforcing state laws determined to be in violation of the federal Constitution, serious efforts were made in Congress to take away the authority thus asserted, but the result instead was legislation providing that suits in which an interlocutory injunction was sought against the enforcement of state statutes by state officers were to be heard by a panel of three federal judges, rather than by a single district judge, with appeal direct to the Supreme Court. 1231 The provision was designed to assuage state feeling by vesting such determinations in a court more prestigious than a single-judge district court, to assure a more authoritative determination, and to prevent the assertion of individual predilections in sensitive and emotional areas. 1232 Because, however, of the heavy burden that convening a three-judge court placed on the judiciary and that the direct appeals placed on the Supreme Court, the provisions for such courts, save in cases “when otherwise required by an Act of Congress” 1233 or in cases involving state legislative or congressional districting, were repealed by Congress in 1976. 1234

Conflicts of Jurisdiction; Federal Court Interference with State Courts

One challenging the constitutionality, under the United States Constitution, of state actions, statutory or otherwise, could, of course, bring suit in state court; indeed, in the time before conferral of federal-question jurisdiction on lower federal courts plaintiffs had to bring actions in state courts, and on some occasions

1229 456 U.S. 468-76. There were four dissents. Id. at 486 (Justices Blackmun, Brennan, and Marshall), 508 (Stevens).
1230 299 U.S. 123 (1908).
1231 36 Stat. 557 (1910). The statute was amended in 1925 to apply to requests for permanent injunctions, 43 Stat. 936, and again in 1937 to apply to constitutional attacks on federal statutes, 50 Stat. 752.
1233 These now are primarily limited to suits under the Voting Rights Act, 42 U.S.C. §§ 1973b(a), 1973c, 1973h(c), and to certain suits by the Attorney General under public accommodations and equal employment provisions of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a-5(b), 2000e-6(b).
now, this has been done. But the usual course is to sue in federal court for either an injunction or a declaratory judgment or both. In an era in which landmark decisions of the Supreme Court and of inferior federal courts have been handed down voiding racial segregation requirements, legislative apportionment and congressional districting, abortion regulations, and many other state laws and policies, it is difficult to imagine a situation in which it might be impossible to obtain such rulings because no one required as a defendant could be sued. Yet, the adoption of the Eleventh Amendment in 1798 resulted in the immunity of the State, and the immunity of state officers if the action upon which they were being sued was state action, from suit without the State’s consent. \textit{Ex parte Young} is a seminal case in American constitutional law because it created a fiction by which the validity of state statutes and other actions could be challenged by suits against state officers as individuals.

Conflict between federal and state courts is inevitable when the federal courts are open to persons complaining about unconstitutional or unlawful state action which could as well be brought in the state courts and perhaps is so brought by other persons, but the various rules of restraint flowing from the concept of comity reduce federal interference here some considerable degree. It is rather in three fairly well defined areas that institutional conflict is most pronounced.

\textbf{Federal Restraint of State Courts by Injunctions.}—Even where the federal anti-injunction law is inapplicable, or where the question of application is not reached, those seeking to enjoin

\begin{itemize}
\item 1235 For example, one of the cases decided in Brown v. Board of Education, 347 U.S. 483 (1954), came from the Supreme Court of Delaware. In Scott v. Germano, 381 U.S. 407 (1965), the Court set aside an order of the district court refusing to defer to the state court which was hearing an apportionment suit and said: “The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States has been specifically encouraged.” See also Scranton v. Drew, 379 U.S. 40 (1964).
\item 1236 By its terms, the Eleventh Amendment bars only suits against a State by citizens of other States, but in Hans v. Louisiana, 134 U.S. 1 (1890), the Court deemed it to embody principles of sovereign immunity which applied to unconsented suits by its own citizens.
\item 1237 In re Ayers, 123 U.S. 443 (1887).
\item 1238 209 U.S. 123 (1908).
\item 1239 The fiction is that while the official is a state actor for purposes of suit against him, the claim that his action is unconstitutional removes the imprimatur of the State that would shield him under the Eleventh Amendment. 209 U.S. at 159-60.
\item 1240 28 U.S.C. § 2283 may be inapplicable because no state court proceeding is pending or because the action is brought under 42 U.S.C. § 1983. Its application may never be reached because a court may decide that equitable principles do not justify injunctive relief. Younger v. Harris, 401 U.S. 37, 54 (1971).
\end{itemize}
state court proceedings must overcome substantial prudential barriers, among them the abstention doctrine and more important than that the equity doctrine that suits in equity are to be withheld "in any case where plain, adequate and complete remedy may be had at law." The application of this latter principle has been most pronounced in the reluctance of federal courts to interfere with a State's good faith enforcement of its criminal law. Here, the Court has required of a litigant seeking to bar threatened state prosecution not only a showing of irreparable injury which is both great and immediate but an inability to defend his constitutional right in the state proceeding. Certain types of injury, such as the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, are insufficient to be considered irreparable in this sense. Even if a state criminal statute is unconstitutional, a person charged under it usually has an adequate remedy at law by raising his constitutional defense in the state trial. The policy has never been stated as an absolute, recognizing that in exceptional and limited circumstances, such as the existence of factors making it impossible for a litigant to protect his federal constitutional rights through a defense of the state criminal charges or the bringing of multiple criminal charges, a federal court injunction could properly issue.

In *Dombrowski v. Pfister*, the Court appeared to change the policy somewhat. The case on its face contained allegations and offers of proof that may have been sufficient alone to establish

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1241 Supra, "Abstention".
1242 The quoted phrase setting out the general principle is from the Judiciary Act of 1789, § 16, 1 Stat. 82.
1245 380 U.S. 479 (1965). Grand jury indictments had been returned after the district court had dissolved a preliminary injunction, erroneously in the Supreme Court's view, so that it took the view that no state proceedings were pending as of the appropriate time. For a detailed analysis of the case, see Fiss, *Dombrowski*, 86 Yale L. J. 1103 (1977).
“irreparable injury” justifying federal injunctive relief. But the formulation of standards by Justice Brennan for the majority placed great emphasis upon the fact that the state criminal statute in issue regulated expression. Any criminal prosecution under a statute regulating expression might of itself inhibit the exercise of First Amendment rights, it was said, and prosecution under an overbroad statute like the one in this case might critically impair exercise of those rights. The mere threat of prosecution under such an overbroad statute “may deter . . . almost as potently as the actual application of sanctions.”

In such cases, courts could no longer embrace the assumption that defense of the criminal prosecution “will generally assure ample vindication of constitutional rights,” because either the mere threat of prosecution or the long wait between prosecution and final vindication could result in a “chilling effect” upon First Amendment rights. The principle apparently established by the Court was two-phased: a federal court should not abstain when there is a facially unconstitutional statute infringing upon speech and application of that statute discourages protected activities, and the court should further enjoin the state proceedings when there is prosecution or threat of prosecution under an overbroad statute regulating expression if the prosecution or threat of prosecution chills the exercise of freedom of expression. These formulations were reaffirmed in Zwickler v. Koota, in which a declaratory judgment was sought with regard to a statute prohibiting anonymous election literature. Abstention was deemed improper, and further it was held that adjudication for purposes of declaratory judgment is not hemmed in by considerations attendant upon injunctive relief.

The aftermath of the Dombrowski and Zwickler decisions was a considerable expansion of federal-court adjudication of constitu-
tional attack through requests for injunctive and declaratory relief, which gradually spread out from First Amendment areas to other constitutionally-protected activities.\footnote{Maraist, \textit{Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski}, 48 Tex. L. Rev. 535 (1970).} However, these developments were highly controversial and after three arguments on the issue, the Court in a series of cases receded from its position and circumscribed the discretion of the lower federal courts to a considerable and ever-broadening degree.\footnote{Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).} The important difference between this series of cases and the \textit{Dombrowski- Zwickler} line was that in the latter there were no prosecutions pending whereas in the former there were. Nevertheless, the care with which Justice Black for the majority undertook to distinguish and limit \textit{Dombrowski} signified a limitation of its doctrine, which proved partially true in later cases.

Justice Black reviewed and reaffirmed the traditional rule of reluctance to interfere with state court proceedings except in extraordinary circumstances. The holding in \textit{Dombrowski}, as distinguished from some of the language, did not change the general rule, because extraordinary circumstances had existed. Thus, Justice Black, with considerable support from the other Justices,\footnote{Only Justice Douglas dissented. 401 U.S. at 58. Justices Brennan, White, and Marshall generally concurred in somewhat restrained fashion. Id. at 56, 75, 93.} went on to affirm that where a criminal proceeding is already pending in a state court, if it is a single prosecution about which there is no allegation that it was brought in bad faith or that it was one of a series of repeated prosecutions which would be brought, and the defendant may put in issue his federal-constitutional defense at the trial, federal injunctive relief is improper, even if it is alleged that the statute on which the prosecution was based regulated expression and was overbroad.

Many statutes regulating expression were valid and some overbroad statutes could be validly applied and attacks on facial unconstitutionality abstracted from concrete factual situations was not a sound judicial method. “It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute ‘on its face’ does not in itself justify an injunction against good faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any
other unusual circumstances that would call for equitable relief.”

The reason for the principle, said Justice Black, flows from “Our Federalism,” which requires federal courts to defer to state courts when there are proceedings pending in them.

Moreover, in a companion case, the Court held that when prosecutions are pending in state court, ordinarily the propriety of injunctive and declaratory relief should be judged by the same standards. A declaratory judgment is as likely to interfere with state proceedings as an injunction, whether the federal decision be treated as res judicata or whether it is viewed as a strong precedent guiding the state court. Additionally, “the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting ‘further necessary or proper relief’ and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to ‘protect or effectuate’ the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings.”

When, however, there is no pending state prosecution, the Court is clear, “Our Federalism” is not offended if a plaintiff in a federal court is able to demonstrate a genuine threat of enforcement of a disputed criminal statute, whether the statute is attacked on its face or as applied, and becomes entitled to a federal declaratory judgment. And, in fact, when no state prosecution is pending, a federal plaintiff need not demonstrate the existence of the Younger factors to justify the issuance of a preliminary or permanent injunction against prosecution under a disputed state statute.

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1256 401 U.S. at 54. On bad faith enforcement, see id. at 56 (Justices Stewart and Harlan concurring); 97 (Justices Brennan, White, and Marshall concurring in part and dissenting in part). For an example, see Universal Amusement Co. v. Vance, 559 F. 2d 1286, 1293-1301 (5th Cir. 1977), affd. per curiam sub nom., Dexter v. Butler, 587 F. 2d 176 (5th Cir.) (en banc), cert. denied, 442 U.S. 929 (1979).

1257 401 U.S. at 44.


1261 Doran v. Salem Inn, 422 U.S. 922 (1975) (preliminary injunction may issue to preserve status quo while court considers whether to grant declaratory relief); Wooley v. Maynard, 430 U.S. 705 (1977) (when declaratory relief is given, permanent injunction may be issued if necessary to protect constitutional rights). However, it may not be easy to discern when state proceedings will be deemed to have been instituted prior to the federal proceeding. E.g., Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); see also Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984).
Of much greater significance is the extension of *Younger* to civil proceedings in state courts and to state administrative proceedings of a judicial nature. The *Younger* principle applies whenever in civil or administrative proceedings important state interests are involved which the State, or its officers or agency, is seeking to promote. Indeed, the presence of important state interests in state proceedings has been held to raise the *Younger* bar to federal relief in proceedings which are entirely between private parties. Comity, the Court said, requires abstention when States have “important” interests in pending civil proceedings between private parties, as long as litigants are not precluded from asserting federal rights. Thus, the Court explained, “proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand.”

**Habeas Corpus: Scope of the Writ.**—At the English common law, *habeas corpus* was available to attack pretrial detention and confinement by executive order; it could not be used to question the conviction of a person pursuant to the judgment of a court with jurisdiction over the person. That common law meaning was applied in the federal courts. Expansion began after the Civil War through more liberal court interpretation of “jurisdiction.” Thus, one who had already completed one sentence on a conviction was released from custody on a second sentence on the ground that the court had lost jurisdiction upon completion of the first sentence. Then, the Court held that the constitutionality of the statute upon which a charge was based could be examined on *habeas*, because an unconstitutional statute was said to deprive the trial court of

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1265 “[T]he State’s interest in protecting ‘the authority of the judicial system, so that its orders and judgments are not rendered nugatory’” was deemed sufficient. Id. at 14 n.12 (quoting Judice v. Vail, 430 U.S. 327, 336 n.12 (1977)).

1266 481 U.S. at 14.

1267 Ex parte Watkins, 28 U.S. (3 Pet.) 193 (1830) (Chief Justice Marshall); cf. Ex parte Parks, 93 U.S. 18 (1876). *But see* Fay v. Noia, 372 U.S. 391, 404-415 (1963). It should be noted that the expansive language used when Congress in 1867 extended the *habeas* power of federal courts to state prisoners “restrained of . . . liberty in violation of . . . the constitution, or of any treaty or law of the United States. . . .” 14 Stat. 385, could have encouraged an expansion of the writ to persons convicted after trial.

1268 Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874).
its jurisdiction. Other cases expanded the want-of-jurisdiction rationale. But the present status of the writ of \textit{habeas corpus} may be said to have been started in its development in \textit{Frank v. Mangum}, in which the Court reviewed on \textit{habeas} a murder conviction in a trial in which there was substantial evidence of mob domination of the judicial process. This issue had been considered and rejected by the state appeals court. The Supreme Court indicated that, though it might initially have had jurisdiction, the trial court could have lost it if mob domination rendered the proceedings lacking in due process.

Further, in order to determine if there had been a denial of due process, a \textit{habeas} court should examine the totality of the process, including the appellate proceedings. Since Frank's claim of mob domination was reviewed fully and rejected by the state appellate court, he had been afforded an adequate corrective process for any denial of rights, and his custody was not in violation of the Constitution. Then, eight years later, in \textit{Moore v. Dempsey}, involving another conviction in a trial in which the court was alleged to have been influenced by a mob and in which the state appellate court had heard and rejected Moore's contentions, the Court directed that the federal district judge himself determine the merits of the petitioner's allegations.

Moreover, the Court shortly abandoned its emphasis upon want of jurisdiction and held that the writ was available to consider constitutional claims as well as questions of jurisdiction. The landmark case was \textit{Brown v. Allen}, in which the Court laid

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\footnotesize{\textsuperscript{1269} Ex parte Siebold, 100 U.S. 371 (1880); Ex parte Royall, 117 U.S. 241 (1886); Crowley v. Christensen, 137 U.S. 86 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

\textsuperscript{1270} Ex parte Wilson, 114 U.S. 417 (1885); In re Nielsen, 131 U.S. 176 (1889); In re Snow, 120 U.S. 274 (1887); \textit{but see} Ex parte Parks, 93 U.S. 18 (1876); Ex parte Bigelow, 113 U.S. 328 (1885). It is possible that the Court expanded the office of the writ because its reviewing power over federal convictions was closely limited. \textit{E.g.}, Glasgow v. Moyer, 225 U.S. 420 (1912); In re Lincoln, 202 U.S. 178 (1906); In re Morgan, 203 U.S. 96 (1906).

\textsuperscript{1271} 237 U.S. 309 (1915).

\textsuperscript{1272} 261 U.S. 86 (1923).

\textsuperscript{1273} Waley v. Johnston, 316 U.S. 101 (1942). \textit{See also} Johnson v. Zerbst, 304 U.S. 458 (1938); Walker v. Johnson, 312 U.S. 275 (1941). The way one reads the history of the developments is inevitably a product of the philosophy one brings to the subject. In addition to the recitations cited in other notes, \textit{compare} Wright v. West, 505 U.S. 277, 285-87 & n.3 (1992) (Justice Thomas for a plurality of the Court), \textit{with} id. at 297-301 (Justice O'Connor concurring).

\textsuperscript{1274} 344 U.S. 443 (1953). \textit{Brown} is commonly thought to rest on the assumption that federal constitutional rights cannot be adequately protected only by direct Supreme Court review of state court judgments but that independent review, on \textit{habeas}, must rest with federal judges. It is, of course, true that \textit{Brown} coincided with the extension of most of the Bill of Rights to the States by way of incorporation and}
almost plenary federal habeas review of state court convictions was authorized and rationalized in the Court’s famous “1963 trilogy.”1275 First, the Court dealt with the established principle that a federal habeas court is empowered, where a prisoner alleges facts which if proved would entitle him to relief, to re-litigate facts, to receive evidence and try the facts anew, and sought to lay down broad guidelines as to when district courts must hold a hearing and find facts.1276 “Where the facts are in dispute, the federal court...
in *habeas corpus* must hold an evidentiary hearing if the *habeas* applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.\(^{1277}\) To "particularize" this general test, the Court went on to hold that an evidentiary hearing must take place when (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state hearing; or (6) for any reason it appears that the state trier of fact did not afford the *habeas* applicant a full and fair fact hearing.\(^{1278}\)

Second, *Sanders v. United States*\(^ {1279}\) dealt with two interrelated questions: the effects to be given successive petitions for the writ, when the second or subsequent application presented grounds previously asserted or grounds not theretofore raised. Emphasizing that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged,"\(^ {1280}\) the Court set out generous standards for consideration of successive claims. As to previously asserted grounds, the Court held that controlling weight may be given to a prior denial of relief if (1) the same ground presented was determined adversely to the applicant before, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application, so that the *ha-
beas court might but was not obligated to deny relief without consider-
ing the claim on the merits.\footnote{373 U.S. at 15. In codifying the Sanders standards in 1966, P.L. 89-711, 80 Stat. 1104, 28 U.S.C. § 2244(b), Congress omitted the “ends of justice” language. Although it was long thought that the omission probably had no substantive effect, this may not be the case. Kuhlmann v. Wilson, 477 U.S. 436 (1986).} With respect to grounds not previously asserted, a federal court considering a successive petition could refuse to hear the new claim only if it decided the petitioner had deliberately bypassed the opportunity in the prior proceeding to raise it; if not, “[n]o matter how many prior applications for federal collateral relief a prisoner has made,” the court must consider the merits of the new claim.\footnote{372 U.S. 391 (1963).}

Third, the most controversial of the 1963 cases, Fay v. Noia,\footnote{373 U.S. at 17-19.} dealt with the important issue of state defaults, of, that is, what the effect on habeas is when a defendant in a state criminal trial has failed to raise in a manner in accordance with state procedure a claim which he subsequently wants to raise on habeas. If, for example, a defendant fails to object to the admission of certain evidence on federal constitutional grounds in accordance with state procedure and within state time constraints, the state courts may therefore simply refuse to address the merits of the claim, and the State’s “independent and adequate state ground” bars direct federal review of the claim.\footnote{Whether a similar result prevailed upon habeas divided the Court in Brown v. Allen,\footnote{374 U.S. 443 (1953).} in which the majority held that a prisoner, refused consideration of his appeal in state court because his papers had been filed a day late, could not be heard on habeas because of his state procedural default. The result was changed in Fay v. Noia, in which the Court held that the adequate and independent state ground doctrine was a limitation only upon the Court’s appellate review, but that it had no place in habeas. A federal court has power to consider any claim that has been procedurally defaulted in state courts.} Whether a similar result prevailed upon habeas divided the Court in Brown v. Allen,\footnote{374 U.S. 443 (1953).} in which the majority held that a prisoner, refused consideration of his appeal in state court because his papers had been filed a day late, could not be heard on habeas because of his state procedural default. The result was changed in Fay v. Noia, in which the Court held that the adequate and independent state ground doctrine was a limitation only upon the Court’s appellate review, but that it had no place in habeas. A federal court has power to consider any claim that has been procedurally defaulted in state courts.\footnote{Still, the Court recognized that the States had legitimate interests that were served by their procedural rules, and that it was important that state courts have the opportunity to afford a claimant relief to which he might be entitled. Thus, a federal court had dis-}

\footnote{373 U.S. at 15. In codifying the Sanders standards in 1966, P.L. 89-711, 80 Stat. 1104, 28 U.S.C. § 2244(b), Congress omitted the “ends of justice” language. Although it was long thought that the omission probably had no substantive effect, this may not be the case. Kuhlmann v. Wilson, 477 U.S. 436 (1986).}
cretion to deny a habeas petitioner relief if it found that he had deliberately bypassed state procedure; the discretion could be exercised only if the court found that the prisoner had intentionally waived his right to pursue his state remedy.\textsuperscript{1287}

Liberalization of the writ thus made it possible for convicted persons who had fully litigated their claims at state trials and on appeal, who had because of some procedural default been denied the opportunity to have their claims reviewed, or who had been at least once heard on federal habeas, to have the chance to present their grounds for relief to a federal habeas judge. In addition to opportunities to relitigate the facts and the law relating to their convictions, prisoners could also take advantage of new constitutional decisions that were retroactive. The filings in federal courts increased year by year, but the numbers of prisoners who in fact obtained either release or retrial remained quite small. A major effect, however, was to exacerbate the feelings of state judges and state law enforcement officials and to stimulate many efforts in Congress to enact restrictive habeas amendments.\textsuperscript{1288} While the efforts were unsuccessful, complaints were received more sympathetically in a newly-constituted Supreme Court and more restrictive rulings ensued.

The discretion afforded the Court was sounded by Justice Rehnquist, who, after reviewing the case law on the 1867 statute, remarked that the history “illustrates this Court’s historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.”\textsuperscript{1289} The emphasis from early on has been upon the equitable nature of the habeas remedy and the judiciary’s

\textsuperscript{1287} 372 U.S. at 438-40.
\textsuperscript{1288} In 1961, state prisoner habeas filings totaled 1,020, in 1965, 4,845, in 1970, a high (to date) of 9,063, in 1975, 7,845 in 1980, 8,534 in 1985, 9,045 in 1986. On relief afforded, no reliable figures are available, but estimates indicate that at most 4% of the filings result in either release or retrial. C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure (1988 & supps.), § 4261, at 284-91.
\textsuperscript{1289} Wainwright v. Sykes, 433 U.S. 72, 81 (1977). The present Court’s emphasis in habeas cases is, of course, quite different from that of the Court in the 1963 trilogy. Now, the Court favors decisions that promote finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum. Keeney v. Tamayo-Reyes, 504 U.S. 1, 8-10 (1992). Overall, federalism concerns are critical. See Coleman v. Thompson, 501 U.S. 722, 726 (1991) (“This is a case about federalism.”) First sentence of opinion). The seminal opinion on which subsequent cases have drawn is Justice Powell’s concurrence in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973). He suggested that habeas courts should entertain only those claims that go to the integrity of the fact-finding process, thus raising questions of the value of a guilty verdict, or, more radically, that only those prisoners able to make a credible showing of “factual innocence” could be heard on habeas. Id. at 256-58, 274-75. As will be evident infra, some form of innocence standard now is pervasive in much of the Court’s habeas jurisprudence.
responsibility to guide the exercise of that remedy in accordance with equitable principles; thus, the Court time and again underscores that the federal courts have plenary power under the statute to implement it to the fullest while the Court's decisions may deny them the discretion to exercise the power. 1290

Change has occurred in several respects in regard to access to and the scope of the writ. It is sufficient to say that the more recent rulings have eviscerated the content of the 1963 trilogy and that Brown v. Allen itself is threatened with extinction.

First, the Court in search and seizure cases has returned to the standard of Frank v. Mangum, holding that where the state courts afford a criminal defendant the opportunity for a full and adequate hearing on his Fourth Amendment claim, his only avenue of relief in the federal courts is to petition the Supreme Court for review and that he cannot raise those claims again in a habeas petition. 1291 Grounded as it is in the Court's dissatisfaction with the exclusionary rule, the case has not since been extended to other constitutional grounds, 1292 but the rationale of the opinion suggests the likelihood of reaching other exclusion questions. 1293

Second, the Court has formulated a "new rule" exception to habeas cognizance. That is, subject to two exceptions, 1294 a case de-


1291 Stone v. Powell, 428 U.S. 465 (1976). The decision is based as much on the Court's dissatisfaction with the exclusionary rule as with its desire to curb habeas. Holding that the purpose of the exclusionary rule is to deter unconstitutional searches and seizures rather than to redress individual injuries, the Court reasoned that no deterrent purpose was advanced by applying the rule on habeas, except to encourage state courts to give claimants a full and fair hearing. Id. at 493-95.


1294 The first exception permits the retroactive application on habeas of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe or addresses a substantive categorical guarantee accorded by the Constitution. The rule must, to say it differently, either decriminalize a class of conduct or prohibit the imposition of a particular punishment on a particular class of persons. The second exception would permit the application of "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. Saffle v. Parks, 494 U.S. 484, 494-495 (1990) (citing cases); Sawyer v. Smith, 497 U.S. 227, 241-245 (1990).
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cided after a petitioner’s conviction and sentence became final may not be the predicate for federal habeas relief if the case announces or applies a “new rule.” A decision announces a new rule “if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” If a rule “was susceptible to debate among reasonable minds,” it could not have been dictated by precedent, and therefore it must be classified as a “new rule.”

Third, the Court has largely maintained the standards of Townsend v. Sain, as embodied in somewhat modified form in statute, with respect to when federal judges must conduct an evidentiary hearing. However, one Townsend factor, not expressly set out in the statute, has been overturned in order to bring the case law into line with other decisions. Townsend had held that a hearing was required if the material facts were not adequately developed at the state-court hearing. If the defendant had failed to develop the material facts in the state court, however, the Court held that unless he had “deliberately bypass[ed]” that procedural outlet he was still entitled to the hearing. The Court overruled that point and substituted a much-stricter “cause-and-prejudice” standard.

Fourth, the Court has significantly stiffened the standards governing when a federal habeas court should entertain a second or successive petition filed by a state prisoner, which was dealt with by Sanders v. United States. A successive petition may be dismissed if the same ground was determined adversely to petitioner previously, the prior determination was on the merits, and “the ends of justice” would not be served by reconsideration. It is with the latter element that the Court has become more restrictive. A plurality in Kuhlmann v. Wilson argued that the “ends of just-

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1299 Keene v. Tamayo-Reyes, 504 U.S. 1 (1992). This standard is imported from the cases abandoning Fay v. Noia and is discussed infra.
tice" standard would be met only if a petitioner supplemented her constitutional claim with a colorable showing of factual innocence. While the Court has not expressly adopted this standard, a later capital case utilized it, holding that a petitioner sentenced to death could escape the bar on successive petitions by demonstrating “actual innocence” of the death penalty by showing by clear and convincing evidence that no reasonable juror would have found the prisoner eligible for the death penalty under applicable state law.\footnote{Sawyer v. Whitley, 503 U.S. 333 (1992). Language in the opinion suggests that the standard is not limited to capital cases. Id. at 339.}

Even if the subsequent petition alleges new and different grounds, a habeas court may dismiss the petition if the prisoner’s failure to assert those grounds in the prior, or first, petition constitutes “an abuse of the writ.”\footnote{The standard is in 28 U.S.C. § 2244(b), along with the standard that if a petitioner “deliberately withheld” a claim, the petition can be dismissed. See also 28 U.S.C. § 2254 Rule 9(b) (judge may dismiss successive petition raising new claims if failure to assert them previously was an abuse of the writ).} Following the 1963 trilogy and especially Sanders, the federal courts had generally followed a rule excusing the failure to raise claims in earlier petitions unless the failure was a result of “inexcusable neglect” or of deliberate relinquishment. In McClesky v. Zant,\footnote{499 U.S. 467 (1991).} the Court construed the “abuse of the writ” language to require a showing of both “cause and prejudice” before a petitioner may allege in a second or later petition a ground or grounds not alleged in the first. In other words, to avoid subsequent dismissal, a petitioner must allege in his first application all the grounds he may have, unless he can show cause, some external impediment, for his failure and some actual prejudice from the error alleged. If he cannot show cause and prejudice, the petitioner may be heard only if she shows that a “fundamental miscarriage of justice” will occur, which means she must make a “colorable showing of factual innocence.”\footnote{Following the 1963 trilogy and especially Sanders, the federal courts had generally followed a rule excusing the failure to raise claims in earlier petitions unless the failure was a result of “inexcusable neglect” or of deliberate relinquishment. In McClesky v. Zant, the Court construed the “abuse of the writ” language to require a showing of both “cause and prejudice” before a petitioner may allege in a second or later petition a ground or grounds not alleged in the first. In other words, to avoid subsequent dismissal, a petitioner must allege in his first application all the grounds he may have, unless he can show cause, some external impediment, for his failure and some actual prejudice from the error alleged. If he cannot show cause and prejudice, the petitioner may be heard only if she shows that a “fundamental miscarriage of justice” will occur, which means she must make a “colorable showing of factual innocence.”}

Fifth, the Court abandoned the rules of Fay v. Noia, although it was not until 1991 that it expressly overruled the case.\footnote{It was not until 1991 that it expressly overruled the case. Fay, it will be recalled, dealt with so-called procedural-bar circumstances; that is, if a defendant fails to assert a claim at the proper time or in accordance with proper procedure under valid state rules, and if the State then refuses to reach the merits of his claim and holds against him solely because of the noncompliance with state procedure, when may a petitioner present the claim in federal habeas? The answer in Fay was that the federal court al-}

\footnote{Fay v. Noia, 379 U.S. 325 (1964), dealt with circumstances where a defendant fails to assert a claim at the proper time or in accordance with proper procedure under valid state rules, and if the State then refuses to reach the merits of his claim and holds against him solely because of the noncompliance with state procedure, when may a petitioner present the claim in federal habeas? The answer in Fay was that the federal court al-}
ways had power to review the claim but that it had discretion to deny relief to a *habeas* claimant if it found that the prisoner had intentionally waived his right to pursue his state remedy through a “deliberate bypass” of state procedure.

That is no longer the law. “In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules.”

The “miscarriage-of-justice” element is probably limited to cases in which actual innocence or actual impairment of a guilty verdict can be shown. The concept of “cause” excusing failure to observe a state rule is extremely narrow; “the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” As for the “prejudice” factor, it is an undeveloped concept, but the Court’s only case establishes a high barrier.

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1308 E.g., Smith v. Murray, 477 U.S. 527, 538-39 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986). In *Bousley v. Brooks*, 523 U.S. 614 (1998), a federal post-conviction relief case, petitioner had pled guilty to a federal firearms offense. Subsequently, the Supreme Court interpreted more narrowly the elements of the offense than had the trial court in Bousley’s case. The Court held that Bousley by his plea had defaulted, but that he might be able to demonstrate “actual innocence” so as to excuse the default if he could show on remand that it was more likely than not that no reasonable juror would have convicted him of the offense, properly defined.

1309 Murray v. Carrier, 477 U.S. at 488. This case held that ineffective assistance of counsel is not “cause” unless it rises to the level of a Sixth Amendment violation. See also Coleman v. Thompson, 501 U.S. 722, 752-57 (1991) (because petitioner had no right to counsel in state postconviction proceeding where error occurred, he could not claim constitutionally ineffective assistance of counsel). The actual novelty of a constitutional claim at the time of the state court proceeding is “cause” excusing the petitioner’s failure to raise it then, *Reed v. Ross*, 468 U.S. 1 (1984), although the failure of counsel to anticipate a line of constitutional argument then foreshadowed in Supreme Court precedent is insufficient “cause.” *Engle v. Isaac*, 456 U.S. 107 (1982).

1310 United States v. *Frady*, 456 U.S. 152, 169 (1982) (under federal rules) (with respect to erroneous jury instruction, inquiring whether the error “so infected the entire trial that the resulting conviction violates due process”).
The Court continues, with some modest exceptions, to construe *habeas* jurisdiction quite restrictively, but it has now been joined by new congressional legislation that is also restrictive. In *Herrera v. Collins,* the Court appeared, though ambiguously, to take the position that, while it requires a showing of actual innocence to permit a claimant to bring a successive or abusive petition, a claim of innocence is not alone sufficient to enable a claimant to obtain review of his conviction on *habeas.* Petitioners are entitled in federal *habeas* courts to show that they are imprisoned in violation of the Constitution, not to seek to correct errors of fact. But a claim of innocence does not bear on the constitutionality of one's conviction or detention, and the execution of a person claiming actual innocence would not itself violate the Constitution.

But, in *Schlup v. Delo,* the Court adopted the plurality opinion of *Kuhlmann v. Wilson* and held that, absent a sufficient showing of “cause and prejudice,” a claimant filing a successive or abusive petition must, as an initial matter, make a showing of “actual innocence” so as to fall within the narrow class of cases implicating a fundamental miscarriage of justice. The Court divided, however, with respect to the showing a claimant must make. One standard, found in some of the cases, was championed by the dissenters; “to show ‘actual innocence’ one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.” The Court adopted a second standard, under which the petitioner must demonstrate that “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” To meet this burden, a claimant “must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”

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1312 506 U.S. at 398-417. However, in a subsequent part of the opinion, the Court purports to reserve the question whether "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for making this showing. Id. at 417-19. Justices Scalia and Thomas would have unequivocally held that "[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Id. at 427-28 (Concurring). However, it is not at all clear that all the Justices joining the Court believe innocence to be non-dispositive on *habeas.* Id. at 419 (Justices O’Connor and Kennedy concurring), 429 (Justice White concurring).
1314 513 U.S. at 334 (Chief Justice Rehnquist dissenting, with Justices Kennedy and Thomas), 342 (Justice Scalia dissenting, with Justice Thomas). This standard was drawn from Sawyer v. Whitney, 506 U.S. 333 (1995).
1315 513 U.S. at 327. This standard was drawn from Murray v. Carrier, 477 U.S. 478 (1986).
In the Antiterrorism and Effective Death Penalty Act of 1996, Congress imposed tight new restrictions on successive or abusive petitions, including making the circuit courts “gate keepers” in permitting or denying the filing of such petitions, with bars to appellate review of these decisions, provisions that in part were upheld in *Felker v. Turpin*. An important new restriction on the authority of federal habeas courts found in the new law provides that a habeas court shall not grant a writ to any person in custody pursuant to a judgment of a state court “with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

For the future, barring changes in Court membership, other curtailing of habeas jurisdiction can be expected. Perhaps the Court will impose some form of showing of innocence as a predicate to obtaining a hearing. More far-reaching would be, as the Court continues to emphasize broad federalism concerns, rather than simply comity and respect for state courts, an overturning of *Brown v. Allen* itself and the renunciation of any oversight, save for the extremely limited direct review of state court convictions in the Supreme Court.

**Removal.**—In the Judiciary Act of 1789, Congress provided that civil actions commenced in the state courts which could have been brought in the original jurisdiction of the inferior federal courts could be removed by the defendant from the state court to the federal court. Generally, as Congress expanded the original jurisdiction of the inferior federal courts, it similarly expanded removal jurisdiction. Although there is potentiality for intra-court
conflict here, of course, in the implied mistrust of state courts’ willingness or ability to protect federal interests, it is rather with regard to the limited areas of removal that do not correspond to federal court original jurisdiction that the greatest amount of conflict is likely to arise.

If a federal officer is sued or prosecuted in a state court for acts done under color of law or if a federal employee is sued for a wrongful or negligent act that the Attorney General certifies was done while she was acting within the scope of her employment, the actions may be removed. But the statute most open to federal-state court dispute is the civil rights removal law, which authorizes removal of any action, civil or criminal, which is commenced in a state court “against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.” In the years after enactment of this statute, however, the court narrowly construed the removal privilege granted, and recent decisions for the most part confirm this restrictive interpretation, so that instances of successful resort to the statute are fairly rare.


See 28 U.S.C. § 1442. This statute had its origins in the Act of February 4, 1815, § 8, 3 Stat. 198 (removal of civil and criminal actions against federal customs officers for official acts), and the Act of March 2, 1833, § 3, 4 Stat. 633 (removal of civil and criminal actions against federal officers on account of acts done under the revenue laws), both of which grew out of disputes arising when certain States attempted to nullify federal laws, and the Act of March 3, 1863, § 5, 12 Stat. 756 (removal of civil and criminal actions against federal officers for acts done during the existence of the Civil War under color of federal authority). In Mesa v. California, 489 U.S. 121 (1989), the Court held that the statute authorized federal officer removal only when the defendant avers a federal defense.


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Subsection (2) provides for the removal of state court actions “if for any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.” This subsection “is available only to federal officers and to persons assisting such officers in the performance of their official duties.” City of Greenwood v. Peacock, 384 U.S. 808, 815 (1966).

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Thus, the Court’s position holds, one may not obtain removal simply by an assertion that he is being denied equal rights or that he cannot enforce the law granting equal rights. Because the removal statute requires the denial to be “in the courts of such State,” the pretrial conduct of police and prosecutors was deemed irrelevant, because it afforded no basis for predicting that state courts would not vindicate the federal rights of defendants. Moreover, in predicting a denial of rights, only an assertion founded on a facially unconstitutional state statute denying the right in question would suffice. From the existence of such a law, it could be predicted that defendant’s rights would be denied. Furthermore, the removal statute’s reference to “any law providing for ... equal rights” covered only laws “providing for specific civil rights stated in terms of racial equality.” Thus, apparently federal constitutional provisions and many general federal laws do not qualify as a basis for such removal.

Clause 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at

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1326 Georgia v. Rachel, 384 U.S. 780, 803 (1966); City of Greenwood v. Peacock, 384 U.S. 808, 827 (1966). Justice Douglas in dissent, joined by Justices Black, Fortas, and Chief Justice Warren, argued that “in the courts of such State” modified only “cannot enforce,” so that one could be denied rights prior to as well as during a trial and police and prosecutorial conduct would be relevant. Alternately, he argued that state courts could be implicated in the denial prior to trial by certain actions. Id. at 844-55.

1327 Georgia v. Rachel, 384 U.S. 780, 797-802 (1966). Thus, in Strauder v. West Virginia, 100 U.S. 303 (1880), African-Americans were excluded by statute from service on grand and petit juries, and it was held that a black defendant’s criminal indictment should have been removed because federal law secured nondiscriminatory jury service and it could be predicted that he would be denied his rights before a discriminatorily-selected state jury. In Virginia v. Rives, 100 U.S. 313 (1880), there was no state statute, but there was exclusion of Negroes from juries pursuant to custom and removal was denied. In Neal v. Delaware, 103 U.S. 370 (1880), the state provision authorizing discrimination in jury selection had been held invalid under federal law by a state court, and a similar situation existed in Bush v. Kentucky, 107 U.S. 110 (1882). Removal was denied in both cases. The dissenters in City of Greenwood v. Peacock, 384 U.S. 808, 848-852 (1966), argued that federal courts should consider facially valid statutes which might be applied unconstitutionally and state court enforcement of custom as well in evaluating whether a removal petitioner could enforce his federal rights in state court.


such Place or Places as the Congress may by Law have directed.\footnote{See the Sixth Amendment.}

\section*{IN GENERAL}

See analysis under the Sixth Amendment.

\section*{SECTION 3. Clause 1.} Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open court.

\section*{TREASON}

The treason clause is a product of the awareness of the Framers of the "numerous and dangerous excrescences" which had disfigured the English law of treason and was therefore intended to put it beyond the power of Congress to "extend the crime and punishment of treason."\footnote{2 J. Elliot, Debates in the Several State Conventions on Adoption of the Constitution 469 (1836) (James Wilson). Wilson was apparently the author of the clause in the Committee of Detail and had some first hand knowledge of the abuse of treason charges. J. Hurst, The Law of Treason in the United States—Selected Essays 90-91, 129-136 (1971).} The debate in the Convention, remarks in the ratifying conventions, and contemporaneous public comment make clear that a restrictive concept of the crime was imposed and that ordinary partisan divisions within political society were not to be escalated by the stronger into capital charges of treason, as so often had happened in England.\footnote{2 M. Farrand, supra at 345-50; 2 J. Elliot, supra at 469, 487 (James Wilson); 3 id. at 102-103, 447, 451, 466; 4 id. at 209, 219, 220; The Federalist No. 43 (J. Cooke ed. 1961), 290 (Madison); id. at No. 84, 576-577 (Hamilton); The Works of James Wilson 663-69 (R. McCloskey ed. 1967). The matter is comprehensively studied in J. Hurst, supra at chs. 3, 4.}

Thus, the Framers adopted two of the three formulations and the phraseology of the English Statute of Treason enacted in 1350,\footnote{25 Edward III, Stat. 5, ch. 2, See J. Hurst, supra at ch 2.} but they conspicuously omitted the phrase defining as treason the "compass[ing] or imagin[ing] the death of our lord the King,"\footnote{Id. at 15, 31-37, 41-49, 51-55.} under which most of the English law of "constructive
Id. “The record does suggest that the clause was intended to guarantee nonviolent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. The most obviously restrictive feature of the constitutional definition is its omission of any provision analogous to that branch of the Statute of Edward III which punished treason by compassing the death of the king. In a narrow sense, this provision perhaps had no proper analogue in a republic. However, to interpret the silence of the treason clause in this way alone does justice neither to the technical proficiency of the Philadelphia draftsmen nor to the practical statecraft and knowledge of English political history among the Framers and proponents of the Constitution. The charge of compassing the king’s death had been the principal instrument by which ‘treason’ had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king’s death to the mere speaking or writing of views restrictive of the royal authority.” Id. at 152-53.

Levying War

Early judicial interpretation of the meaning of treason in terms of levying war was conditioned by the partisan struggles of the early nineteenth century, in which were involved the treason trials of Aaron Burr and his associates. In *Ex parte Bollman*, 1339 which involved two of Burr’s confederates, Chief Justice Marshall, speaking for himself and three other Justices, confined the meaning of levying war to the actual waging of war. “However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that . . . it has been determined that the actual enlistment of men to serve against the government does not amount to levying of war.” Chief Justice Marshall was careful, however, to state that the Court did not mean that no person could be guilty of this crime who had not appeared in arms against the country. “On the contrary, if it be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who

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1335 Id. “The record does suggest that the clause was intended to guarantee nonviolent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. The most obviously restrictive feature of the constitutional definition is its omission of any provision analogous to that branch of the Statute of Edward III which punished treason by compassing the death of the king. In a narrow sense, this provision perhaps had no proper analogue in a republic. However, to interpret the silence of the treason clause in this way alone does justice neither to the technical proficiency of the Philadelphia draftsmen nor to the practical statecraft and knowledge of English political history among the Framers and proponents of the Constitution. The charge of compassing the king’s death had been the principal instrument by which ‘treason’ had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king’s death to the mere speaking or writing of views restrictive of the royal authority.” Id. at 152-53.

1336 The clause does not, however, prevent Congress from specifying other crimes of a subversive nature and prescribing punishment, so long as Congress is not merely attempting to evade the restrictions of the treason clause. *E.g.*, *Ex parte Bollman*, 8 U.S. (4 Cr.) 75, 126 (1807); *Wimmer v. United States*, 264 Fed. 11, 12-13 (6th Cir. 1920), *cert den.*, 253 U.S. 494 (1920).

1337 By the requirement of two witnesses to the same overt act or a confession in open court.

1338 Cl. 2, infra, “Corruption of the Blood and Forfeiture”.

1339 8 U.S. (4 Cr.) 75 (1807).
perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war."

On the basis of these considerations and due to the fact that no part of the crime charged had been committed in the District of Columbia, the Court held that Bollman and Swartwout could not be tried in the District, and ordered their discharge. Marshall continued by saying that “the crime of treason should not be extended by construction to doubtful cases” and concluded that no conspiracy for overturning the Government and “no enlisting of men to effect it, would be an actual levying of war.”

The Burr Trial.—Not long afterward, the Chief Justice went to Richmond to preside over the trial of Aaron Burr himself. His ruling denying a motion to introduce certain collateral evidence bearing on Burr’s activities is significant both for rendering the latter’s acquittal inevitable and for the qualifications and exceptions made to the Bollman decision. In brief, this ruling held that Burr, who had not been present at the assemblage on Blennerhassett’s Island, could be convicted of advising or procuring a levying of war only upon the testimony of two witnesses to his having procured the assemblage. This operation having been covert, such testimony was naturally unobtainable. The net effect of Marshall’s pronouncements was to make it extremely difficult to convict one of levying war against the United States short of the conduct of or personal participation in actual hostilities.
Aid and Comfort to the Enemy

The Cramer Case.—Since the Bollman case, the few treason cases which have reached the Supreme Court were outgrowths of World War II and have charged adherence to enemies of the United States and the giving of aid and comfort. In the first of these, Cramer v. United States, the issue was whether the “overt act” had to be “openly manifest treason” or if it was enough if, when supported by the proper evidence, it showed the required treasonable intention. The Court in a five-to-four opinion by Justice Jackson in effect took the former view holding that “the two-witness principle” interdicted “imputation of incriminating acts to the accused by circumstantial evidence or by the testimony of a single witness,” even though the single witness in question was the accused himself. “Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses,” Justice Jackson asserted. Justice Douglas in a dissent, in which Chief Justice Stone and Justices Black and Reed concurred, contended that Cramer’s treasonable intention was sufficiently shown by overt acts as attested to by two witnesses each, plus statements made by Cramer on the witness stand.

The Haupt Case.—The Supreme Court sustained a conviction of treason, for the first time in its history, in 1947 in Haupt v. United States. Here it was held that although the overt acts relied upon to support the charge of treason—defendant’s harboring and sheltering in his home his son who was an enemy spy and saboteur, assisting him in purchasing an automobile, and in obtaining employment in a defense plant—were all acts which a father would naturally perform for a son, this fact did not necessarily relieve them of the treasonable purpose of giving aid and comfort to the enemy. Speaking for the Court, Justice Jackson said: “No matter
whether young Haupt's mission was benign or traitorous, known or
unknown to the defendant, these acts were aid and comfort to him.
In the light of this mission and his instructions, they were more
than casually useful; they were aids in steps essential to his design
for treason. If proof be added that the defendant knew of his son's
instruction, preparation and plans, the purpose to aid and comfort
the enemy becomes clear.”

The Court held that conversation and occurrences long prior to
the indictment were admissible evidence on the question of defend-
ant's intent. And more important, it held that the constitutional re-
quirement of two witnesses to the same overt act or confession in
open court does not operate to exclude confessions or admissions
made out of court, where a legal basis for the conviction has been
laid by the testimony of two witnesses of which such confessions or
admissions are merely corroborative. This relaxation of restrictions
surrounding the definition of treason evoked obvious satisfaction
from Justice Douglas, who saw in the Haupt decision a vindication
of his position in the Cramer case. His concurring opinion contains
what may be called a restatement of the law of treason and merits
quotation at length:

‘As the Cramer case makes plain, the overt act and the intent
with which it is done are separate and distinct elements of the
crime. Intent need not be proved by two witnesses but may be in-
ferred from all the circumstances surrounding the overt act. But if
two witnesses are not required to prove treasonable intent, two wit-
tnesses need not be required to show the treasonable character of
the overt act. For proof of treasonable intent in the doing of the
overt act necessarily involves proof that the accused committed the
overt act with the knowledge or understanding of its treasonable
character.’

‘The requirement of an overt act is to make certain a treason-
able project has moved from the realm of thought into the realm
of action. That requirement is undeniably met in the present case,
as it was in the case of Cramer.’

‘The Cramer case departed from those rules when it held that
‘The two-witness principle is to interdict imputation of incrimi-
nating acts to the accused by circumstantial evidence or by the tes-
timony of a single witness. 325 U.S. p. 35. The present decision is
truer to the constitutional definition of treason when it forsakes

\[1348\]
that test and holds that an act, quite innocent on its face, does not need two witnesses to be transformed into an incriminating one.\[1349\]

**The Kawakita Case.**—**Kawakita v. United States**\[1350\] was decided on June 2, 1952. The facts are sufficiently stated in the following headnote: “At petitioner’s trial for treason, it appeared that originally he was a native-born citizen of the United States and also a national of Japan by reason of Japanese parentage and law. While a minor, he took the oath of allegiance to the United States; went to Japan for a visit on an American passport; and was prevented by the outbreak of war from returning to this country. During the war, he reached his majority in Japan; changed his registration from American to Japanese, showed sympathy with Japan and hostility to the United States; served as a civilian employee of a private corporation producing war materials for Japan; and brutally abused American prisoners of war who were forced to work there. After Japan’s surrender, he registered as an American citizen; swore that he was an American citizen and had not done various acts amounting to expatriation; and returned to this country on an American passport.” The question whether, on this record Kawakita had intended to renounce American citizenship, said the Court, in sustaining conviction, was peculiarly one for the jury and their verdict that he had not so intended was based on sufficient evidence. An American citizen, it continued, owes allegiance to the United States wherever he may reside, and dual nationality does not alter the situation.\[1351\]

**Doubtful State of the Law of Treason Today**

The vacillation of Chief Justice Marshall between the *Bollman*\[1352\] and *Burr*\[1353\] cases and the vacillation of the Court in the *Cramer*\[1354\] and *Haupt*\[1355\] cases leave the law of treason in a somewhat doubtful condition. The difficulties created by the...
Burr case have been obviated to a considerable extent through the punishment of acts ordinarily treasonable in nature under a different label,\footnote{1356 Cf. United States v. Rosenberg, 195 F.2d 583 (2d. Cir.), cert den., 344 U.S. 889 (1952), holding that in a prosecution under the Espionage Act for giving aid to a country, not an enemy, an offense distinct from treason, neither the two-witness rule nor the requirement as to the overt act is applicable.} within a formula provided by Chief Justice Marshall himself in the Bollman case. The passage reads: “Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our Constitution ... must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation.”\footnote{1357 Ex parte Bollman, 8 U.S. (4 Cr.) 126, 127 (1807). Justice Frankfurter appended to his opinion in Cramer v. United States, 325 U.S. 1, 25 n.38 (1945), a list taken from the Government’s brief of all the cases prior to Cramer in which construction of the treason clause was involved. The same list, updated, appears in J. Hurst, supra at 260-67. Professor Hurst was responsible for the historical research underlaying the Government’s brief in Cramer.}

Clause 2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

CORRUPTION OF BLOOD AND FORFEITURE

The Confiscation Act of 1862 “to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels”\footnote{1358 12 Stat. 589. This act incidentally did not designate rebellion as treason.} raised issues under Article III, § 3, cl.2. Because of the constitutional doubts of the President, the act was accompanied by an explanatory joint resolution which stipulated that only a life estate terminating with the death of the offender could be sold and that at his death his children could take the fee simple by descent as his heirs without deriving any title from the United States. In applying this act, passed in pursuance of the war power and not
the power to punish treason, the Court in one case quoted with approval the English distinction between a disability absolute and perpetual and one personal or temporary. Corruption of blood as a result of attainder of treason was cited as an example of the former and was defined as the disability of any of the posterity of the attained person “to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him.”

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1361 Lord de la Warre’s Case, 11 Coke Rept. 1a, 77 Eng. Rept. 1145 (1597). A number of cases dealt with the effect of a full pardon by the President of owners of property confiscated under this act. They held that a full pardon relieved the owner of forfeiture as far as the Government was concerned but did not divide the interest acquired by third persons from the Government during the lifetime of the offender. Illinois Central R.R. v. Bosworth, 133 U.S. 92, 101 (1880); Knote v. United States, 95 U.S. 149 (1877); Wallach v. Van Riswick, 92 U.S. 202, 203 (1876); Armstrong’s Foundry, 73 U.S. (6 Wall.) 766, 769 (1868). There is no direct ruling on the question of whether only citizens can commit treason. In Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154-155 (1873), the Court declared that aliens while domiciled in this country owe a temporary allegiance to it and may be punished for treason equally with a native-born citizen in the absence of a treaty stipulation to the contrary. This case involved the attempt of certain British subjects to recover claims for property seized under the Captured and Abandoned Property Act, 12 Stat. 820 (1863), which provided for the recovery of property or its value in suits in the Court of Claims by persons who had not rendered aid and comfort to the enemy. Earlier in United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 97 (1820), which involved a conviction for manslaughter under an act punishing manslaughter and treason on the high seas, Chief Justice Marshall going beyond the necessities of the case stated that treason “is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary.” However, see In re Shinohara, Court Martial Orders, No. 19, September 8, 1949, p. 4, Office of the Judge Advocate General of the Navy, reported in 17 Geo. Wash. L. Rev. 283 (1949). In the latter, an enemy alien resident in United States territory (Guam) was held guilty of treason for acts done while the enemy nation of which he was a citizen occupied such territory. Under English precedents, an alien residing in British territory is open to conviction for high treason on the theory that his allegiance to the Crown is not suspended by foreign occupation of the territory. DeJager v. Attorney General of Natal (1907), A.C., 96 L.T.R. 857. See also 18 U.S.C. § 2381.
ARTICLE IV

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STATES' RELATIONS

ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

SOURCES AND EFFECT OF THIS PROVISION

Private International Law

The historical background of this section is furnished by that branch of private law which is variously termed “private international law,” “conflict of laws,” and “comity.” This comprises a body of rules, based largely on the writings of jurists and judicial decisions, in accordance with which the courts of one country, or “jurisdiction,” will ordinarily, in the absence of a local policy to the contrary, extend recognition and enforcement to rights claimed by individuals by virtue of the laws or judicial decisions of another country or “jurisdiction.” Most frequently applied examples of these rules include the following: the rule that a marriage which is good in the country where performed (lex loci) is good elsewhere; the rule that contracts are to be interpreted in accordance with the laws of the country where entered into (lex loci contractus) unless the parties clearly intended otherwise; the rule that immovables may be disposed of only in accordance with the law of the country where situated (lex rei sitae); the converse rule that chattels adhere to the person of their owner and hence are disposable by him, even when located elsewhere, in accordance with the law of his domicile (lex domicilii); the rule that regardless of where the cause arose, the courts of any country where personal service of the defendant can be effected will take jurisdiction of certain types of personal actions, hence termed “transitory,” and accord such remedy as the lex fori affords. Still other rules, of first importance in the present connection, determine the recognition which the judgments

1 Clark v. Graham, 19 U.S. (6 Wheat.) 577 (1821), is an early case in which the Supreme Court enforced this rule.
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of the courts of one country shall receive from those of another country.

So even had the States of the Union remained in a mutual relationship of entire independence, private claims originating in one often would have been assured recognition and enforcement in the others. The Framers felt, however, that the rules of private international law should not be left among the States altogether on a basis of comity and hence subject always to the overruling local policy of the lex fori but ought to be in some measure at least placed on the higher plane of constitutional obligation. In fulfillment of this intent the section now under consideration was inserted, and Congress was empowered to enact supplementary and enforcing legislation.\(^2\)

**JUDGMENTS: EFFECT TO BE GIVEN IN FORUM STATE**

**In General**

Article IV, § 1, has had its principal operation in relation to judgments. Embraced within the relevant discussions are two principal classes of judgments. First, those in which the judgment involved was offered as a basis of proceedings for its own enforcement outside the State where rendered, as for example, when an action for debt is brought in the courts of State B on a judgment for money damages rendered in State A; second, those in which the judgment involved was offered, in conformance with the principle of *res judicata*, in defense in a new or collateral proceeding growing out of the same facts as the original suit, as for example, when a decree of divorce granted in State A is offered as barring a suit for divorce by the other party to the marriage in the courts of State B.

The English courts and the different state courts in the United States, while recognizing “foreign judgments *in personam*” which were reducible to money terms as affording a basis for actions in debt, originally accorded them generally only the status of *prima facie* evidence in support thereof, so that the merits of the original controversy could always be opened. When offered in defense, on the other hand, “foreign judgments *in personam*” were regarded as conclusive upon everybody on the theory that, as stated by Chief Justice Marshall, “it is a proceeding *in rem*, to which all the world

\(^2\)Congressional legislation under the Full Faith and Credit Clause, so far as it is pertinent to adjudication hereunder, is today embraced in 28 U.S.C. §§ 1738-1739. See also 28 U.S.C. §§ 1740-1742.
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are parties.” The pioneer case was Mills v. Duryee, decided in 1813. In an action brought in the circuit court of the District of Columbia, the equivalent of a state court for this purpose, on a judgment from a New York court, the defendant endeavored to reopen the whole question of the merits of the original case by a plea of “nil debet.” It was answered in the words of the first implementing statute of 1790 that such records and proceedings were entitled in each State to the same faith and credit as in the State of origin, and that inasmuch as they were records of a court in the State of origin, and so conclusive of the merits of the case there, they were equally so in the forum State. The Court adopted the latter view, saying that it had not been the intention of the Constitution merely to reenact the common law—that is, the principles of private international law—with regard to the reception of foreign judgments, but to amplify and fortify these. And in Hampton v. McConnell, some years later, Chief Justice Marshall went even further, using language which seems to show that he regarded the judgment of a state court as constitutionally entitled to be accorded in the courts of sister States not simply the faith and credit on conclusive evidence but the validity of final judgment.

When, however, the next important case arose, the Court had come under new influences. This was McElmoyle v. Cohen, in which the issue was whether a statute of limitations of the State of Georgia, which applied only to judgments obtained in courts other than those of Georgia, could constitutionally bar an action in Georgia on a judgment rendered by a court of record of South Caro-

5 1 Stat. 122.
6 On the same basis, a judgment cannot be impeached either in, or out of, the State by showing that it was based on a mistake of law. American Express Co. v. Mullins, 212 U.S. 311, 312 (1909); Fauntleroy v. Lum, 210 U.S. 230 (1908); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917).
7 16 U.S. (3 Wheat.) 234 (1818).
8 38 U.S. (13 Pet.) 312 (1839). See also Townsend v. Jemison, 50 U.S. (9 How.) 407, 413-420 (1850); Bank of Alabama v. Dalton, 50 U.S. (9 How.) 522, 528 (1850); Bacon v. Howard, 61 U.S. (20 How.) 22, 25 (1858); Christmas v. Russell, 72 U.S. (5 Wall.) 290, 301 (1866); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 292 (1888); Great Western Tel. Co. v. Purdy, 162 U.S. 329 (1896); Wells v. Simonds Abrasive Co., 345 U.S. 514, 516-518 (1953). Recently, the Court reconsidered and adhered to the rule of these cases, although the Justices divided with respect to rationales. Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). Acknowledging that in some areas it had treated statutes of limitations as substantive rules, such as in diversity cases to insure uniformity with state law in federal courts, the Court ruled that such rules are procedural for full-faith-and-credit purposes, since “the purpose . . . of the Full Faith and Credit Clause . . . is . . . to delimit spheres of state legislative competence.” id. at 727.
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lina. Declining to follow Marshall’s lead in *Hampton v. McCon- 
nell*, the Court held that the Constitution was not intended “mate-
rially to interfere with the essential attributes of the *lex fori*,” that 
the act of Congress only established a rule of evidence, of conclu-
sive evidence to be sure, but still of evidence only; and that it was 
necessary, in order to carry into effect in a State the judgment of 
a court of a sister State, to institute a fresh action in the court of 
the former, in strict compliance with its laws; and that, con-
sequently, when remedies were sought in support of the rights ac-
cruing in another jurisdiction, they were governed by the *lex fori*.
In accord with this holding, it has been further held that for-

eign judgments enjoy, not the right of priority or privilege or lien 
which they have in the State where they are pronounced but only 
that which the *lex fori* gives them by its own laws, in their char-
acter of foreign judgments. A judgment of a state court, in a cause 
within its jurisdiction, and against a defendant lawfully sum-
moned, or against lawfully attached property of an absent defend-
ant, is entitled to as much force and effect against the person sum-
moned or the property attached, when the question is presented for 
decision in a court in another State, as it has in the State in which 
it was rendered.

A judgment enforceable in the State where rendered must be 
given effect in another State, notwithstanding that the modes of 
procedure to enforce its collection may not be the same in both 
States. If the initial court acquired jurisdiction, its judgment is 
entitled to full faith and credit elsewhere even though the former, 
by reason of the departure of the defendant with all his property, 
after having been served, has lost its capacity to enforce it by exe-
cution in the State of origin. “A cause of action on a judgment 
is different from that upon which the judgment was entered. In a 
suit upon a money judgment for a civil cause of action, the validity 
of the claim upon which it was founded is not open to inquiry, 
whatever its genesis. Regardless of the nature of the right which 
gave rise to it, the judgment is an obligation to pay money in the 
nature of a debt upon a specialty. Recovery upon it can be resisted 
only on the grounds that the court which rendered it was without

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Sec. 1—Full Faith and Credit

jurisdiction, ... or that it has ceased to be obligatory because of payment or other discharge ... or that it is a cause of action for which the State of the forum has not provided a court.”

On the other hand, the clause is not violated when a judgment is disregarded because it is not conclusive of the issues before a court of the forum. Conversely, no greater effect can be given than is given in the State where rendered. Thus, an interlocutory judgment may not be given the effect of a final judgment. Likewise, when a federal court does not attempt to foreclose the state court from hearing all matters of personal defense which landowners might plead, a state court may refuse to accept the former's judgment as determinative of the landowners' liabilities. Similarly, though a confession of judgment upon a note, with a warrant of attorney annexed, in favor of the holder, is in conformity with a state law and usage as declared by the highest court of the State in which the judgment is rendered, the judgement may be collaterally impeached upon the ground that the party in whose behalf it was rendered was not in fact the holder. But a consent decree, which under the law of the State has the same force and effect as a decree in invitum, must be given the same effect in the courts of another State.

Subsequent to its departure from Hampton v. McConnell, the Court does not appear to have formulated, by way of substitution, any clear-cut principles for disposing of the contention that a State need not provide a forum for a particular type of judgment of a sister State. Thus, in one case it held that a New York statute forbidding foreign corporations doing a domestic business to sue on causes originating outside the State was constitutionally applicable to prevent such a corporation from suing on a judgment obtained in a sister State. But in a later case it ruled that a Mississippi statute forbidding contracts in cotton futures could not validly close the courts of the State to an action on a judgment obtained in a sister State on such a contract, although the contract in question had been entered into in the forum State and between its citi-

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14 Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521 (1873); Robertson v. Pickrell, 109 U.S. 608, 610 (1883).
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Following the later rather than the earlier precedent, subsequent cases have held: (1) that a State may adopt such system of courts and form of remedy as it sees fit but cannot, under the guise of merely affecting the remedy, deny enforcement of claims otherwise within the protection of the Full Faith and Credit Clause when its courts have general jurisdiction of the subject matter and the parties; (2) that, accordingly, a forum State, which has a shorter period of limitations than the State in which a judgment was granted and later revived, erred in concluding that, whatever the effect of the revivor under the law of the State of origin, it could refuse enforcement of the revived judgment; (3) that the courts of one State have no jurisdiction to enjoin the enforcement of judgments at law obtained in another State, when the same reasons assigned for granting the restraining order were passed upon on a motion for new trial in the action at law and the motion denied; (4) that the constitutional mandate requires credit to be given to a money judgment rendered in a civil cause of action in another State, even though the forum State would have been under no duty to entertain the suit on which the judgment was founded, inasmuch as a State cannot, by the adoption of a particular rule of liability or of procedure, exclude from its courts a suit on a judgment; and (5) that, similarly, tort claimants in State A, who obtain a judgment against a foreign insurance company, notwithstanding that, prior to judgment, domiciliary State B appointed a liquidator for the company, vested company assets in him, and ordered suits against the company stayed, are entitled to have such judgment recognized in State B for purposes of determining the amount of the claim, although not for determination of what priority, if any, their claim should have.

20 Fauntleroy v. Lum, 210 U.S. 230 (1908). Justice Holmes, who spoke for the Court in both cases, asserted in his opinion in the latter that the New York statute was “directed to jurisdiction,” the Mississippi statute to “merits,” but four Justices could not grasp the distinction.

21 Kenney v. Supreme Lodge, 252 U.S. 411 (1920), and cases there cited. Holmes again spoke for the Court. See also Cook, The Powers of Congress under the Full Faith and Credit Clause, 28 Yale L.J. 421, 434 (1919).


26 Morris v. Jones, 329 U.S. 545 (1947). Moreover, there is no apparent reason why Congress, acting on the implications of Marshall’s words in Hampton v. M’Connell, 16 U.S. (3 Wheat.) 234 (1818), should not clothe extrastate judgments of any particular type with the full status of domestic judgments of the same type in the several States. Thus, why should not a judgment for alimony be made directly enforceable in sister States instead of merely furnishing the basis of an action in debt?
**Sec. 1—Full Faith and Credit**

**Jurisdiction: A Prerequisite to Enforcement of Judgments**

The jurisdictional question arises both in connection with judgments *in personam* against nonresident defendants to whom it is alleged personal service was not obtained in the State originating the judgment and in relation to judgments *in rem* against property or a status alleged not to have been within the jurisdiction of the court which handed down the original decree.\(^{27}\) Records and proceedings of courts wanting jurisdiction are not entitled to credit.\(^{28}\)

**Judgments in Personam.**—When the subject matter of a suit is merely the defendant’s liability, it is necessary that it should appear from the record that the defendant has been brought within the jurisdiction of the court by personal service of process, or by his voluntary appearance, or that he had in some manner authorized the proceeding.\(^{29}\) Thus, when a state court endeavored to acquire jurisdiction of a nonresident defendant by an attachment of his property within the State and constructive notice to him, its judgment was defective for want of jurisdiction and hence could not afford the basis of an action against the defendant in the court of another State, although it bound him so far as the property attached by virtue of the inherent right of a State to assist its own citizens in obtaining satisfaction of their just claims.\(^{30}\)

The fact that a nonresident defendant was only temporarily in the State when he was served in the original action does not vitiate the judgment thus obtained and later relied upon as the basis of an action in his home State.\(^{31}\) Also a judgment rendered in the State of his domicile against a defendant who, pursuant to the statute thereof providing for the service of process on absent defend-

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Sec. 1—Full Faith and Credit

ants, was personally served in another State is entitled to full faith and credit. When the matter of fact or law on which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment.

Inasmuch as the principle of res judicata applies only to proceedings between the same parties and privies, the plea by defendant in an action based on a judgment that he was not party or privy to the original action raises the question of jurisdiction; while a judgment against a corporation in one State may validly bind a stockholder in another State to the extent of the par value of his holdings, an administrator acting under a grant of administration in one State stands in no sort of relation of privity to an administrator of the same estate in another State. But where a judgment of dismissal was entered in a federal court in an action against one of two joint tortfeasors, in a State in which such a judgment would constitute an estoppel in another action in the same State against the other tortfeasor, such judgment is not entitled to full faith and credit in an action brought against the tortfeasor in another State.

Service on Foreign Corporations.—In 1856, the Court decided Lafayette Ins. Co. v. French, a pioneer case in its general class. Here it was held that “where a corporation chartered by the State of Indiana was allowed by a law of Ohio to transact business in the latter State upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment obtained against the corporation by means of such process” ought to receive in Indiana the same

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32 Milliken v. Meyer, 311 U.S. 457, 463 (1940). In the pioneer case of D'Arcy v. Ketchum, 52 U.S. (1 How.) 165 (1851), the question presented was whether a judgment rendered by a New York court, under a statute which provided that, when joint debtors were sued and one of them was brought into court on a process, a judgment in favor of the plaintiff would entitle him to execute against all, must be accorded full faith and credit in Louisiana when offered as a basis of an action in debt against a resident of that State who had not been served by process in the New York action. The Court ruled that the original implementing statute, 1 Stat. 122 (1790), did not reach this type of case, and hence the New York judgment was not enforceable in Louisiana against defendant. Had the Louisiana defendant thereafter ventured to New York, however, he could, as the Constitution then stood, have been subjected to the judgment to the same extent as the New York defendant who had been personally served. Subsequently, the disparity between operation of personal judgment in the home State has been eliminated, because of the adoption of the Fourteenth Amendment. In divorce cases, however, it still persists in some measure. See infra.

34 Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900).
36 Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912).
37 59 U.S. (18 How.) 404 (1856).
faith and credit as it was entitled to in Ohio. Later cases establish under both the Fourteenth Amendment and article IV, § 1, that the cause of action must have arisen within the State obtaining service in this way, that service on an officer of a corporation, not its resident agent and not present in the State in an official capacity, will not confer jurisdiction over the corporation, that the question whether the corporation was actually “doing business” in the State may be raised. On the other hand, the fact that the business was interstate is no objection.

Service on Nonresident Motor Vehicle Owners.—By analogy to the above cases, it has been held that a State may require nonresident owners of motor vehicles to designate an official within the State as an agent upon whom process may be served in any legal proceedings growing out of their operation of a motor vehicle within the State. While these cases arose under the Fourteenth Amendment alone, unquestionably a judgment validly obtained upon this species of service could be enforced upon the owner of a car through the courts of his home State.

Judgments in Rem.—In sustaining the challenge to jurisdiction in cases involving judgments in personam, the Court in the main was making only a somewhat more extended application of recognized principles. In order to sustain the same kind of challenge in cases involving judgments in rem it has had to make law outright. The leading case is Thompson v. Whitman. Thompson, sheriff of Monmouth County, New Jersey, acting under a New Jersey statute, had seized a sloop belonging to Whitman and by a proceeding in rem had obtained its condemnation and forfeiture in a local court. Later, Whitman, a citizen of New York, brought an action for trespass against Thompson in the United States Circuit Court for the Southern District of New York, and Thompson answered by producing a record of the proceedings before the New Jersey tribunal. Whitman thereupon set up the contention that the New Jersey court had acted without jurisdiction, inasmuch as the sloop which was the subject matter of the proceedings had been

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38To the same effect is Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).
4485 U.S. (18 Wall.) 457 (1874).
Sec. 1—Full Faith and Credit

seized outside the county to which, by the statute under which it had acted, its jurisdiction was confined.

As previously explained, the plea of lack of privity cannot be set up in defense in a sister State against a judgment in rem. In a proceeding in rem, however, the presence of the res within the court’s jurisdiction is a prerequisite, and this, it was urged, had not been the case in Thompson v. Whitman. Could, then, the Court consider this challenge with respect to a judgment which was offered, not as the basis for an action for enforcement through the courts of a sister State but merely as a defense in a collateral action? As the law stood in 1873, it apparently could not. All difficulties, nevertheless, to its consideration of the challenge to jurisdiction in the case were brushed aside by the Court. Whenever, it said, the record of a judgment rendered in a state court is offered “in evidence” by either of the parties to an action in another State, it may be contradicted as to the facts necessary to sustain the former court’s jurisdiction; “and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding the claim that they did exist.”

Divorce Decrees: Domicile as the Jurisdictional Prerequisite

This, however, was only the beginning of the Court’s lawmaking in cases in rem. The most important class of such cases is that in which the respondent to a suit for divorce offers in defense an earlier decree from the courts of a sister State. By the almost universally accepted view prior to 1906, a proceeding in divorce was one against the marriage status, i.e., in rem, and hence might be validly brought by either party in any State where he or she was bona fide domiciled; and, conversely, when the plaintiff did not have a bona fide domicile in the State, a court could not render a decree binding in other States even if the nonresident defendant entered a personal appearance.

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46 See also Simmons v. Saul, 138 U.S. 439, 448 (1891). In other words, the challenge to jurisdiction is treated as equivalent to the plea nul titl record, a plea which was recognized even in Mills v. Duryee as available against an attempted invocation of the Full Faith and Credit Clause. What is not pointed out by the Court is that it was also assumed in the earlier case that such a plea could always be rebutted by producing a transcript, properly authenticated in accordance with the act of Congress, of the judgment in the original case. See also Brown v. Fletcher’s Estate, 210 U.S. 82 (1908); German Savings Soc’y v. Dormitzer, 192 U.S. 125, 128 (1904); Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287, 294 (1890).
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**Divorce Suit: In Rem or in Personam; Judicial Indecision.**—In 1906, however, by a vote of five to four, the Court departed from its earlier ruling, rendered five years previously in *Atherton v. Atherton*, 49 and in *Haddock v. Haddock*, 50 it announced that a divorce proceeding might be viewed as one *in personam*. In the former it was held, in the latter denied, that a divorce granted a husband without personal service upon the wife, who at the time was residing in another State, was entitled to recognition under the Full Faith and Credit Clause and the acts of Congress; the difference between the cases consisted solely in the fact that in the *Atherton* case the husband had driven the wife from their joint home by his conduct, while in the *Haddock* case he had deserted her. The court which granted the divorce in *Atherton v. Atherton* was held to have had jurisdiction of the marriage status, with the result that the proceeding was one *in rem* and hence required only service by publication upon the respondent. Haddock's suit, on the contrary, was held to be as to the wife *in personam* and so to require personal service upon her or her voluntary appearance, neither of which had been had; although, notwithstanding this, the decree in the latter case was held to be valid in the State where obtained because of the State's inherent power to determine the status of its own citizens. The upshot was a situation in which a man and a woman, when both were in Connecticut, were divorced; when both were in New York, were married; and when the one was in Connecticut and the other in New York, the former was divorced and the latter married. In *Atherton v. Atherton* the Court had earlier acknowledged that "a husband without a wife, or a wife without a husband, is unknown to the law."

The practical difficulties and distresses likely to result from such anomalies were pointed out by critics of the decision at the time. In point of fact, they have been largely avoided, because most of the state courts have continued to give judicial recognition and full faith and credit to one another's divorce proceedings on the basis of the older idea that a divorce proceeding is one *in rem*, and that if the applicant is *bona fide* domiciled in the State the court has jurisdiction in this respect. Moreover, until the second of the *Williams v. North Carolina* cases 51 was decided in 1945, there had not been manifested the slightest disposition to challenge judicially the power of the States to determine what shall constitute domicile for divorce purposes. Shortly prior thereto, the Court in *Davis v.*

49 181 U.S. 155, 162 (1901).
50 201 U.S. 562 (1906).
51 317 U.S. 287 (1942); 325 U.S. 226 (1945).
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Davis rejected contentions adverse to the validity of a Virginia decree of which enforcement was sought in the District of Columbia. In this case, a husband, after having obtained in the District a decree of separation subject to payment of alimony, established years later a residence in Virginia and sued there for a divorce. Personally served in the District, where she continued to reside, the wife filed a plea denying that her husband was a resident of Virginia and averred that he was guilty of a fraud on the court in seeking to establish a residence for purposes of jurisdiction. In ruling that the Virginia decree, granting to the husband an absolute divorce minus any alimony payment, was enforceable in the District, the Court stated that in view of the wife’s failure, while in Virginia litigating her husband’s status to sue, to answer the husband’s charges of willful desertion, it would be unreasonable to hold that the husband’s domicile in Virginia was not sufficient to entitle him to a divorce effective in the District. The finding of the Virginia court on domicile and jurisdiction was declared to bind the wife. Davis v. Davis is distinguishable from the Williams v. North Carolina decisions in that in the former determination of the jurisdictional prerequisite of domicile was made in a contested proceeding while in the Williams cases it was not.

Williams I and Williams II.—In the Williams I and Williams II cases, the husband of one marriage and the wife of another left North Carolina, obtained six-week divorce decrees in Nevada, married there, and resumed their residence in North Carolina where both previously had been married and domiciled. Prosecuted for bigamy, the defendants relied upon their Nevada decrees and won the preliminary round of this litigation, that is, in Williams I, when a majority of the Justices, overruling Haddock v. Haddock, declaring that in this case, the Court must assume that the petitioners for divorce had a bona fide domicile in Nevada and not that their Nevada domicile was a sham. “[E]ach State, by virtue of its command over the domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of substituted service meet the requirements of due process.” Accordingly, a decree granted by Nevada to one, who, it is assumed, is at the time bona fide domiciled therein, is binding upon the courts of other States, including North Carolina in which the marriage was performed and where the other party to the marriage is still domiciled when the divorce was decreed. In view of its

52 See 305 U.S. 32 (1938).
assumptions, which it justified on the basis of an inadequate record, the Court did not here pass upon the question whether North Carolina had the power to refuse full faith and credit to a Nevada decree because it was based on residence rather than domicile or because, contrary to the findings of the Nevada court, North Carolina found that no *bona fide* domicile had been acquired in Nevada.54

Presaging what ruling the Court would make when it did get around to passing upon the latter question, Justice Jackson, dissenting in *Williams* I, protested that “this decision repeals the divorce laws of all the States and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there.... While a State can no doubt set up its own standards of domicile as to its internal concerns, I do not think it can require us to accept and in the name of the Constitution impose them on other States.... The effect of the Court’s decision today—that we must give extra-territorial effect to any judgment that a state honors for its own purposes—is to deprive this Court of control over the operation of the full faith and credit and the due process clauses of the Federal Constitution in cases of contested jurisdiction and to vest it in the first State to pass on the facts necessary to jurisdiction.”55

Notwithstanding that one of the deserted spouses had died since the initial trial and that another had remarried, North Carolina, without calling into question the status of the latter marriage, began a new prosecution for bigamy; when the defendants appealed the conviction resulting therefrom, the Supreme Court, in *Williams* II,56 sustained the adjudication of guilt as not denying full faith and credit to the Nevada divorce decree. Reiterating the doctrine that jurisdiction to grant divorce is founded on domicile,57 a majority of the Court held that a decree of divorce rendered in one State may be collaterally impeached in another by proof that the court which rendered the decree lacked jurisdiction (the parties not having been domiciled therein), even though the record of proceedings in that court purports to show jurisdiction.58
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Cases Following Williams II.—Fears registered by the dissenters in the second Williams case that the stability of all divorces might be undermined thereby and that thereafter the court of each forum State, by its own independent determination of domicile, might refuse recognition of foreign decrees were temporarily set at rest by the holding in Sherrer v. Sherrer, wherein Massachusetts, a State of domiciliary origin, was required to accord full faith and credit to a 90-day Florida decree which had been contested by the husband. The latter, upon receiving notice by mail, retained Florida counsel who entered a general appearance and denied all allegations in the complaint, including the wife’s residence. At the hearing, the husband, though present in person and by counsel, did not offer evidence in rebuttal of the wife’s proof of her Florida residence, and when the Florida court ruled that she was a bona fide resident, the husband did not appeal. Inasmuch as the findings of the requisite jurisdictional facts, unlike those in the second Williams case, were made in proceedings in which the defendant appeared and participated, the requirements of full faith and credit were held to bar him from collaterally attacking such findings in a suit instituted by him in his home State of Massachusetts, par-

... The Constitution does not mention domicile. Nowhere does it posit the powers of the state or the nation upon that amorphous, highly variable common law conception... No legal conception, save possibly 'jurisdiction'... afford such possibilities for uncertain application... Apart from the necessity for travel, [to effect a change of domicile, the latter] criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity... When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character... [The majority have not held] that denial of credit will be allowed, only if the evidence [as to the place of domicile] is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact 'not unreasonably.'... But... [the Court] does not define 'not unreasonably.' It vaguely suggests a supervisory function, to be exercised when the denial [of credit] strikes its sensibilities as wrong, by some not stated standard... There will be no 'weighing' [of evidence],... only examination for sufficiency.” 325 U.S. at 248, 251, 255, 258-259.

No less disposed to prophesy undesirable results from this decision was Justice Black in whose dissenting opinion Justice Douglas concurred.

“The Full Faith and Credit Clause, as now interpreted, has become a disrupting influence. The Court in effect states that the clause does not apply to divorce actions, and that States alone have the right to determine what effect shall be given to the decrees of other States. If the Court is abandoning the principle that a marriage [valid where made is valid everywhere], a consequence is to subject people to bigamy or adultery prosecutions because they exercise their constitutional right to pass from a State in which they were validly married on to another which refuses to recognize their marriage. Such a consequence violates basic guarantees.” Id. at 262.

334 U.S. 343 (1948).
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particularly in the absence of proof that the divorce decree was subject to such collateral attack in a Florida court. Having failed to take advantage of the opportunities afforded him by his appearance in the Florida proceeding, the husband was thereafter precluded from relitigating in another State the issue of his wife’s domicile already passed upon by the Florida court.

In Coe v. Coe,\(^{60}\) embracing a similar set of facts, the Court applied like reasoning to reach a similar result. Massachusetts again was compelled to recognize the validity of a six-week Nevada decree obtained by a husband who had left Massachusetts after a court of that State had refused him a divorce and had granted his wife separate support. In the Nevada proceeding, the wife appeared personally and by counsel filed a cross-complaint for divorce, admitted the husband’s residence, and participated personally in the proceedings. After finding that it had jurisdiction of the plaintiff, defendant, and the subject matter involved, the Nevada court granted the wife a divorce, which was valid, final, and not subject to collateral attack under Nevada law. The husband married again, and on his return to Massachusetts, his ex-wife petitioned the Massachusetts court to adjudge him in contempt for failing to make payments for her separate support under the earlier Massachusetts decree. Inasmuch as there was no intimation that under Massachusetts law a decree of separate support would survive a divorce, recognition of the Nevada decree as valid accordingly necessitated a rejection of the ex-wife’s contention.

Appearing to review Williams II, and significant for the social consequences produced by the result decreed therein, is the case of Rice v. Rice.\(^{61}\) To determine the widowhood status of the party litigants in relation to inheritance of property of a husband who had

\(^{60}\) 334 U.S. 378 (1948). In a dissenting opinion filed in the case of Sherrer v. Sherrer, but applicable also to the case of Coe v. Coe, Justice Frankfurter, with Justice Murphy concurring, asserted his inability to accept the proposition advanced by the majority that “regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering bargain-counter divorces was a sham, the home State of the parties is not permitted to question the matter if the form of a controversy had been gone through.” 334 U.S. at 343, 377.

\(^{61}\) 336 U.S. 674 (1949). Of four justices dissenting, Black, Douglas, Rutledge, and Jackson, Justice Jackson alone filed a written opinion. To him the decision was “an example of the manner in which, in the law of domestic relations, ‘confusion now hath made his masterpiece,’ but for the first Williams case and its progeny, the judgment of the Connecticut court might properly have held that the Rice divorce decree was void for every purpose because it was rendered by a State court which never obtained jurisdiction of the nonresident defendant. But if we adhere to the holdings that the Nevada court had power over her for the purpose of blasting her marriage and opening the way to a successor, I do not see the justice of inventing a compensating confusion in the device of divisible divorce by which the parties are half-bound and half-free and which permits Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife.” Id. at 676, 679, 680.
Vermont violated the clause in sustaining a collateral attack on a Florida divorce decree, the presumption of Florida’s jurisdiction over the cause and the parties not having been overcome by extrinsic evidence or the record of the case. Cook v. Cook, 342 U.S. 126 (1951). The Sherrer and Coe cases were relied upon. There seems, therefore, to be no doubt of their continued vitality.

A Florida divorce decree was also at the bottom of another case in which the daughter of a divorced man by his first wife and his legatee under his will sought to attack his divorce in the New York courts and thereby indirectly his third marriage. The Court held that inasmuch as the attack would not have been permitted in Florida under the doctrine of res judicata, it was not permissible under the Full Faith and Credit Clause in New York. On the whole, it appears that the principle of res judicata is slowly winning out against the principle of domicile. Johnson v. Muelberger, 340 U.S. 581 (1951).

Claims for Alimony or Property in Forum State.—In Esenwein v. Commonwealth, decided on the same day as the second Williams case, the Supreme Court also sustained a Pennsylvania court in its refusal to recognize an ex parte Nevada decree on the ground that the husband who obtained it never acquired a bona fide domicile in the latter State. In this instance, the husband and wife had separated in Pennsylvania, where the wife was granted a support order; after two unsuccessful attempts to win a divorce in that State, the husband departed for Nevada. Upon the receipt of a Nevada decree, the husband thereafter established a residence in Ohio and filed an action in Pennsylvania for total relief from the support order. In a concurring opinion, in which he was joined by Justices Black and Rutledge, Justice Douglas stressed the “basic difference between the problem of marital capacity and the problem of support,” and stated that it was “not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domi-
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ciled in the State which awarded him the divorce decree,” unless the other spouse appeared or was personally served. “The State where the deserted wife is domiciled has a concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized.” Or, as succinctly stated by Justice Rutledge, “the jurisdictional foundation for a decree in one State capable of foreclosing an action for maintenance or support in another may be different from that required to alter the marital status with extraterritorial effect.” 64

Three years later, but on this occasion as spokesman for a majority of the Court, Justice Douglas reiterated these views in the case of Estin v. Estin. 65 Even though it acknowledged the validity of an ex parte Nevada decree obtained by a husband, New York was held not to have denied full faith and credit to the decree when, subsequently thereto, it granted the wife a judgment for arrears in alimony founded upon a decree of separation previously awarded to her when both she and her husband after he had resided there a year and upon constructive notice to the wife in New York who entered no appearance, was held to be effective only to change the marital status of both parties in all States of the Union but ineffective on the issue of alimony. Divorce, in other words, was viewed as being divisible; Nevada, in the absence of acquiring jurisdiction over the wife, was held incapable of adjudicating the rights of the wife in the prior New York judgment awarding her alimony. Accordingly, the Nevada decree could not prevent New York from applying its own rule of law which, unlike that of Pennsylvania, 66 does permit a support order to survive a divorce decree. 67

Such a result was justified as accommodating the interests of both New York and Nevada in the broken marriage by restricting each State to matters of her dominant concern, the concern of New

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64 Id. at 281-283.
67 Because the record, in his opinion, did not make it clear whether New York “law” held that no “ex parte” divorce decree could terminate a prior New York separate maintenance decree, or merely that no “ex parte” decree of divorce of another State could, Justice Frankfurter dissented and recommended that the case be remanded for clarification. Justice Jackson dissented on the ground that under New York law, a New York divorce would terminate the wife’s right to alimony, and if the Nevada decree is good, it was entitled to no less effect in New York than a local decree. However, for reasons stated in his dissent in the first Williams case, 317 U.S. 287, he would have preferred not to give standing to constructive service divorces obtained on short residence. 334 U.S. 541, 549-554 (1948). These two Justices filed similar dissents in the companion case of Kreiger v. Kreiger, 334 U.S. 555, 557 (1948).
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York being that of protecting the abandoned wife against impoverishment. In Simons v. Miami National Bank, 68 the Court held that a dower right in the deceased husband’s estate is extinguished even though a divorce decree was obtained in a proceeding in which the nonresident wife was served by publication only and did not make a personal appearance. 69 The Court found the principle of Estin v. Estin 70 was not applicable. In Simons, the Court rejected the contention that the forum court, in giving recognition to the foreign court’s separation decree providing for maintenance and support, has to allow for dower rights in the deceased husband’s estate in the forum State. 71 Full faith and credit is not denied to a sister State’s separation decree, including an award of monthly alimony, where nothing in the foreign State’s separation decree could be construed as creating or preserving any interest in the nature of or in lieu of dower in any property of the decedent, wherever located and where the law of the forum State did not treat such a decree as having such effect nor indicate such an effect irrespective of the existence of the foreign State’s decree. 72

Decrees Awarding Alimony, Custody of Children.—Resulting as a by-product of divorce litigation are decrees for the payment of alimony, judgments for accrued and unpaid installments of alimony, and judicial awards of the custody of children, all of which necessitate application of the Full Faith and Credit Clause when extrastate enforcement is sought for them. Thus, a judgment in State A for alimony in arrears and payable under a prior judgment of separation which is not by its terms conditional nor subject by the law of State A to modification or recall, and on which execution was directed to issue, is entitled to recognition in the forum State. Although an obligation for accrued alimony could have been modified or set aside in State A prior to its merger in the judgment, such a judgment, by the law of State A, is not lacking in finality. 73 As to the finality of alimony decrees in general, the Court had previously ruled that where such a decree is rendered, payable in future installments, the right to such installments becomes absolute and vested on becoming due, provided no modification of the decree has been made prior to the maturity of the installments. 74 How-

68 381 U.S. 81 (1965).
69 Id. at 84-85.
70 334 U.S. 541 (1948).
71 381 U.S. at 84-85.
72 Id. at 85.
73 Barber v. Barber, 323 U.S. 77, 84 (1944).
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ever, a judicial order requiring the payment of arrearages in alimony, which exceeded the alimony previously decreed, is invalid for want of due process, the respondent having been given no opportunity to contest it. 75 “A judgment obtained in violation of procedural due process,” said Chief Justice Stone, “is not entitled to full faith and credit when sued upon in another jurisdiction.” 76

An example of a custody case was one involving a Florida divorce decree which was granted ex parte to a wife who had left her husband in New York, where he was served by publication. The decree carried with it an award of the exclusive custody of the child, whom the day before the husband had secretly seized and brought back to New York. The Court ruled that the decree was adequately honored by a New York court when, in habeas corpus proceedings, it gave the father rights of visitation and custody of the child during stated periods and exacted a surety bond of the wife conditioned on her delivery of the child to the father at the proper times, 77 it having not been “shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida laws. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida.”

Answering a question left open in the preceding holding as to the binding effect of the ex parte award, the Court more recently acknowledged that in a proceeding challenging a mother’s right to retain custody of her children, a State is not required to give effect to the decree of another State’s court, which never acquired personal jurisdiction over the mother of her children, and which awarded custody to the father as the result of an ex parte divorce action instituted by him. 78 In Kovacs v. Brewer, 79 however, the

76 Id. at 228. An alimony case of a quite extraordinary pattern was that of Sutton v. Leib, 342 U.S. 402 (1952). Because of the diverse citizenship of the parties, who had once been husband and wife, the case was brought by the latter in a federal court in Illinois. Her suit was to recover unpaid alimony which was to continue until her remarriage. To be sure, she had, as she confessed, remarried in Nevada, but the marriage had been annulled in New York on the ground that the man was already married, inasmuch as his divorce from his previous wife was null and void, she having neither entered a personal appearance nor been personally served. The Court, speaking by Justice Reed, held that the New York annulment of the Nevada marriage must be given full faith and credit in Illinois but left Illinois to decide for itself the effect of the annulment upon the obligations of petitioner’s first husband.
79 356 U.S. 604 (1958). Rejecting the implication that recognition must be accorded unless the circumstances have changed, Justice Frankfurter dissented on the ground that in determining what is best for the welfare of the child, the forum court cannot be bound by an absentee, foreign custody decree, “irrespective of whether changes in circumstances are objectively provable.”
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Court indicated that a finding of changed circumstances rendering observance of an absentee foreign custody decree inimical to the best interests of the child is essential to sustain the validity of the forum court’s refusal to enforce a foreign decree, rendered with jurisdiction over all the parties but the child, and revising an initial decree by transferring custody from the paternal grandfather to the mother. However, when, as is true in Virginia, agreements by parents as to shared custody of a child do not bind the State’s courts, the dismissal by a Virginia court of a *habeas corpus* petition instituted by a father to obtain custody was not *res judicata* in that State; therefore, even if the Full Faith and Credit Clause were applicable to child custody decrees, it would not require a South Carolina court, in a custody suit instituted by the wife, to recognize a court order not binding in Virginia.\(^\text{80}\)

**Status of the Law.**—The doctrine of divisible divorce, as developed by Justice Douglas in *Estin v. Estin*,\(^\text{81}\) may have become the prevailing standard for determining the enforceability of foreign divorce decrees. If such be the case, it may be tenable to assert that an *ex parte* divorce, founded upon acquisition of domicile by one spouse in the State which granted it, is effective to destroy the marital status of both parties in the State of domiciliary origin and probably in all other States. The effect is to preclude subsequent prosecutions for bigamy but not to alter rights as to property, alimony, or custody of children in the State of domiciliary origin of a spouse who neither was served nor appeared personally.

In any event the accuracy of these conclusions has not been impaired by any decision rendered by the Court since 1948. Thus, in *Armstrong v. Armstrong*,\(^\text{82}\) an *ex parte* divorce decree obtained by the husband in Florida was deemed to have been adequately recognized by an Ohio court when, with both of the parties before it, it disposed of the wife’s suit for divorce and alimony with a decree limited solely to an award of alimony.\(^\text{83}\) Similarly, a New York court was held not bound by an *ex parte* Nevada divorce decree, rendered without personal jurisdiction over the wife, to the extent that it relieved the husband of all marital obligations, and in an *ex parte* action for separation and alimony instituted by the wife,


\(^{81}\) 334 U.S. 541 (1948).

\(^{82}\) 350 U.S. 568 (1956).

\(^{83}\) Four Justices, Black, Douglas, Clark, and Chief Justice Warren, disputed the Court’s contention that the Florida decree contained no ruling on the wife’s entitlement to alimony and mentioned that for want of personal jurisdiction over the wife, the Florida court was not competent to dispose of that issue. Id. at 575
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it was competent to sequester the husband’s property in New York to satisfy his obligations to the wife.\textsuperscript{84}

Other Types of Decrees

Probate Decrees.—Many judgments, enforcement of which has given rise to litigation, embrace decrees of courts of probate respecting the distribution of estates. In order that a court have jurisdiction of such a proceeding, the decedent must have been domiciled in the state, and the question whether he was so domiciled at the time of his death may be raised in the court of a sister State.\textsuperscript{85} Thus, when a court of State A, in probating a will and issuing letters, in a proceeding to which all distributees were parties, expressly found that the testator’s domicile at the time of death was in State A, such adjudication of domicile was held not to bind one subsequently appointed as domiciliary administrator c.t.a. in State B, in which he was liable to be called upon to deal with claims of local creditors and that of the State itself for taxes, he having not been a party to the proceeding in State A. In this situation, it was held, a court of State C, when disposing of local assets claimed by both personal representatives, was free to determine domicile in accordance with the law of State C.\textsuperscript{86}

Similarly, there is no such relation of privity between an executor appointed in one State and an administrator c.t.a. appointed in another State as will make a decree against the latter binding upon the former.\textsuperscript{87} On the other hand, judicial proceedings in one State, under which inheritance taxes have been paid and the administration upon the estate has been closed, are denied full faith and credit by the action of a probate court in another State in assuming jurisdiction and assessing inheritance taxes against the beneficiaries of the estate, when under the law of the former State the order of the probate court barring all creditors who had failed to bring in their demand from any further claim against the executors was binding upon all.\textsuperscript{88} What is more important, however, is

\textsuperscript{84}Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). Two Justices dissented. Justice Frankfurter was unable to perceive “why dissolution of the marital relation is not so personal as to require personal jurisdiction over the absent spouse, while the denial of alimony ... is.” Justice Harlan maintained that inasmuch as the wife did not become a domiciliary of New York until after the Nevada decree, she had no pre-divorce rights in New York which the latter was obligated to protect.

\textsuperscript{85}Tilt v. Kelsey, 207 U.S. 43 (1907); Burbank v. Ernst, 232 U.S. 162 (1914).


\textsuperscript{87}Brown v. Fletcher’s Estate, 210 U.S. 82, 90 (1908). See also Stacy v. Thrasher, 47 U.S. (6 How.) 44, 58 (1848); McLean v. Meek, 59 U.S. (18 How.) 16, 18 (1856).

\textsuperscript{88}Tilt v. Kelsey, 207 U.S. 43 (1907). In the case of Borer v. Chapman, 119 U.S. 587, 599 (1887), involving a complicated set of facts, it was held that a judgment in a probate proceeding, which was merely ancillary to proceedings in another State and which ordered the residue of the estate to be assigned to the legatee and dis-
that the res in such a proceeding, that is, the estate, in order to entitle the judgment to recognition under article IV, 1, must have been located in the State or legally attached to the person of the decedent. Such a judgment is accordingly valid, generally speaking, to distribute the intangible property of the decedent, though the evidences thereof were actually located elsewhere. This is not so, on the other hand, as to tangibles and realty. In order that the judgment of a probate court distributing these be entitled to recognition under the Constitution, they must have been located in the State; as to tangibles and realty outside the State, the decree of the probate court is entirely at the mercy of the lex rei sitae. So, the probate of a will in one State, while conclusive therein, does not displace legal provisions necessary to its validity as a will of real property in other States.

Adoption Decrees.—That a statute legitimizing children born out of wedlock does not entitle them by the aid of the Full Faith and Credit Clause to share in the property located in another State is not surprising, in view of the general principle, to which, however, there are exceptions, that statutes do not have extraterritorial operation. For the same reason, adoption proceedings in one State are not denied full faith and credit by the law of the sister State which excludes children adopted by proceedings in other States from the right to inherit land therein.

Garnishment Decrees.—Garnishment proceedings combine some of the elements of both an in rem and an in personam action. Suppose that A owes B and B owes C, and that the two former live in a different State than C. A, while on a brief visit to C's State, is presented with a writ attaching his debt to B and also a summons to appear in court on a named day. The result of the proceedings thus instituted is that a judgment is entered in C's favor against A to the amount of his indebtedness to B. Subsequently A is sued by B in their home State and offers the judgment, which he has in the meantime paid, in defense. It was argued in behalf

charged the executor from further liability, did not prevent a creditor, who was not a resident of the State in which the ancillary judgment was rendered, from setting up his claim in the state probate court which had the primary administration of the estate.

89 Blodgett v. Silberman, 277 U.S. 1 (1928).
90 Kerr v. Moon, 22 U.S. (9 Wheat.) 565 (1824); McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825); Clarke v. Clarke, 178 U.S. 186 (1900). The controlling principle of these cases is not confined to proceedings in probate. A court of equity "not having jurisdiction of the res cannot affect it by its decree nor by a deed made by a master in accordance with the decree." Fall v. Eastin, 215 U.S. 1, 11 (1909).
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of B that A's debt to him had a *situs* in their home State and furthermore that C could not have sued B in this same State without formally acquiring a domicile there. Both propositions were, however, rejected by the Court, which held that the judgment in the garnishment proceedings was entitled to full faith and credit as against B's action. 94

**Penal Judgments: Types Entitled to Recognition**

Finally, the clause has been interpreted in the light of the "incontrovertible maxim" that "the courts of no country execute the penal laws of another." 95 In the leading case of *Huntington v. Attrill*, 96 however, the Court so narrowly defined "penal" in this connection as to make it substantially synonymous with "criminal" and on this basis held a judgment which had been recovered under a state statute making the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock liable for all of its debts to be entitled under article IV, § 1, to recognition and enforcement in the courts of sister States. Nor, in general, is a judgment for taxes to be denied full faith and credit in state and federal courts merely because it is for taxes. In *Nelson v. George*, 97 in which a prisoner was tried in California and North Carolina and convicted and sentenced in both states for various felonies, the Court determined that the Full Faith and Credit Clause did not require California to enforce a penal judgment handed down by North Carolina; California was free to consider what effect if any it would give to the North Carolina detainer. 98 Until the obligation to extradite matured, the Full Faith and Credit Clause did not require California to enforce the North Carolina penal judgment in any way.

**Fraud as a Defense to Suits on Foreign Judgments**

With regard to whether recognition of a state judgment can be refused by the forum State on other than jurisdictional grounds, there are dicta to the effect that judgments for which extraterritorial operation is demanded under article IV, § 1 and

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98 Id. at 229.
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acts of Congress are “impeachable for manifest fraud.” But unless the fraud affected the jurisdiction of the court, the vast weight of authority is against the proposition. Also, it is universally agreed that a judgment may not be impeached for alleged error or irregularity, or as contrary to the public policy of the State where recognition is sought for it under the Full Faith and Credit Clause.

Previously listed cases indicate, however, that the Court in fact has permitted local policy to determine the merits of a judgment under the pretext of regulating jurisdiction. Thus in one case, Cole v. Cunningham, the Court sustained a Massachusetts court in enjoining, in connection with insolvency proceedings instituted in that State, a Massachusetts creditor from continuing in New York courts an action which had been commenced there before the insolvency suit was brought. This was done on the theory that a party within the jurisdiction of a court may be restrained from doing something in another jurisdiction opposed to principles of equity, it having been shown that the creditor was aware of the debtor’s embarrased condition when the New York action was instituted. The injunction unquestionably denied full faith and credit and commanded the assent of only five Justices.

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

With regard to the extrastate protection of rights which have not matured into final judgments, the Full Faith and Credit Clause has never abolished the general principle of the dominance of local policy over the rules of comity. This was stated by Justice Nelson in the Dred Scott case, as follows: “No State … can enact laws to operate beyond its own dominions … Nations, from convenience and comity … recognizes [sic] and administer the laws of other countries. But, of the nature, extent, and utility, of them, respecting property, or the state and condition of persons within her territories, each nation judges for itself.” He added that it was the same with the States of the Union in relation to one another. It followed that even though Dred Scott had become a free man in con-

99 Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Maxwell v. Stewart, 88 U.S. (21 Wall.) 71 (1875); Hanley v. Donoghue, 116 U.S. 1 (1885); Wisconsin v. Peli-

can Ins. Co., 127 U.S. 265 (1888); Simmons v. Saul, 138 U.S. 439 (1891); American


100 Fauntleroy v. Lum, 210 U.S. 230 (1908).


102 133 U.S. 107 (1890).

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sequence of his having resided in the “free” State of Illinois, he had nevertheless upon his return to Missouri, which had the same power as Illinois to determine its local policy respecting rights acquired extraterritorially, reverted to servitude under the laws and judicial decisions of that State.  

In a case decided in 1887, however, the Court remarked: “Without doubt the constitutional requirement, Art. IV, § 1, that ‘full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,’ implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home.” And this proposition was later held to extend to state constitutional provisions. More recently this doctrine has been stated in a very mitigated form, the Court saying that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit Clause and thus compelling courts of each State to subordinate its own statutes to those of others but by appraising the governmental interest of each jurisdiction and deciding accordingly. That is, the Full Faith and Credit Clause, in its design to transform the States from independent sovereigns into a single unified Nation, directs that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty, but because the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate in-

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104 Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857); Bonaparte v. Tax Court, 104 U.S. 592 (1882), where it was held that a law exempting from taxation certain bonds of the enacting State did not operate extraterritorially by virtue of the Full Faith and Credit Clause.


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The clause (and the comparable due process clause standards) obligate the forum State to take jurisdiction and to apply foreign law, subject to the forum’s own interest in furthering its public policy. In order “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” Obviously this doctrine endows the Court with something akin to an arbitral function in the decision of cases to which it is applied.

Transitory Actions: Death Statutes.—The initial effort in this direction was made in connection with transitory actions based on statute. Earlier, such actions had rested upon the common law, which was fairly uniform throughout the States, so that there was usually little discrepancy between the law under which the plaintiff from another jurisdiction brought his action (lex loci) and the law under which the defendant responded (lex fori). In the late seventies, however, the States, abandoning the common law rule on the subject, began passing laws which authorized the representatives of a decedent whose death had resulted from injury to bring an action for damages. The question at once presented itself whether, if such an action was brought in a State other than that in which the injury occurred, it was governed by the statute under which it arose or by the law of the forum State, which might be less favorable to the defendant. Nor was it long before the same question presented itself with respect to transitory action ex contractu.
where the contract involved had been made under laws peculiar to the State where made, and with those laws in view.

**Actions Upon Contract.**—In *Chicago & Alton R.R. v. Wiggins Ferry Co.*, the Court indicated that it was the law under which the contract was made, not the law of the forum State, which should govern. Its utterance on the point was, however, not merely *obiter*, it was based on an error, namely, the false supposition that the Constitution gives “acts” the same extraterritorial operation as the Act of 1790 does “judicial records and proceedings.” Notwithstanding which, this *dictum* is today the basis of “the settled rule” that the defendant in a transitory action is entitled to all the benefits resulting from whatever material restrictions the statute under which plaintiff’s rights of action originated sets thereto, except that courts of sister States cannot be thus prevented from taking jurisdiction in such cases.

However, the modern doctrine permits a forum State with sufficient contacts with the parties or the matter in dispute to follow its own law. In *Allstate Ins. Co. v. Hague*, the decedent was a Wisconsin resident who had died in an automobile accident within Wisconsin near the Minnesota border in the course of his daily employment commute to Wisconsin. He had three automobile insurance policies on three automobiles, each limited to $15,000. Following his death, his widow and personal representative moved to Minnesota, and she sued in that State. She sought to apply Minnesota law, under which she could “stack” or aggregate all three policies, permissible under Minnesota law but not allowed under Wisconsin law, where the insurance contracts had been made. The Court, in a divided opinion, permitted resort to Minnesota law, because of the number of contacts the State had with the matter. On the other hand, an earlier decision is in considerable conflict with *Hague*. There, a life insurance policy was executed in New York, on a New York insured, with a New York beneficiary. The insured died in New York, and his beneficiary moved to Georgia and sued to recover on the policy. The insurance company defended on the ground that the insured, in the application for the policy, had made materially false statements that rendered it void under New York law. The defense was good under New York law, impermissible under Georgia law, and Georgia’s decision to apply its own law was overturned, the Court stressing the surprise to the parties of the

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111 *119* U.S. 615 (1887).
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resort to the law of another State and the absence of any occurrence in Georgia to which its law could apply.\footnote{John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).}

Stockholder Corporation Relationship.—The protections of the Full Faith and Credit Clause extend beyond transitory actions. Some legal relationships are so complex, the Court holds, that the law under which they were formed ought always to govern them as long as they persist.\footnote{Modern Woodmen v. Mixer, 267 U.S. 544 (1925).} One such relationship is that of a stockholder and his corporation. Hence, if a question arises as to the liability of the stockholders of a corporation, the courts of the forum State are required by the Full Faith and Credit Clause to determine the question in accordance with the constitution, laws and judicial decisions of the corporation’s home States.\footnote{Converse v. Hamilton, 224 U.S. 243 (1912); Selig v. Hamilton, 234 U.S. 652 (1914); Marin v. Augedahl, 247 U.S. 142 (1918).} Illustrative applications of the latter rule are to be found in the following cases. A New Jersey statute forbidding an action at law to enforce a stockholder’s liability arising under the laws of another State and providing that such liability may be enforced only in equity, and that in such a case the corporation, its legal representatives, all its creditors, and stockholders, should be necessary parties, was held not to preclude an action at law in New Jersey by the New York superintendent of banks against 557 New Jersey stockholders in an insolvent New York bank to recover assessments made under the laws of New York.\footnote{Broderick v. Rosner, 294 U.S. 629 (1935). See also Thrormann v. Frame, 176 U.S. 350, 356 (1900); Reynolds v. Stockton, 140 U.S. 254, 264 (1891).} Also, in a suit to enforce double liability, brought in Rhode Island against a stockholder in a Kansas trust company, the courts of Rhode Island were held to be obligated to extend recognition to the statutes and court decisions of Kansas whereunder it is established that a Kansas judgment recovered by a creditor against the trust company is not only conclusive as to the liability of the corporation but also an adjudication binding each stockholder therein. The only defenses available to the stockholder are those which he could make in a suit in Kansas.\footnote{Hancock Nat’l Bank v. Farnum, 176 U.S. 640 (1900).}

Fraternal Benefit Society: Member Relationship.—The same principle applies to the relationship which is formed when one takes out a policy in a “fraternal benefit society.” Thus in Royal Arcanum v. Green,\footnote{237 U.S. 531 (1915), followed in Modern Woodmen v. Mixer, 267 U.S. 544 (1925).} in which a fraternal insurance association chartered under the laws of Massachusetts was being sued in the courts of New York by a citizen of the latter State on a contract
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of insurance made in that State, the Court held that the defendant company was entitled under the Full Faith and Credit Clause to have the case determined in accordance with the laws of Massachusetts and its own constitution and by-laws as these had been construed by the Massachusetts courts.

Nor has the Court manifested any disposition to depart from this rule. In *Sovereign Camp v. Bolin*, it declared that a State in which a certificate of life membership of a foreign fraternal benefit association is issued, which construes and enforces the certificate according to its own law rather than according to the law of the State in which the association is domiciled, denies full faith and credit to the association’s charter embodied in the status of the domiciliary State as interpreted by the latter’s court. “The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. [Hence] another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of domicile.” Consistent therewith, the Court also held, in *Order of Travelers v. Wolfe*, that South Dakota, in a suit brought therein by an Ohio citizen against an Ohio benefit society, must give effect to a provision of the constitution of the society prohibiting the bringing of an action on a claim more than six months after disallowance by the society, notwithstanding that South Dakota’s period of limitation was six years and that its own statutes voided contract stipulations limiting the time within which rights may be enforced. Objecting to these results, Justice Black dissented on the ground that fraternal insurance companies are not entitled, either by the language of the Constitution, or by the nature of their enterprise, to such unique constitutional protection.

**Insurance Company, Building and Loan Association: Contractual Relationships.**—Whether or not distinguishable by nature of their enterprise, stock and mutual insurance companies and mutual building and loan associations, unlike fraternal benefit societies, have not been accorded the same unique constitutional protection; with few exceptions, they have had controversies arising out of their business relationships settled by application of

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120 305 U.S. 66, 75, 79 (1938).
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the law of the forum State. In *National Mutual B. & L. Ass’n v. Brahan*, the principle applicable to these three forms of business organizations was stated as follows: where a corporation has become localized in a State and has accepted the laws of the State as a condition of doing business there, it cannot abrogate those laws by attempting to make contract stipulations, and there is no violation of the Full Faith and Credit Clause in instructing a jury to find according to local law notwithstanding a clause in a contract that it should be construed according to the laws of another State.

Thus, when a Mississippi borrower, having repaid a mortgage loan to a New York building and loan association, sued in a Mississippi court to recover, as usurious, certain charges collected by the association, the usury law of Mississippi rather than that of New York was held to control. In this case, the loan contract, which was negotiated in Mississippi subject to approval by the New York office, did not expressly state that it was governed by New York law. Similarly, when the New York Life Insurance Company, which had expressly stated in its application and policy forms that they would be controlled by New York law, was sued in Missouri on a policy sold to a resident thereof, the court of that State was sustained in its application of Missouri, rather than New York law. Also, in an action in a federal court in Texas to collect the amount of a life insurance policy which had been made in New York and later changed by instruments assigning beneficial interest, it was held that questions (1) whether the contract remained one governed by the law of New York with respect to rights of assignees, rather than by the law of Texas, (2) whether the public policy of Texas permits recovery by one named beneficiary who has no beneficial interest in the life of the insured, and (3) whether lack of insurable interest becomes material when the insurer acknowledges liability and pays the money into court, were questions of Texas law, to be decided according to Texas decisions. Similarly, a State, by reason of its potential obligation to care for dependents of persons injured or killed within its limits, is conceded to have a substantial interest in insurance policies, wherever issued, which may afford compensation for such losses; accordingly, it is competent, by its own direct action statute, to grant the injured party a direct cause of action against the insurer of the tortfeasor, and to refuse to enforce the law of the State, in which

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123 193 U.S. 635 (1904).
124 Id.
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the policy is issued or delivered, which recognizes as binding a policy stipulation which forbids direct actions until after the determination of the liability of the insured tortfeasor. 127

Consistent with the latter holding are the following two involving mutual insurance companies. In *Pink v. A.A.A. Highway Express*, 128 the New York insurance commissioner, as a statutory liquidator of an insolvent auto mutual company organized in New York, sued resident Georgia policyholders in a Georgia court to recover assessments alleged to be due by virtue of their membership in it. The Supreme Court held that, although by the law of the State of incorporation, policyholders of a mutual insurance company become members thereof and as such liable to pay assessments adjudged to be required in liquidation proceedings in that State, the courts of another State are not required to enforce such liability against local resident policyholders who did not appear and were not personally served in the foreign liquidation proceedings but are free to decide according to local law the questions whether, by entering into the policies, residents became members of the company. Again, in *State Farm Ins. Co. v. Duel*, 129 the Court ruled that an insurance company chartered in State A, which does not treat membership fees as part of premiums, cannot plead denial of full faith and credit when State B, as a condition of entry, requires the company to maintain a reserve computed by including membership fees as well as premiums received in all States. Were the company's contention accepted, "no State," the Court observed, "could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation." It is not apparent, the Court added, that State A has an interest superior to that of State B in the financial soundness and stability of insurance companies doing business in State B.

Workers' Compensation Statutes.—Finally, the relationship of employer and employee, insofar as the obligations of the one and the rights of the other under workmen's compensation acts are con-

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128 314 U.S. 201, 206-208 (1941). However, a decree of a Montana Supreme Court, insofar as it permitted judgment creditors of a dissolved Iowa surety company to levy execution against local assets to satisfy judgment, as against title to such assets of the Iowa insurance commissioner as statutory liquidator and successor to the dissolved company, was held to deny full faith and credit to the statutes of Iowa. Clark v. Williard, 292 U.S. 112 (1934).

129 324 U.S. 154, 159-160 (1945).
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cerned, has been the subject of differing and confusing treatment. In an early case, the injury occurred in New Hampshire, resulting in death to a worker who had entered the defendant company’s employ in Vermont, the home State of both parties. The Court required the New Hampshire courts to respect a Vermont statute which precluded a worker from bringing a common-law action against his employer for job related injuries where the employment relation was formed in Vermont, prescribing a constitutional rule giving priority to the place of the establishment of the employment relationship over the place of injury. 130 The same result was achieved in a subsequent case, but the Court promulgated a new rule, applied thereafter, which emphasized a balancing of the governmental interests of each jurisdiction, rather than the mere application of the statutory rule of one or another State under full faith and credit. 131 Thus, the Court held that the clause did not preclude California from disregarding a Massachusett’s workmen’s compensation statute, making its law exclusive of any common law action or any law of any other jurisdiction, and applying its own act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment. 132 It is therefore settled that an injured worker may seek a compensation award either in the State in which the injury occurred or in the State in which the employee resided, his employer was principally located, and the employment relation was formed, even if one statute or the other purported to confer an exclusive remedy on the worker. 133

Less settled is the question whether a second State, with interests in the matter, may supplement a workers’ compensation award provided in the first State. At first, the Court ruled that a Louisiana employee of a Louisiana employer, who was injured on the job in Texas and who received an award under the Texas act, which did not grant further recovery to an employee who received compensation under the laws of another State, could not obtain additional compensation under the Louisiana statute. 134 Shortly,

131 Alaska Packers Ass’n v. Industrial Accident Comm’n, 294 U.S. 532 (1935).
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however, the Court departed from this holding, permitting Wisconsin, the State of the injury, to supplement an award pursuant to the laws of Illinois, where the worker resided and where the employment contract had been entered into.\footnote{Industrial Comm'n v. McCartin, 330 U.S. 622 (1947).} Although the second case could have been factually distinguished from the first,\footnote{Employer and employee had entered into a contract of settlement under the Illinois act, the contract expressly providing that it did not affect any rights the employee had under Wisconsin law. Id. at 624.} the Court instead chose to depart from the principle of the first, saying that only if the laws of the first State making an award contained “unmistakable language” to the effect that those laws were exclusive of any remedy under the laws of any other State would supplementary awards be precluded.\footnote{Id. at 627-628, 630.}

While the overwhelming number of state court decisions since follow McCartin, and Magnolia has been little noticed, all the Justices have recently expressed dissatisfaction with the former case as a rule of the Full Faith and Credit Clause, although a majority of the Court followed it and permitted a supplementary award.\footnote{Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980). For the disapproval of McCartin, see id. at 269-272 (plurality opinion of four), 289 (concurring opinion of three), 291 (dissenting opinion of two). But the four Justice plurality would have instead overruled Magnolia, id. at 277-286, and adopted the rule of interest balancing used in deciding which State may apply its laws in the first place. The dissenting two Justices would have overruled McCartin and followed Magnolia. Id. at 290. The other Justices considered Magnolia the sounder rule but decided to follow McCartin because it could be limited to workmen’s compensation cases, thus requiring no evaluation of changes throughout the reach of the Full Faith and Credit Clause. Id. at 286.}

Full Faith and Credit and Statutes of Limitation.—The Full Faith and Credit Clause is not violated by a state statute providing that all suits upon foreign judgments shall be brought within five years after such judgment shall have been obtained, where the statute has been construed by the state courts as barring suits on foreign judgments, only if the plaintiff could not revive his judgment in the state where it was originally obtained.\footnote{Watkins v. Conway, 385 U.S. 188, 190-191 (1965).}

FULL FAITH AND CREDIT: MISCELLANY

Full Faith and Credit in Federal Courts

The rule of 28 U.S.C. §§ 1738-1739 pertains not merely to recognition by state courts of the records and judicial proceedings of courts of sister States but to recognition by “every court within the United States,” including recognition of the records and proceedings of the courts of any territory or any country subject to the jurisdiction of the United States. The federal courts are bound to
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give to the judgments of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States. Where suits to enforce the laws of one State are entertained in courts of another on principles of comity, federal district courts sitting in that State may entertain them and should, if they do not infringe federal law or policy. However, the refusal of a territorial court in Hawaii, having jurisdiction of the action which was on a policy issued by a New York insurance company, to admit evidence that an administrator had been appointed and a suit brought by him on a bond in the federal court in New York wherein no judgment had been entered, did not violate this clause.

The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgment of its courts is coextensive with its territorial jurisdiction.

Evaluation Of Results Under Provision

The Court, after according an extrastate operation to statutes and judicial decisions in favor of defendants in transitory actions, proceeded next to confer the same protection upon certain classes of defendants in local actions in which the plaintiff’s claim was the outgrowth of a relationship formed extraterritorially. But can the Court stop at this point? If it is true, as Chief Justice Marshall once remarked, that “the Constitution was not made for the benefit of plaintiffs alone,” so also it is true that it was not made for the


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benefit of defendants alone. The day may come when the Court will approach the question of the relation of the Full Faith and Credit Clause to the extrastate operation of laws from the same angle as it today views the broader question of the scope of state legislative power. When and if this day arrives, state statutes and judicial decisions will be given such extraterritorial operation as seems reasonable to the Court to give them. In short, the rule of the dominance of legal policy of the forum State will be superseded by that of judicial review.144

The question arises whether the application to date, not by the Court alone but by Congress and the Court, of article IV, § 1, can be said to have met the expectations of its Framers. In the light of some things said at the time of the framing of the clause this may be doubted. The protest was raised against the clause that, in vesting Congress with power to declare the effect state laws should have outside the enacting State, it enabled the new government to usurp the powers of the States, but the objection went unheeded. The main concern of the Convention, undoubtedly, was to render the judgments of the state courts in civil cases effective throughout the Union. Yet even this object has been by no means completely realized, owing to the doctrine of the Court, that before a judgment of a state court can be enforced in a sister State, a new suit must be brought on it in the courts of the latter, and the further doctrine that with respect to such a suit, the judgment sued on is only evidence; the logical deduction from this proposition is that the sister State is under no constitutional compulsion to give it a forum. These doctrines were first clearly stated in the McElmoyle case and flowed directly from the new states’ rights premises of the Court, but they are no longer in harmony with the prevailing spirit of constitutional construction nor with the needs of the times. Also, the clause seems always to have been interpreted on the basis of the assumption that the term “judicial proceedings” refers only to final judgments and does not include intermediate processes and writs, but the assumption would seem to be groundless, and if it is, then Congress has the power under the clause to provide for the service and execution throughout the United States of the judicial processes of the several States.

144Reviewing some of the cases treated in this section, a writer in 1926 said: “It appears, then, that the Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts...although the precise circumstances under which it will regard itself as having jurisdiction for this purpose are far from clear.” Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 HARV. L. REV. 533, 562 (1926). It can hardly be said that the law has been subsequently clarified on this point.
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SCOPE OF POWERS OF CONGRESS UNDER PROVISION

Under the present system, suit ordinarily has to be brought where the defendant, the alleged wrongdoer, resides, which means generally where no part of the transaction giving rise to the action took place. What could be more irrational? "Granted that no state can of its own volition make its process run beyond its borders . . . is it unreasonable that the United States should by federal action be made a unit in the manner suggested?" 145

Indeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the Full Faith and Credit Clause. Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of state legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

JUDGMENTS OF FOREIGN STATES

Doubtless Congress, by virtue of its powers in the field of foreign relations, might also lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States. At present the duty to recognize judgments even in national courts rests only on comity and is qualified in the judgment of the Supreme Court, by a strict rule of parity. 146

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146 No right, privilege, or immunity is conferred by the Constitution in respect to judgments of foreign states and nations. Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912). See also Hilton v. Guyot, 159 U.S. 113, 234 (1895), where a French judgment offered in defense was held not a bar to the suit. Four Justices disented on the ground that "the application of the doctrine of res judicata does not rest in discretion; and it is for the Government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." At the same sitting of the Court, an action in a United States circuit court on a Canadian judgment was sustained on the same ground of reciprocity, Ritchie v. McMullen, 159 U.S. 235 (1895). See also Ingenohl v. Olsen & Co., 273 U.S. 541 (1927), where a decision of the Supreme Court of the Philippine Islands was reversed for refusal to enforce a judgment of the Supreme Court of the British colony of Hong Kong, which was rendered "after a fair trial by a court having jurisdiction of the parties." Another instance of international cooperation in the judicial field is furnished by letters rogatory. See 28 U.S.C. § 1781. Several States have similar provisions, 2 J. Moore, Digest of International Law 108-109 (1906).
Art. IV—States' Relations

Sec. 2—Interstate Comity  Cl. 1—State Citizenship: Privileges and Immunities

SECTION 2. Clause 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

Origin and Purpose

"The primary purpose of this clause, like the clauses between which it is located...was to help fuse into one Nation a collection of independent sovereign States." 147 Precedent for this clause was a much wordier and a somewhat unclear 148 clause of the articles of Confederation. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively,..." 149 In the Convention, the present clause was presented, reported by the Committee on Detail, and adopted all in the language ultimately approved. 150 Little commentary was addressed to it, 151 and we may assume with Justice Miller that "[t]here can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the articles of Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the..." 147 Toomer v. Witsell, 334 U.S. 385, 395 (1948).


151 "It may be esteemed the basis of the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which its is founded." The Federalist, No. 80 (J. Cooke ed. 1961), 537-538 (Hamilton).
class of civil rights meant by the phrase.” At least four theories have been proffered regarding the purpose of this clause. First, the clause is a guaranty to the citizens of the different States of equal treatment by Congress; in other words, it is a species of equal protection clause binding on the National Government. Though it received some recognition in the Dred Scott case, particularly in the opinion of Justice Catron, this theory is today obsolete. Second, the clause is a guaranty to the citizens of each State of the natural and fundamental rights inherent in the citizenship of persons in a free society, the privileges and immunities of free citizens, which no State could deny to citizens of other States, without regard to the manner in which it treated its own citizens. This theory found some expression in a few state cases and best accords with the natural law-natural rights language of Justice Washington in Corfield v. Coryell.

If it had been accepted by the Court, this theory might well have endowed the Supreme Court with a reviewing power over restrictive state legislation as broad as that which it later came to exercise under the due process and equal protection clauses of the Fourteenth Amendment, but it was firmly rejected by the Court. Third, the clause guarantees to the citizen of any State the rights

152 Slaughter House Cases, 83 U.S. (16 Wall.) 36, 75 (1873).
154 Id. at 518, 527-529.
156 Campbell v. Morris, 3 H. & McH. 288 (Md. 1797); Murray v. McCarty, 2 Munf. 373 (Va. 1811); Livingston v. Van Ingen, 9 Johns. Case. 507 (N.Y. 1812); Douglas v. Stephens, 1 Del. Ch. 465 (1821); Smith v. Moody, 26 Ind. 299 (1866).
157 6 Fed. Cas. 546, 550 (No. 3230) (C.C.E.D. Pa. 1823). (Justice Washington on circuit), quoted infra, “All Privileges and Immunities of Citizens in the Several States”. “At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as ‘natural rights’; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.” Hague v. CIO, 307 U.S. 496, 511 (1939) (Justice Roberts for the Court). This view of the clause was asserted by Justices Field and Bradley, Slaughter House Cases, 83 U.S. (16 Wall.) 97, 117-118 (1873) (dissenting opinions); Butchers’ Union Co. v. Crescent City Co., 111 U.S. 746, 760 (1884) (Justice Field concurring), but see infra, and was possibly understood so by Chief Justice Taney. Scott v. Sandford, 60 U.S. (19 How.) 393, 423 (1857). And see id. at 580 (Justice Curtis dissenting). The natural rights concept of privileges and immunities was strongly held by abolitionists and their congressional allies who drafted the similar clause into 1 of the Fourteenth Amendment. Graham, Our ‘Declaratory’ Fourteenth Amendment, reprinted in H. GRAHAM, EVERYMAN’S CONSTITUTION—HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE CONSPIRACY THEORY, AND AMERICAN CONSTITUTIONALISM 295 (1968).
158 McKane v. Durston, 153 U.S. 684, 687 (1894); and see cases cited infra.
which he enjoys as such even when he is sojourning in another State; that is, it enables him to carry with him his rights of State citizenship throughout the Union, unembarrassed by state lines. This theory, too, the Court rejected.\(^{159}\) Fourth, the clause merely forbids any State to discriminate against citizens of other States in favor of its own. It is this narrow interpretation that has become the settled one. “It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.”\(^{160}\)

The recent cases emphasize that interpretation of the clause is tied to maintenance of the Union. “Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those ‘privileges’ and ‘immunities’ bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.”\(^{161}\) While the clause “was intended to create a national economic union,” it also protects non-economic interests relating to the Union.\(^{162}\)

Hostile discrimination against all nonresidents infringes the clause,\(^{163}\) but controversies between a State and its own citizens

\(^{159}\)City of Detroit v. Osborne, 135 U.S. 492 (1890).

\(^{160}\)Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (Justice Field for the Court; \textit{but see infra}); \textit{and see} Slaughter House Cases, 83 U.S. (16 Wall.) 36, 77 (1873); Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907); Whitfield v. Ohio, 297 U.S. 431 (1936).

\(^{161}\)Baldwin v. Montana Fish & Game Comm’n, 436 U.S. 371, 383 (1978). \textit{See also} Austin v. New Hampshire, 420 U.S. 656, 660-665 (1975) (clause “implicates not only the individual’s right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism.” Id. at 662); Hicklin v. Orbeck, 437 U.S. 518, 522-524 (1978).


are not covered by the provision. However, a state discrimination in favor of residents of one of its municipalities implicates the clause, even though the disfavored class consists of in-state as well as out-of-state inhabitants. The clause should not be read so literally, the Court held, as to permit States to exclude out-of-state residents from benefits through the simple expediency of delegating authority to political subdivisions.

How Implemented

This clause is self-executory, that is to say, its enforcement is dependent upon the judicial process. It does not authorize penal legislation by Congress. Federal statutes prohibiting conspiracies to deprive any person of rights or privileges secured by state laws, or punishing infractions by individuals of the right of citizens to reside peacefully in the several States and to have free ingress into and egress from such States, have been held void.

Citizens of Each State

A question much mooted before the Civil War was whether the term could be held to include free Negroes. In the Dred Scott case, the Court answered it in the negative. “Citizens of each State,” Chief Justice Taney argued, meant citizens of the United States as understood at the time the Constitution was adopted, and Negroes were not then regarded as capable of citizenship. The only category of national citizenship added under the Constitution comprised aliens, naturalized in accordance with acts of Congress. In dissent, Justice Curtis not only denied the Chief Justice’s assertion that there were no Negro citizens of States in 1789 but further argued that while Congress alone could determine what classes of aliens should be naturalized, the several States retained the right to extend citizenship to classes of persons born within their borders.
Sec. 2—Interstate Comity  

who had not previously enjoyed citizenship and that one upon whom state citizenship was thus conferred became a citizen of the State in the full sense of the Constitution.\textsuperscript{171} So far as persons born in the United States, and subject to the jurisdiction thereof are concerned, the question was put at rest by the Fourteenth Amendment.

\textit{Corporations.}—At a comparatively early date, the claim was made that a corporation chartered by a State and consisting of its citizens was entitled to the benefits of the comity clause in the transaction of business in other States. It was argued that the Court was bound to look beyond the act of incorporation and see who were the incorporators. If it found these to consist solely of citizens of the incorporating State, it was bound to permit them through the agency of the corporation to exercise in other States such privileges and immunities as the citizens thereof enjoyed. In \textit{Bank of Augusta v. Earle},\textsuperscript{172} this view was rejected. The Court held that the comity clause was never intended “to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself.”\textsuperscript{173} A similar result was reached in \textit{Paul v. Virginia},\textsuperscript{174} but by a different course of reasoning. The Court there held that a corporation, in this instance, an insurance company, was “the mere creation of local law” and could “have no legal existence beyond the limits of the sovereignty”\textsuperscript{175} which created it; even recognition of its existence by other States rested exclusively in their discretion. More recent cases have held that this discretion is qualified by other provisions of the Constitution notably the Commerce Clause and the Fourteenth Amendment.\textsuperscript{176} By reason of its similarity to the corporate form of organization, a Massachusetts trust has been denied the protection of this clause.\textsuperscript{177}

\textsuperscript{171}Id. at 572-590.
\textsuperscript{172}38 U.S. (13 Pet.) 519 (1839).
\textsuperscript{173}Id. at 586.
\textsuperscript{174}75 U.S. (8 Wall.) 168 (1869).
\textsuperscript{175}Id. at 181.
\textsuperscript{176}Crutcher v. Kentucky, 141 U.S. 47 (1891).
\textsuperscript{177}Hemphill v. Orloff, 277 U.S. 537 (1928).
Sec. 2—Interstate Comity

Cl. 1—State Citizenship: Privileges and Immunities

All Privileges and Immunities of Citizens in the Several States

The classical judicial exposition of the meaning of this phrase is that of Justice Washington in *Corfield v. Coryell*, which was decided by him on circuit in 1823. The question at issue was the validity of a New Jersey statute which prohibited “any person who is not, at the time, an actual inhabitant and resident in this State” from raking or gathering “clams, oysters or shells” in any of the waters of the State, on board any vessel “not wholly owned by some person, inhabitant of and actually residing in this State. . . . The inquiry is,” wrote Justice Washington, “what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union. . . .” He specified the following rights as answering this description: “Protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government must justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefits of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; . . .”

After thus defining broadly the private and personal rights which were protected, Justice Washington went on to distinguish them from the right to a share in the public patrimony of the State. “[W]e cannot accede” the opinion proceeds, “to the proposition . . . that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all other States the same advantages as are secured to their own

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179 Id. at 551-552.
180 Id. at 552.
citizens." The right of a State to the fisheries within its borders he then held to be in the nature of a property right, held by the State "for the use of the citizens thereof," the State was under no obligation to grant "co-tenancy in the common property of the State, to the citizens of all the other States." The precise holding of this case was confirmed in *McCready v. Virginia*; the logic of *Geer v. Connecticut* extended the same rule to wild game, and *Hudson Water Co. v. McCarter* applied it to the running water of a State. In *Toomer v. Witsell*, however, the Court refused to apply this rule to free-swimming fish caught in the three-mile belt off the coast of South Carolina. It held instead that "commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause" and that a severely discriminatory license fee exacted from nonresidents was unconstitutional.

The virtual demise, however, of the state ownership theory of animals and natural resources compelled the Court to review and revise its mode of analysis of state restrictions that distinguished between residents and nonresidents in respect to hunting and fishing and working with natural resources. A two-pronged test emerged. First, the Court held, it must be determined whether an activity in which a nonresident wishes to engage is within the protection of the clause. Such an activity must be "fundamental," must, that is, be essential or basic, "interference with which would frustrate the purposes of the formation of the Union, . . ." Justice Washington’s opinion on Circuit in *Coryell* afforded the Court the standard; while recognizing that the opinion relied on notions of natural rights, the Court thought he used the term "fundamental" in the modern sense as well. Such activities as the pursuit of com-

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181 Id.
182 Id.
183 94 U.S. 391 (1877).
184 161 U.S. 519 (1896).
185 209 U.S. 349 (1908).
186 334 U.S. 385 (1948).
187 Id. at 403. In *Mullaney v. Anderson*, 342 U.S. 415 (1952), an Alaska statute providing for the licensing of commercial fishermen in territorial waters and levying a license fee of $50.00 on nonresident and only $5.00 on resident fishermen was held void under Art. IV, § 2 on the authority of *Toomer v. Witsell*.
189 Although the clause specifically refers to "citizens," the Court treats the terms "citizens" and "residents" as "essentially interchangeable." *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975); *Hicklin v. Orbeck*, 437 U.S. 518, 524 n.8 (1978).
190 Baldwin v. Montana Fish & Game Comm’n, 436 U.S. 371 (1978). The quotation is id. at 387.
193 Hicklin v. Orbeck, 437 U.S. 518 (1978). Activity relating to pursuit of an occupation or common calling the Court recognized had long been held to be protected by the clause. The burden of showing constitutional justification was clearly placed on the State, id. at 526-528, rather than giving the statute the ordinary presumption of constitutionality. See Mullaney v. Anderson, 342 U.S. 415, 418 (1952).
195 Blake v. McClung, 172 U.S. 239, 256 (1898). Of course as to suffrage, see Dunn v. Blumstein, 405 U.S. 330 (1972), but not as to candidacy, the principle is now qualified under the equal protection clause of the Fourteenth Amendment. Baldwin v. Montana Fish & Game Comm’n, 436 U.S. 371, 383 (1978) (citing
Discrimination in Private Rights

Not only has judicial construction of the comity clause excluded certain privileges of a public nature from its protection, but the courts also have established the proposition that the purely private and personal rights to which the clause admittedly extends are not in all cases beyond the reach of state legislation which differentiates citizens and noncitizens. Broadly speaking, these rights are held subject to the reasonable exercise by a State of its police power, and the Court has recognized that there are cases in which discrimination against nonresidents may be reasonably resorted to by a State in aid of its own public health, safety and welfare. To that end a State may reserve the right to sell insurance to persons who have resided within the State for a prescribed period of time.\(^{196}\) It may require a nonresident who does business within the State\(^ {197}\) or who uses the highways of the State\(^ {198}\) to consent, expressly or by implication, to service of process on an agent within the State. Without violating this section, a State may limit the dower rights of a nonresident to lands of which the husband died seized while giving a resident dower in all lands held during the marriage,\(^ {199}\) or may leave the rights of nonresident married persons in respect of property within the State to be governed by the laws of their domicile, rather than by the laws it promulgates for its own residents.\(^ {200}\) But a State may not give a preference to resident creditors in the administration of the property of an insolvent foreign corporation.\(^ {201}\) An act of the Confederate Government, enforced by a State, to sequester a debt owed by one of its residents to a citizen of another State was held to be a flagrant violation of this clause.\(^ {202}\)

Access to Courts

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each State to the citizens of all other States to the same extent that it is allowed to its own citizens.\(^ {203}\) The constitutional require-
ment is satisfied if the nonresident is given access to the courts of
the State upon terms which, in themselves, are reasonable and
adequate for the enforcing of any rights he may have, even though
they may not be technically the same as those accorded to resident
citizens. 204 The Supreme Court upheld a state statute of limita-
tions which prevented a nonresident from suing in the State’s
courts after expiration of the time for suit in the place where the
cause of action arose 205 and another such statute which suspended
its operation as to resident plaintiffs, but not as to nonresidents,
during the period of the defendant’s absence from the State. 206 A
state law making it discretionary with the courts to entertain an
action by a nonresident of the State against a foreign corporation
doing business in the State was sustained since it was applicable
alike to citizens and noncitizens residing out of the State. 207 A
statute permitting a suit in the courts of the State for wrongful
death occurring outside the State, only if the decedent was a resi-
dent of the State, was sustained, because it operated equally upon
representatives of the deceased whether citizens or noncitizens. 208
Being patently nondiscriminatory, a Uniform Reciprocal State Law
to secure the attendance of witnesses from within or without a
State in criminal proceedings, whereunder an Illinois resident,
while temporarily in Florida, was summoned to appear at a hear-
ing for determination as to whether he should be surrendered to
a New York officer for testimony in the latter State, is not violative
of this clause. 209

Taxation

In the exercise of its taxing power, a State may not discrimi-
nate substantially between residents and nonresidents. In Ward v.
Maryland, 210 the Court set aside a state law which imposed spe-
cific taxes upon nonresidents for the privilege of selling within the
State goods which were produced in other States. Also found to be
incompatible with the comity clause was a Tennessee license tax,
the amount of which was dependent upon whether the person
taxed had his chief office within or without the State. 211 In Travis

204 Canadian Northern Ry. v. Eggen, 252 U.S. 553 (1920).
205 Id. at 563.
206 Chemung Canal Bank v. Lowery, 93 U.S. 72, 76 (1876).
sented.
210 79 U.S. (12 Wall.) 418, 424 (1871). See also Downham v. Alexandria Council,
77 U.S. (10 Wall.) 173, 175 (1870).
v. Yale & Towne Mfg. Co., 212 the Court, while sustaining the right of a State to tax income accruing within its borders to nonresidents, 213 held the particular tax void because it denied to nonresidents exemptions which were allowed to residents. The “terms ‘resident’ and ‘citizen’ are not synonymous,” wrote Justice Pitney, “... but a general taxing scheme ... if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other States; ...” 214 Where there were no discriminations between citizens and noncitizens, a state statute taxing the business of hiring persons within the State for labor outside the State was sustained. 215

The Court returned to the privileges-and-immunities restrictions upon disparate state taxation of residents and nonresidents in Lunding v. New York Tax Appeals Tribunal. 216 In this case, the State denied nonresidents any deduction from taxable income for alimony payments, although it permitted residents to deduct such payments. While observing that approximate equality between residents and nonresidents was required by the clause, the Court acknowledged that precise equality was neither necessary nor in most instances possible. But it was required of the challenged State that it demonstrate a “substantial reason” for the disparity, and the discrimination must bear a “substantial relationship” to that reason. 217 A State, under this analysis, may not deny nonresidents a general tax exemption provided to residents that would reduce their tax burdens, but it could limit specific expense deductions based on some relationship between the expenses and their in-state property or income. Here, the State flatly denied the exemption. Moreover, the Court rejected various arguments that had been presented, finding that most of those arguments, while they might support targeted denials or partial denials, simply reiterated the State’s contention that it need not afford any exemptions at all. This section of the Constitution does not prevent a territorial government, exercising powers delegated by Congress, from imposing a discriminatory license tax on nonresident fishermen operating within its waters. 218

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212 252 U.S. 60 (1920).
213 Id. at 62-64. See also Shaffer v. Carter, 252 U.S. 37 (1920). In Austin v. New Hampshire, 420 U.S. 656 (1975), the Court held void a state commuter income tax, inasmuch as the State imposed no income tax on its own residents and thus the tax fell exclusively on nonresidents’ income and was not offset even approximately by other taxes imposed upon residents alone.
215 Williams v. Fears, 179 U.S. 270, 274 (1900).
217 522 U.S. at 298.
However, what at first glance may appear to be a discrimination may turn out not to be when the entire system of taxation prevailing in the enacting State is considered. On the basis of overall fairness, the Court sustained a Connecticut statute which required nonresident stockholders to pay a state tax measured by the full market value of their stock while resident stockholders were subject to local taxation on the market value of that stock reduced by the value of the real estate owned by the corporation.\textsuperscript{219} Occasional or accidental inequality to a nonresident taxpayer is not sufficient to defeat a scheme of taxation whose operation is generally equitable.\textsuperscript{220} In an early case the Court brushed aside as frivolous the contention that a State violated this clause by subjecting one of its own citizens to a property tax on a debt due from a nonresident secured by real estate situated where the debtor resided.\textsuperscript{221}

Clause 2. A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

**INTERSTATE RENDITION**

**Duty to Surrender Fugitives From Justice**

Although this provision is not in its nature self-executing, and there is no express grant to Congress of power to carry it into effect, that body passed a law shortly after the Constitution was adopted, imposing upon the Governor of each State the duty to deliver up fugitives from justice found in such State.\textsuperscript{222} The Supreme Court has accepted this contemporaneous construction as estab-

\textsuperscript{220} Maxwell v. Bugbee, 250 U.S. 525 (1919).
\textsuperscript{221} Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879). Cf. Colgate v. Harvey, 296 U.S. 404 (1935), in which discriminatory taxation of bank deposits outside the State owned by a citizen of the State was held to infringe a privilege of national citizenship, in contravention of the Fourteenth Amendment. The decision in Colgate v. Harvey was overruled in Madden v. Kentucky, 309 U.S. 83, 93 (1940).
\textsuperscript{222} 1 Stat. 302 (1793), 18 U.S.C. § 3182. The Act requires rendition of fugitives at the request of a demanding “Territory,” as well as of a State, thus extending beyond the terms of the clause. In New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909), the Court held that the legislative extension was permissible under the territorial clause. See Puerto Rico v. Branstad, 483 U.S. 219, 229-230 (1987).
lishing the validity of this legislation. The duty to surrender is not absolute and unqualified; if the laws of the State to which the fugitive has fled have been put in force against him, and he is imprisoned there, the demands of those laws may be satisfied before the duty of obedience to the requisition arises. But, in Kentucky v. Dennison, the Court held that this statute was merely declaratory of a moral duty; that the Federal Government “has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; . . .”, and consequently that a federal court could not issue a mandamus to compel the governor of one State to surrender a fugitive to another. Long considered a constitutional derelict, Dennison was finally formally overruled in 1987. Now, States and Territories may invoke the power of federal courts to enforce against state officers this and other rights created by federal statute, including equitable relief to compel performance of federally-imposed duties.

**Fugitive From Justice Defined.**—To be a fugitive from justice within the meaning of this clause, it is not necessary that the party charged should have left the State after an indictment found or for the purpose of avoiding a prosecution anticipated or begun. It is sufficient that the accused, having committed a crime within one State and having left the jurisdiction before being subjected to criminal process, is found within another State. The motive which induced the departure is immaterial. Even if he were brought involuntarily into the State where found by requisition

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223 Roberts v. Reilly, 116 U.S. 80, 94 (1885). See also Innes v. Tobin, 240 U.S. 127 (1916). Said Justice Story: “[T]he natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution;” and again “it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby.” Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618-619 (1842).


226 65 U.S. (24 How.) 66, 107 (1861). Congress in 1934 plugged the loophole created by this decision by making it unlawful for any person to flee from one State to another for the purpose of avoiding prosecution in certain cases. 48 Stat. 782, 18 U.S.C. § 1073.


228 Id. at 230.

229 Roberts v. Reilly, 116 U.S. 80 (1885). See also Strassheim v. Daily, 221 U.S. 280 (1911); Apple erad v. Massachusetts, 203 U.S. 222 (1906); Ex parte Reggel, 114 U.S. 642, 650 (1885).

from another State, he may be surrendered to a third State upon an extradition warrant. A person indicted a second time for the same offense is nonetheless a fugitive from justice by reason of the fact that after dismissal of the first indictment, on which he was originally indicted, he left the State with the knowledge of, or without objection by, state authorities. But a defendant cannot be extradited if he was only constructively present in the demanding State at the time of the commission of the crime charged. For the purpose of determining who is a fugitive from justice, the words “treason, felony or other crime” embrace every act forbidden and made punishable by a law of a State, including misdemeanors.

**Procedure for Removal.**—Only after a person has been charged with a crime in the regular course of judicial proceedings is the governor of a State entitled to make demand for his return from another State. The person demanded has no constitutional right to be heard before the governor of the State in which he is found on the question whether he has been substantially charged with crime and is a fugitive from justice. The constitutionally required surrender is not to be interfered with by *habeas corpus* upon speculations as to what ought to be the result of a trial. Nor is it proper thereby to inquire into the motives controlling the actions of the governors of the demanding and surrendering States, Matters of defense, such as the running of the statute of limitations, or the contention that continued confinement in the prison of the demanding State would amount to cruel and unjust punishment, cannot be heard on *habeas corpus* but should be tested in the courts of the demanding State, where all parties may be heard, where all pertinent testimony will be readily available, and where suitable relief, if any, may be fashioned. A defendant will, however, be discharged on *habeas corpus* if he shows by clear and satisfactory evidence that he was outside the demanding State at the time

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of the crime. 242 If, however, the evidence is conflicting, *habeas corpus* is not a proper proceeding to try the question of alibi. 243 The *habeas* court's role is, therefore, very limited. 244

**Trial of Fugitives After Removal.**—There is nothing in the Constitution or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though he was brought from another State by unlawful violence, 245 or by abuse of legal process, 246 and a fugitive lawfully extradited from another State may be tried for an offense other than that for which he was surrendered. 247 The rule is different, however, with respect to fugitives surrendered by a foreign government, pursuant to treaty. In that case the offender may be tried only “for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.” 248

Clause 3. No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

**FUGITIVES FROM LABOR**

This clause contemplated the existence of a positive unqualified right on the part of the owner of a slave which no state law could in any way regulate, control, or restrain. Consequently the owner of a slave had the same right to seize and repossess him in another State, as the local laws of his own State conferred upon him, and a state law which penalized such seizure was held unconstitutional. 249 Congress had the power and the duty, which it exer-

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244 Michigan v. Doran, 439 U.S. 282, 289 (1978). In California v. Superior Court, 482 U.S. 400 (1987), the Court reiterated that extradition is a “summary procedure.”
cised by the Act of February 12, 1793, to carry into effect the rights given by this section, and the States had no concurrent power to legislate on the subject. However, a state statute providing a penalty for harboring a fugitive slave was held not to conflict with this clause since it did not affect the right or remedy either of the master or the slave; by it the State simply prescribed a rule of conduct for its own citizens in the exercise of its police power.

SECTION 3. Clause 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned was well as of the Congress.

DOCTRINE OF THE EQUALITY OF STATES

"Equality of constitutional right and power is the condition of all the States of the Union, old and new." This doctrine, now a truism of constitutional law, did not find favor in the Constitutional Convention. That body struck out from this section, as reported by the Committee on Detail, two sections to the effect that "new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States concerning the public debt which shall be subsisting." Opposing this action, Madison insisted that "the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States." Nonetheless, after further expressions of opinion pro and con, the Convention voted nine States to two to delete the requirement of equality.

Prior to this time, however, Georgia and Virginia had ceded to the United States large territories held by them, upon condition that new States should be formed therefrom and admitted to the
Sec. 3—New States  
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Union on an equal footing with the original States. Since the admission of Tennessee in 1796, Congress has included in each State's act of admission a clause providing that the State enters the Union "on an equal footing with the original States in all respects whatever." With the admission of Louisiana in 1812, the principle of equality was extended to States created out of territory purchased from a foreign power. By the Joint Resolution of December 29, 1845, Texas, then an independent Nation, "was admitted into the Union on an equal footing with the original States in all respects whatever."

However, if the doctrine rested merely on construction of the declarations in the admission acts, then the conditions and limitations imposed by Congress and agreed to by the States in order to be admitted would nonetheless govern, since they must be construed along with the declarations. Again and again, however, in adjudicating the rights and duties of States admitted after 1789, the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union. That the doctrine is of constitutional stature was made evident at least by the time of the decision in Pollard's Lessee, if not before. Pollard's Lessee involved conflicting claims by the United States and Alabama of ownership of certain partially inundated lands on the shore of the Gulf of Mexico in Alabama. The enabling act for Alabama had contained both a declaration of equal footing and a reservation to the United States of these lands. Rather than an issue of mere land ownership, the Court saw the question as one of federal property rights.

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259 1 Stat. 491 (1796). Prior to Tennessee's admission, Vermont and Kentucky were admitted with different but conceptually similar terminology. 1 Stat. 191 (1791); 1 Stat. 189 (1791).

260 2 Stat. 701, 703 (1812).


264 3 Stat. 489, 492 (1819).
concerning sovereignty and jurisdiction of the States. Inasmuch as the original States retained sovereignty and jurisdiction over the navigable waters and the soil beneath them within their boundaries, retention by the United States of either title to or jurisdiction over common lands in the new States would bring those States into the Union on less than an equal footing with the original States. This, the Court would not permit. “Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it, before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding.... [T]o Alabama belong the navigable waters and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.”

Finally, in 1911, the Court invalidated a restriction on the change of location of the State capital, which Congress had imposed as a condition for the admission of Oklahoma, on the ground that Congress may not embrace in an enabling act conditions relating wholly to matters under state control. In an opinion, from which Justices Holmes and McKenna dissented, Justice Lurton argued: “The power is to admit ‘new States into this Union,’ ‘This Union’ was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission.”

The equal footing doctrine is a limitation only upon the terms by which Congress admits a State. That is, States must be admitted on an equal footing in the sense that Congress may not exact conditions solely as a tribute for admission, but it may, in the enabling or admitting acts or subsequently impose requirements

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266 Coyle v. Smith, 221 U.S. 559 (1911).
267 Id. at 567.
that would be or are valid and effectual if the subject of congressional legislation after admission.\textsuperscript{269} Thus, Congress may embrace in an admitting act a regulation of commerce among the States or with Indian tribes or rules for the care and disposition of the public lands or reservations within a State. “[I]n every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State’s legislative power in respect of any matter which was not plainly within the regulating power of Congress.”\textsuperscript{270}

Until recently the requirement of equality has applied primarily to political standing and sovereignty rather than to economic or property rights.\textsuperscript{271} Broadly speaking, every new State is entitled to exercise all the powers of government which belong to the original States of the Union.\textsuperscript{272} It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its limits even as to federal lands, except where the Federal Government has reserved or the State has ceded some degree of jurisdiction to the United States, and, of course, no State can enact a law which would conflict with the constitutional powers of the United States. Consequently, it has jurisdiction to tax private activities carried on within the public domain (although not to tax the Federal lands), if the tax does not constitute an unconstitutional burden on the Federal Government.\textsuperscript{274} Statutes applicable to territories, e.g., the Northwest Territory Ordinance of 1787, cease to have any operative force when the territory, or any part thereof, is admitted to the


\textsuperscript{270} Coyle v. Smith, 221 U.S. 559, 574 (1911). Examples include Stearns v. Minnesota, 179 U.S. 223 (1900) (congressional authority to dispose of and to make rules and regulations respecting the property of the United States); United States v. Sandoval, 231 U.S. 28 (1913) (regulating Indian tribes and intercourse with them); United States v. Chavez, 290 U.S. 357 (1933) (same); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9-10 (1888) (prevention of interference with navigability of waterways under commerce clause).

\textsuperscript{271} United States v. Texas, 339 U.S. 707, 716 (1950); Stearns v. Minnesota, 179 U.S. 223, 245 (1900).


\textsuperscript{273} Van Brocklin v. Tennessee, 117 U.S. 151, 167 (1886).

\textsuperscript{274} Wilson v. Cook, 327 U.S. 474 (1946).
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Union, except as adopted by state law. When the enabling act contains no exclusion of jurisdiction as to crimes committed on Indian reservations by persons other than Indians, state courts are vested with jurisdiction. But the constitutional authority of Congress to regulate commerce with Indian tribes is not inconsistent with the equality of new States, and conditions inserted in the New Mexico Enabling Act forbidding the introduction of liquor into Indian territory were therefore valid. Similarly, Indian treaty rights to hunt, fish, and gather on lands ceded to the Federal Government were not extinguished by statehood. These “usufructuary” rights were subject to reasonable state regulation, and hence were not irreconcilable with state sovereignty over natural resources.

Admission of a State on an equal footing with the original States involves the adoption as citizens of the United States of those whom Congress makes members of the political community and who are recognized as such in the formation of the new State.

Judicial Proceedings Pending on Admission of New States

Whenever a territory is admitted into the Union, the cases pending in the territorial court which are of exclusive federal cognizance are transferred to the federal court having jurisdiction over the area; cases not cognizable in the federal courts are transferred to the tribunals of the new State, and those over which federal and state courts have concurrent jurisdiction may be transferred either to the state or federal courts by the party possessing the option under existing law. Where Congress neglected to make provision for disposition of certain pending cases in an enabling act for the admission of a State to the Union, a subsequent act supplying the omission was held valid. After a case, begun in a United States court of a territory, is transferred to a state court under the oper-


277 Dick v. United States, 208 U.S. 340 (1908); Ex parte Webb, 225 U.S. 663 (1912).


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ation of the enabling act and the state constitution, the appellate procedure is governed by the state statutes and procedures. 283

The new State, without the express or implied assent of Congress, cannot enact that the records of the former territorial court of appeals should become records of its own courts or provide by law for proceedings based thereon. 284

Property Rights of States to Soil Under Navigable Waters

The “equal footing” doctrine has had an important effect on the property rights of new States to soil under navigable waters. In Pollard’s Lessee v. Hagan, 285 as was observed above, the Court held that the original States had reserved to themselves the ownership of the shores of navigable waters and the soils under them, and that under the principle of equality the title to the soils beneath navigable water passes to a new State upon admission. The principle of this case supplies the rule of decision in many property-claims cases. 286

After refusing to extend the inland-water rule of Pollard’s Lessee to the three mile marginal belt under the ocean along the coast, 287 the Court applied the principle in reverse in United States v. Texas. 288 Since the original States had been found not to own the soil under the three mile belt, Texas, which concededly did own this soil before its annexation to the United States, was held to have surrendered its dominion and sovereignty over it, upon entering the Union on terms of equality with the existing States. To this extent, the earlier rule that unless otherwise declared by Congress the title to every species of property owned by a territory passes

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to the State upon admission has been qualified. However, when Congress, through passage of the Submerged Lands Act of 1953, surrendered its paramount rights to natural resources in the marginal seas to certain States, without any corresponding cession to all States, the transfer was held to entail no abdication of national sovereignty over control and use of the oceans in a manner destructive of the equality of the States.

While the territorial status continues, the United States has power to convey property rights, such as rights in soil below the high-water mark along navigable waters, or the right to fish in designated waters, which will be binding on the State.

Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

PROPERTY AND TERRITORIAL POWERS OF CONGRESS

Methods of Disposing of Property

The Constitution is silent as to the methods of disposing of property of the United States. In United States v. Gratiot, in which the validity of a lease of lead mines on government lands was put in issue, the contention was advanced that “disposal is not letting or leasing,” and that Congress has no power “to give or authorize leases.” The Court sustained the leases, saying “the disposal must be left to the discretion of Congress.” Nearly a cen-
tury later this power to dispose of public property was relied upon to uphold the generation and sale of electricity by the Tennessee Valley Authority. The reasoning of the Court ran thus: the potential electrical energy made available by the construction of a dam in the exercise of its constitutional powers is property which the United States is entitled to reduce to possession; to that end it may install the equipment necessary to generate such energy. In order to widen the market and make a more advantageous disposition of the product, it may construct transmission lines and may enter into a contract with a private company for the interchange of electric energy. 296

**Public Lands: Federal and State Powers Over**

No appropriation of public lands may be made for any purpose except by authority of Congress. 297 However, Congress was held to have acquiesced in the long-continued practice of withdrawing land from the public domain by Executive Orders. 298 In 1976 Congress enacted legislation that established procedures for withdrawals and that explicitly disclaimed continued acquiescence in any implicit executive withdrawal authority. 299 The comprehensive authority of Congress over public lands includes the power to prescribe the times, conditions, and mode of transfer thereof and to designate the persons to whom the transfer shall be made, 300 to declare the dignity and effect of titles emanating from the United States, 301 to determine the validity of grants which antedate the government’s acquisition of the property, 302 to exempt lands acquired under the homestead laws from previously contracted debts, 303 to withdraw land from settlement and to prohibit grazing thereon, 304 to prevent unlawful occupation of public property and to declare what are

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302 Tameling v. United States Freehold & Immigration Co., 93 U.S. 644, 663 (1877). See also Maxwell Land-Grant Case, 121 U.S. 325, 366 (1887).


nusiances, as affecting such property, and provide for their abatement, and to prohibit the introduction of liquor on lands purchased and used for an Indian colony. Congress may limit the disposition of the public domain to a manner consistent with its views of public policy. A restriction inserted in a grant of public lands to a municipality which prohibited the grantee from selling or leasing to a private corporation the right to sell or sublet water or electric energy supplied by the facilities constructed on such land was held valid.

Unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands, the Court restated the applicable principles governing Congress’ power under this clause. It empowers Congress to act as both proprietor and legislature over the public domain; Congress has complete power to make those “needful rules” which in its discretion it determines are necessary. When Congress acts with respect to those lands covered by the clause, its legislation overrides conflicting state laws. Absent action by Congress, however, States may in some instances exercise some jurisdiction over activities on federal lands.

No State can tax public lands of the United States within its borders, nor can state legislation interfere with the power of Congress under this clause or embarrass its exercise. Thus, by virtue of a Treaty of 1868, according self-government to Navajos living on an Indian Reservation in Arizona, the tribal court, rather than the courts of that State, had jurisdiction over a suit for a debt owed by an Indian resident thereof to a non-Indian conducting a store on the Reservation under federal license. The question whether title to land which has once been the property of the United States has passed from it must be resolved by the laws of the United States; after title has passed, “that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.” In construing a conveyance by the United States of land within a

State, the settled and reasonable rule of construction of the State affords a guide in determining what impliedly passes to the grantee as an incident to land expressly granted.314 But a state statute enacted subsequently to a federal grant cannot operate to vest in the State rights which either remained in the United States or passed to its grantee.315

**Territories: Powers of Congress Over**

In the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a state legislature might act.316 It may legislate directly with respect to the local affairs of a territory or it may transfer that function to a legislature elected by the citizens thereof,317 which will then be invested with all legislative power except as limited by the Constitution of the United States and acts of Congress.318 In 1886, Congress prohibited the enactment by territorial legislatures of local or special laws on enumerated subjects.319 The constitutional guarantees of private rights are applicable in territories which have been made a part of the United States by congressional action320 but not in unincorporated territories.321
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gress may establish, or may authorize the territorial legislature to create, legislative courts whose jurisdiction is derived from statutes enacted pursuant to this section other than from article III. Such courts may exercise admiralty jurisdiction despite the fact that such jurisdiction may be exercised in the States only by constitutional courts.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

GUARANTEE OF REPUBLICAN FORM OF GOVERNMENT

The first clause of this section, in somewhat different language, was contained in the Virginia Plan introduced in the Convention and was obviously attributable to Madison. Through the various permutations into its final form, the object of the clause seems...
Sec. 4—Obligations of United States to States

clearly to have been more than an authorization for the Federal Government to protect States against foreign invasion or internal insurrection, a power seemingly already conferred in any case. No one can now resurrect the full meaning of the clause and intent which moved the Framers to adopt it, but with the exception of the reliance for a brief period during Reconstruction the authority contained within the confines of the clause has been largely unexplored.

In Luther v. Borden, the Supreme Court established the doctrine that questions arising under this section are political, not judicial, in character and that “it rests with Congress to decide what government is the established one in a State ... as well as its republican character.” Texas v. White held that the action of the President in setting up provisional governments at the conclusion of the war was justified, if at all, only as an exercise of his powers as Commander-in-Chief and that such governments were to be regarded merely as provisional regimes to perform the functions of government pending action by Congress. On the ground that the issues were not justiciable, the Court in the early part of this century refused to pass on a number of challenges to state governmental reforms and thus made the clause in effect noncognizable by the courts in any matter, a status from which the Court’s

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326 Thus, Randolph on June 11, supporting Madison’s version pending then, said that “a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy.” 1 id. at 206. Again, on July 18, when Wilson and Mason indicated their understanding that the object of the proposal was “merely” to protect States against violence, Randolph asserted: “The Resoln. has 2 Objects. 1. to secure Republican government. 2. to suppress domestic commotions. He urged the necessity of both these provisions.” 2 id. at 47. Following speakers alluded to the dangers of monarchy being created peacefully as necessitating the provision. Id. at 48. See W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION ch. 2 (1972).

327 See article I, § 8, cl. 15.


330 Id. at 42.

331 74 U.S. (7 Wall.) 700, 729 (1869). In Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1868), the State attempted to attack Reconstruction legislation on the premise that it already had a republican form of government and that Congress was thus not authorized to act. The Court viewed the congressional decision as determinative.

opinion in *Baker v. Carr*,\(^{333}\) despite its substantial curbing of the political question doctrine, did not release it.\(^{334}\)

Similarly, in *Luther v. Borden*,\(^{335}\) the Court indicated that it rested with Congress to determine the means proper to fulfill the guarantee of protection to the States against domestic violence. Chief Justice Taney declared that Congress might have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere, but that instead Congress had by the act of February 28, 1795,\(^{336}\) authorized the President to call out the militia in case of insurrection against the government of any State. It followed, said Taney, that the President “must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress”,\(^{337}\) which determination was not subject to review by the courts.

In recent years, the authority of the United States to use troops and other forces in the States has not generally been derived from this clause and it has been of little importance.

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\(^{333}\) 369 U.S. 186, 218-232 (1962). In the Court’s view, guarantee clause questions were nonjusticiable because resolution of them had been committed to Congress and not because they involved matters of state governmental structure.


\(^{335}\) 48 U.S. (7 How.) 1 (1849).

\(^{336}\) 1 Stat. 424.

\(^{337}\) Luther v. Borden, 48 U.S. (7 How.) 1, 43 (1849).
# ARTICLE V

## MODE OF AMENDMENT

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MODE OF AMENDMENT

ARTICLE V

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

AMENDMENT OF THE CONSTITUTION

Scope of the Amending Power

When this Article was before the Constitutional Convention, a motion to insert a provision that “no State shall without its consent be affected in its internal policy” was made and rejected. ¹ A further attempt to impose a substantive limitation on the amending power was made in 1861, when Congress submitted to the States a proposal to bar any future amendments which would authorize Congress to “interfere, within any State, with the domestic institutions thereof . . . .” ² Three States ratified this article before the outbreak of the Civil War made it academic. ³ Members of Congress

² 57 CONG. GLOBE 1263 (1861).
opposed passage by Congress of the Thirteenth Amendment on the basis that the amending process could not be utilized to work such a major change in the internal affairs of the States, but the protest was in vain.\(^4\) Many years later the validity of both the Eighteenth and Nineteenth Amendments was challenged because of their content. The arguments against the former took a wide range. Counsel urged that the power of amendment is limited to the correction of errors in the framing of the Constitution and that it does not comprehend the adoption of additional or supplementary provisions. They contended further that ordinary legislation cannot be embodied in a constitutional amendment and that Congress cannot constitutionally propose any amendment which involves the exercise or relinquishment of the sovereign powers of a State.\(^5\) The Nineteenth Amendment was attacked on the narrower ground that a State which had not ratified the amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing, i.e., persons chosen by voters whom the State itself had not authorized to vote for Senators.\(^6\) Brushing aside these arguments as unworthy of serious attention, the Supreme Court held both amendments valid.

**Proposing a Constitutional Amendment**

Thirty-three proposed amendments to the Constitution have been submitted to the States pursuant to this Article, all of them upon the vote of the requisite majorities in Congress and none, of course, by the alternative convention method.\(^7\) In the Convention, much controversy surrounded the issue of the process by which the document then being drawn should be amended. At first, it was voted that “provision ought to be made for the amendment [of the Constitution] whencesoever it shall seem necessary” without the agency of Congress being at all involved.\(^8\) Acting upon this instruction, the Committee on Detail submitted a section providing that upon the application of the legislatures of two-thirds of the States Congress was to call a convention for purpose of amending the Constitution.\(^9\) Adopted,\(^10\) the section was soon reconsidered on the motion of Framers of quite different points of view, some who worried that the provision would allow two-thirds of the States to subvert

466 CONG. GLOBE 921, 1424-1425, 1444-1447, 1483-1488 (1864).
4 National Prohibition Cases, 253 U.S. 350 (1920).
6 A recent scholarly study of the amending process and the implications for our polity is R. Bernstein, Amending America (1993).
8 Id. at 188.
9 Id. at 467-468.
the others\textsuperscript{11} and some who thought that Congress would be the first to perceive the need for amendment and that to leave the matter to the discretion of the States would mean that no alterations but those increasing the powers of the States would ever be proposed.\textsuperscript{12} Madison's proposal was adopted, empowering Congress to propose amendments either on its own initiative or upon application by the legislatures of two-thirds of the States.\textsuperscript{13} When this provision came back from the Committee on Style, however, Gouverneur Morris and Gerry succeeded in inserting the language providing for a convention upon the application of the legislatures of two-thirds of the States.\textsuperscript{14}

\textbf{Proposals by Congress}.—Few difficulties of a constitutional nature have arisen with regard to this method of initiating constitutional change, the only method, as we noted above, so far successfully resorted to. When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that they should be incorporated in the text of the original instrument.\textsuperscript{15} Instead, the House decided to propose them as supplementary articles, a method followed since.\textsuperscript{16} It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals.\textsuperscript{17} In the \textit{National Prohibition Cases},\textsuperscript{18} the Court ruled that in proposing an amendment, the two Houses of Congress thereby indicated that they deemed revision necessary. The same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership.\textsuperscript{19} The approval of the President is not necessary for a proposed amendment.\textsuperscript{20}

\textbf{The Convention Alternative}.—Because it has never successfully been invoked, the convention method of amendment is sur-

\textsuperscript{11}Id. at 557-558 (Gerry).
\textsuperscript{12}Id. at 558 (Hamilton).
\textsuperscript{13}Id. at 559
\textsuperscript{14}Id. at 629-630. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the State as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum etc. which in Constitutional regulations ought to be as much as possible avoided."
\textsuperscript{15}1 ANNALS OF CONGRESS 433-436 (1789).
\textsuperscript{16}Id. at 717.
\textsuperscript{17}Id. at 717.
\textsuperscript{18}Id. at 430.
\textsuperscript{19}253 U.S. 350, 386 (1920).
\textsuperscript{20}Id.
\textsuperscript{20}Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).
rounded by a lengthy list of questions. When and how is a convention to be convened? Must the applications of the requisite number of States be identical or ask for substantially the same amendment or merely deal with the same subject matter? Must the requisite number of petitions be contemporaneous with each other, substantially contemporaneous, or strung out over several years? Could a convention be limited to consideration of the amendment or the subject matter which it is called to consider? These are only a few of the obvious questions and others lurk to be revealed on deeper consideration. This method has been close to utilization several times. Only one State was lacking when the Senate finally permitted passage of an amendment providing for the direct election of Senators. Two States were lacking in a petition drive for a constitutional limitation on income tax rates. The drive for an amendment to limit the Supreme Court’s legislative apportionment decisions came within one State of the required number, and a proposal for a balanced budget amendment has been but two States short of the requisite number for some time. Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the States there will be a response by Congress.

Ratification. In 1992, the Nation apparently ratified a long-quiescent 27th Amendment, to the surprise of just about everyone. Whether the new Amendment has any effect in the area of its subject matter, the effective date of congressional pay raises, the adoption of this provision has unsettled much of the supposed learning on the issue of the timeliness of pendency of constitutional amendments.

It has been accepted that Congress may, in proposing an amendment, set a reasonable time limit for its ratification. Beginning with the Eighteenth Amendment, save for the Nineteenth, Congress has included language in all proposals stating that the amendment should be inoperative unless ratified within seven years.
Seven-year periods were included in the texts of the proposals of the 18th, 20th, 21st, and 22d amendments; apparently concluding in proposing the 23d that putting the time limit in the text merely cluttered up the amendment, Congress in it and subsequent amendments including the time limits in the authorizing resolution. After the extension debate over the Equal Rights proposal, Congress once again inserted into the text of the amendment the time limit with respect to the proposal of voting representation in Congress for the District of Columbia.

In *Coleman v. Miller*, the Court refused to pass upon the question whether the proposed child labor amendment, the one submitted to the States in 1924, was open to ratification thirteen years later. This it held to be a political question which Congress would have to resolve in the event three fourths of the States ever gave their assent to the proposal.

In *Dillon v. Gloss*, the Court upheld Congress’ power to prescribe time limitations for state ratifications and intimated that proposals which were clearly out of date were no longer open for ratification. Granting that it found nothing express in Article V relating to time constraints, the Court yet allowed that it found intimated in the amending process a “strongly suggest[ive]” argument that proposed amendments are not open to ratification for all time or by States acting at widely separate times.

Three related considerations were put forward. “First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.”

Continuing, the Court observed that this conclusion was the far better one, because the consequence of the opposite view was that the four amendments proposed long before, including the two sent out to the States in 1789 “are still pending and in a situation where their ratification in some of the States many years since by

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26 Seven-year periods were included in the texts of the proposals of the 18th, 20th, 21st, and 22d amendments; apparently concluding in proposing the 23d that putting the time limit in the text merely cluttered up the amendment, Congress in it and subsequent amendments including the time limits in the authorizing resolution. After the extension debate over the Equal Rights proposal, Congress once again inserted into the text of the amendment the time limit with respect to the proposal of voting representation in Congress for the District of Columbia.

27 207 U.S. 433 (1939).
28 256 U.S. 368 (1921).
29 Id. at 374.
30 Id. at 374-375.
representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable."

What seemed “untenable” to a unanimous Court in 1921 proved quite acceptable to both executive and congressional branches in 1992. After a campaign calling for the resurrection of the 1789 proposal, which was originally transmitted to the States as one of the twelve original amendments, enough additional States ratified to make up a three-fourths majority, and the responsible executive official proclaimed the amendment as ratified as both Houses of Congress concurred in resolutions.

That there existed a “reasonable” time period for ratification was strongly controverted. The Office of Legal Counsel of the Department of Justice prepared for the White House counsel an elaborate memorandum that disputed all aspects of the Dillon opinion. First, Dillon’s discussion of contemporaneity was discounted as dictum. Second, the three “considerations” relied on in Dillon were deemed unpersuasive. Thus, the Court simply assumes that, since proposal and ratification are steps in a single process, the process must be short rather than lengthy, the argument that an amendment should reflect necessity says nothing about the length of time available, inasmuch as the more recent ratifying States obviously thought the pay amendment was necessary, and the fact that an amendment must reflect consensus does not so much as intimate contemporaneous consensus. Third, the OLC memorandum argued that the proper mode of interpretation of Article V was to “provide a clear rule that is capable of mechanical application,

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31 Id. One must observe that all the quoted language is dicta, the actual issue in Dillon being whether Congress could include in the text of a proposed amendment a time limit. In Coleman v. Miller, 307 U.S. 433, 453-454 (1939), Chief Justice Hughes, for a plurality, accepted the Dillon dictum, despite his opinion’s forceful argument for judicial abstinence on constitutional-amendment issues. The other four Justices in the Court majority thought Congress had complete and sole control over the amending process, subject to no judicial review. Id. at 459.

32 Supra, “Congressional Pay”; infra, “Twenty-Seventh Amendment”.

33 Thus, Professor Tribe wrote: “Article V says an amendment ‘shall be valid to all Intents and Purposes, as part of this Constitution’ when ‘ratified’ by three-fourths of the states—not that it might face a veto for tardiness. Despite the Supreme Court’s suggestion, no speedy ratification rule may be extracted from Article V’s text, structure or history.” Tribe, The 27th Amendment Joins the Constitution, WALL STREET JOURNAL, May 13, 1992, A15.

34 16 Ops. of the Office of Legal Coun. 102 (1992) (prolim.pr.).

35 Id. at 109-110. Coleman’s endorsement of the dictum in the Hughes opinion was similarly pronounced dictum. Id. at 110. Both characterizations, as noted above, are correct.

36 Id. at 111-112.
without any need to inquire into the timeliness or substantive validity of the consensus achieved by means of the ratification process. Accordingly, any interpretation that would introduce confusion must be disfavored.”

The rule ought to be, echoing Professor Tribe, that an amendment is ratified when three-fourths of the States have approved it. The memorandum vigorously pursues a “plain-meaning” rule of constitutional construction. Article V says nothing about time limits, and elsewhere in the Constitution when the Framers wanted to include time limits they did so. The absence of any time language means there is no requirement of contemporaneity or of a “reasonable” period.

Now that the Amendment has been proclaimed and has been accepted by Congress, where does this development leave the argument over the validity of proposals long distant in time? One may assume that this precedent stands for the proposition that proposals remain viable forever. It may, on the one hand, stand for the proposition that certain proposals, because they reflect concerns that are as relevant today, or perhaps in some future time, as at the time of transmission to the States, remain open to ratification. Certainly, the public concern with congressional pay made the Twenty-seventh Amendment particularly pertinent. The other 1789 proposal, relating to the number of representatives, might remain viable under this standard, whereas the other proposals would not. On the other hand, it is possible to argue that the precedent is an “aberration,” that its acceptance owed more to a political and philosophical argument between executive and legislative branches and to the defensive posture of Congress in the political context of 1992 that led to an uncritical acceptance of the Amendment. In that latter light, the development is relevant to but not dispositive of the controversy. And, barring some judicial interpretation, that is likely to be where the situation rests.

Nothing in the status of the precedent created by the Twenty-seventh Amendment suggests that Congress may not, when it proposes an amendment, include, either in the text or in the accompanying resolution, a time limitation, simply as an exercise of its necessary and proper power.

Whether once it has prescribed a ratification period Congress may extend the period without necessitating action by already-ratified States embroiled Congress, the States, and the courts in argu-

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37 Id. at 113.
38 Id. at 113-116.
39 Id. at 103-106. The OLC also referenced previous debates in Congress in which Members had assumed this proposal and the others remained viable. Id.
ment with respect to the proposed Equal Rights Amendment. Proponents argued and opponents doubted that the fixing of a time limit and the extending of it were powers committed exclusively to Congress under the political question doctrine and that in any event Congress had power to extend. It was argued that inasmuch as the fixing of a reasonable time was within Congress’ power and that Congress could fix the time either in advance or at some later point, based upon its evaluation of the social and other bases of the necessities of the amendment, Congress did not do violence to the Constitution when, once having fixed the time, it subsequently extended the time. Proponents recognized that if the time limit was fixed in the text of the amendment Congress could not alter it because the time limit as well as the substantive provisions of the proposal had been subject to ratification by a number of States, making it unalterable by Congress except through the amending process again. Opponents argued that Congress, having by a two-thirds vote sent the amendment and its authorizing resolution to the States, had put the matter beyond changing by passage of a simple resolution, that States had either acted upon the entire package or at least that they had or could have acted affirmatively upon the promise of Congress that if the amendment had not been ratified within the prescribed period it would expire and their assent would not be compelled for longer than they had intended. Congress did pass a resolution extending by three years the period for ratification.

Litigation followed and a federal district court, finding the issue to be justiciable, held that Congress did not have the power to extend, but before the Supreme Court could review the decision the extended time period expired and mooted the matter.

Also much disputed during consideration of the proposed Equal Rights Amendment was the question whether once a State had ratified it could thereafter withdraw or rescind its ratification, precluding Congress from counting that State toward completion of ratification. Four States had rescinded their ratifications and a fifth had declared that its ratification would be void unless the amendment was ratified within the original time limit. The issue

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43 Nebraska (March 15, 1973), Tennessee (April 23, 1974), and Idaho (February 8, 1977) all passed rescission resolutions without dispute about the actual passage. The Kentucky rescission was attached to another bill and was vetoed by the Lieu-
was not without its history. The Fourteenth Amendment was ratified by the legislatures of Ohio and New Jersey, both of which subsequently passed rescinding resolutions. Contemporaneously, the legislatures of Georgia, North Carolina, and South Carolina rejected ratification resolutions. Pursuant to the Act of March 2, 1867, the governments of those States were reconstituted and the new legislatures ratified. Thus, there were presented both the question of the validity of a withdrawal and the question of the validity of a ratification following rejection. Congress requested the Secretary of State to report on the number of States ratifying the proposal and the Secretary’s response specifically noted the actions of the Ohio and New Jersey legislatures. The Secretary then issued a proclamation reciting that 29 States, including the two that had rescinded and the three which had ratified after first rejecting, had ratified, which was one more than the necessary three-fourths. He noted the attempted withdrawal of Ohio and New Jersey and observed that it was doubtful whether such attempts were effectual in withdrawing consent. He therefore certified the amendment to be in force if the rescissions by Ohio and New Jersey were invalid. The next day Congress adopted a resolution listing all 29 States, including Ohio and New Jersey, as having ratified and concluded that the ratification process was completed. The Secretary of State then proclaimed the Amendment as part of the Constitution.

In Coleman v. Miller, the congressional action was interpreted as going directly to the merits of withdrawal after ratification and of ratification after rejection. “Thus, the political departments of the Government dealt with the effect of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.” Although rescission was hotly debated with respect to the Equal Rights Amendment,

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44 14 Stat. 428.
45 The Secretary was then responsible for receiving notices of ratification and proclaiming adoption.
46 15 Stat. 706, 707.
47 15 Stat. 709.
48 307 U.S. 433, 488-450 (1939) (plurality opinion). For an alternative construction of the precedent, see Corwin & Ramsey, The Constitutional Law of Constitutional Amendment, 27 Notre Dame Law. 185, 201-204 (1951). The legislature of New York attempted to withdraw its ratification of the 15th Amendment; although the Secretary of State listed New York among the ratifying States, noted the withdrawal resolution, there were ratifications from three-fourths of the States without New York. 16 Stat. 1131.
ment, the failure of ratification meant that nothing definitive emerged from the debate. The questions that must be resolved are whether the matter is justiciable, that is, whether under the political question doctrine resolution of the issue is committed exclusively to Congress, and whether there is judicial review of what Congress’ power is in respect to deciding the matter of rescission. The Fourteenth Amendment precedent and *Coleman v. Miller* combine to suggest that resolution is a political question committed to Congress, but the issue is not settled.

The Twenty-seventh Amendment precedent is relevant here. The Archivist of the United States proclaimed the Amendment as having been ratified a day previous to the time both Houses of Congress adopted resolutions accepting ratification. 49 There is no necessary conflict, inasmuch as the Archivist and Congress concurred in their actions, but the Office of Legal Counsel of the Department of Justice opined that the *Coleman* precedent was not binding and that the Fourteenth Amendment action by Congress was an “aberration.” 50 That is, the memorandum argued that the *Coleman* opinion by Chief Justice Hughes was for only a plurality of the Court and, moreover, was dictum since it addressed an issue not before the Court. 51 On the merits, OLC argued that Article V gave Congress no role other than to propose amendments and to specify the mode of ratification. An amendment is valid when ratified by three-fourths of the States, no further action being required. Although someone must determine when the requisite number have acted, OLC argued that the executive officer charged with the function of certifying, now the Archivist, has only the ministerial duty of counting the notifications sent to him. Separation of powers and federalism concerns also counseled against a congressional role, and past practice, in which all but the Fourteenth Amendment were certified by an executive officer, was noted as supporting a decision against a congressional role. 52

What would be the result of adopting one view over the other?

First, finding that resolution of the question is committed to Congress merely locates the situs of the power, and says nothing about what the resolution should be. That Congress in the past has refused to accept rescissions is but the starting point, inasmuch as, unlike courts, Congress operates under no principle of *stare decisis* so that the decisions of one Congress on a subject do not bind

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50 16 Ops. of the Office of Legal Coun. 102, 125 (1992) (prelim.pr.).
51 Id. at 118-121.
52 Id. at 121-126.
future Congresses. If Congress were to be faced with a decision about the validity of rescission, to what standards should it look?

That a question of constitutional interpretation may be “political” in the sense of being committed to one or to both of the “political” branches is not, of course, a judgment that in its resolution the political branch may decide without recourse to principle. Resolution of political questions is not subject to judicial review, so the prospect of court overruling is not one with which the decision-maker need trouble himself. But both legislators and executive are bound by oath to observe the Constitution, and consequently it is with the original document that the search for an answer must begin.

At the same time, it may well be that the Constitution affords no answer. Generally, in the exercise of judicial review, courts view the actions of the legislative and executive branches in terms not of the wisdom or desirability or propriety of their actions but in terms of the comportment of those actions with the constitutional grants of power and constraints upon those powers; if an action is within a granted power and violates no restriction, the courts will not interfere. How the legislature or the executive decides to deal with a question within the confines of the powers each constitutionally have is beyond judicial control.

Therefore, if the Constitution commits decision on an issue to, say, Congress, and imposes no standards to govern or control the reaching of that decision, in its resolution Congress may be restrained only by its sense of propriety or wisdom or desirability, i.e., may be free to make a determination solely as a policy matter. The reason that these issues are not justiciable is not only that they are committed to a branch for decision without intervention by the courts but also that the Constitution does not contain an answer. This interpretation, in the context of amending the Constitution, may be what Chief Justice Hughes was deciding for the plurality of the Court in *Coleman.*

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54 Coleman v. Miller, 307 U.S. 433, 450, 453 (1939) (plurality opinion). Thus, considering the question of ratification after rejection, the Chief Justice found “no basis in either Constitution or statute” to warrant the judiciary in restraining state officers from notifying Congress of a State’s ratification, so that it could decide to accept or reject. “Article 5, speaking solely of ratification, contains no provision as to rejection.” And in considering whether the Court could specify a reasonable time for an amendment to be before the State before it lost its validity as a proposal, Chief Justice Hughes asked: “Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute.” His discussion of
Article V may be read to contain a governing constitutional principle, however. Thus, it can be argued that as written the provision contains only language respecting ratification and that inexorably once a State acts favorably on a resolution of ratification it has exhausted its jurisdiction over the subject and cannot rescind, nor can Congress even authorize a State to rescind. This conclusion is premised on Madison’s argument that a State may not ratify conditionally, that it must adopt “in toto and for ever.” While the Madison principle may be unexceptionable in the context in which it was stated, it may be doubted that it transfers readily to the significantly different issue of rescission.

A more pertinent principle would seem to be that expressed in Dillon v. Gloss. In that case, the action of Congress in fixing a seven-year-period within which ratification was to occur or the proposal would expire was attacked as vitiating the amendment. The Court, finding no express provision in Article V, nonetheless thought it “reasonably implied” therein “that the ratification must be within some reasonable time after the proposal.” Three reasons underlay the Court’s finding of this implication and they are suggestive on the question of rescission.

Although addressed to a different issue, the Court’s discussion of the length of time an amendment may reasonably pend before losing its viability is suggestive with respect to rescission. That is, first, with proposal and ratification as successive steps in a single endeavor, second, with the necessity of amendment forming the basis for adoption of the proposal, and, third, especially with the implication that an amendment’s adoption should be “sufficiently
contemporaneous” in the requisite number of States “to reflect the will of the people in all sections at relatively the same period,” it would raise a large question were the ratification process to count one or more States which were acting to withdraw their expression of judgment that amendment was necessary at the same time other States were acting affirmatively. The “decisive expression of the people’s will” that is to bind all might well in those or similar circumstances be found lacking. Employment of this analysis would not necessarily lead in specific circumstances to failures of ratification; the particular facts surrounding the passage of rescission resolutions, for example, might lead Congress to conclude that the requisite “contemporaneous” “expression of the people’s will” was not undermined by the action.

And employment of this analysis would still seem, under these precedents, to leave to Congress the crucial determination of the success or failure of ratification. At the same time it was positing this analysis in the context of passing on the question of Congress’ power to fix a time limit, the Court in Dillon v. Gloss observed that Article V left to Congress the authority “to deal with subsidiary matters of detail as the public interest and changing conditions may require.”60 And in Coleman v. Miller, Chief Justice Hughes went further in respect to these “matters of detail” being “within the congressional province” in the resolution of which the decision by Congress “would not be subject to review by the courts.”61

Thus, it may be that if the Dillon v. Gloss construction is found persuasive, Congress would have constitutional standards to guide its decision on the validity of rescission. At the same time, if these precedents reviewed above are adhered to, and strictly applied, it appears that the congressional determination to permit or to disallow rescission would not be subject to judicial review.

Adoption of the alternative view, that Congress has no role but that the appropriate executive official has the sole responsibility, would entail different consequences. That official, now the Archivist, appears to have no discretion but to certify once he receives

60Id. at 375-376. It should be noted that the Court seemed to retain the power for itself to pass on the congressional decision, saying “[o]f the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt” and noting later than no question existed that the seven-year period was reasonable. Id.

61307 U.S. 433, 452-454 (1939) (plurality opinion). It is, as noted above, not entirely clear to what extent the Hughes plurality exempted from judicial review congressional determinations made in the amending process. Justice Black’s concurrence thought the Court “treated the amending process of the Constitution in some respects as subject to judicial review, in others as subject to the final authority of Congress” and urged that the Dillon v. Gloss “reasonable time” construction be disapproved. Id. at 456, 458.
state notification. The official could, of course, request a Department of Justice legal opinion on some issue, such as the validity of rescissions. That is the course advocated by the executive branch, naturally, but it is one a little difficult to square with the ministerial responsibility of the Archivist. In any event, there would seem to be no support for a political question preclusion of judicial review under these circumstances. Whether the Archivist certifies on the mere receipt of a ratification resolution or does so only after ascertaining the resolution’s validity, it would appear that it is action subject to judicial review.

Congress has complete freedom of choice between the two methods of ratification recognized by Article V: by the legislatures of the States or by conventions in the States. In United States v. Sprague, counsel advanced the contention that the Tenth Amendment recognized a distinction between powers reserved to the States and powers reserved to the people, and that state legislatures were competent to delegate only the former to the National Government; delegation of the latter required action of the people through conventions in the several States. The Eighteenth Amendment being of the latter character, the ratification by state legislatures, so the argument ran, was invalid. The Supreme Court rejected the argument. It found the language of Article V too clear to admit of reading any exception into it by implication.

The term “legislatures” as used in Article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several States. It does not comprehend the popular referendum, which has subsequently become a part of the legislative process in many of the States. A State may not validly condition ratification of a proposed constitutional amendment on its approval by such a referendum. In the words of the Court: “[T]he

63 Id. at 116-118. Thus, OLC says that the statute “clearly requires that, before performing this ministerial function, the Archivist must determine whether he has received ‘official notice’ that an amendment has been adopted ‘according to the provisions of the Constitution.’ This is the question of law that the Archivist may properly submit to the Attorney General for resolution.” Id. at 118. But if his duty is “ministerial,” it seems, the Archivist may only notice the fact of receipt of a state resolution; if he may, in consultation with the Attorney General, determine whether the resolution is valid, that is considerably more than a “ministerial” function.
64 Under the Administrative Procedure Act, doubtless, 5 U.S.C. §§ 701-706, though there may well be questions about one possible exception, the “committed to agency discretion” provision. Id. at § 701(a) (2).
65 282 U.S. 716 (1931).
function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."\textsuperscript{67}

\textbf{Authentication and Proclamation}.—Formerly, official notice from a state legislature, duly authenticated, that it had ratified a proposed amendment went to the Secretary of State, upon whom it was binding, “being certified by his proclamation, [was] conclusive upon the courts” as against any objection which might be subsequently raised as to the regularity of the legislative procedure by which ratification was brought about.\textsuperscript{68} This function of the Secretary was first transferred to a functionary called the Administrator of General Services,\textsuperscript{69} and then to the Archivist of the United States.\textsuperscript{70} In \textit{Dillon v. Gloss},\textsuperscript{71} the Supreme Court held that the Eighteenth Amendment became operative on the date of ratification by the thirty-sixth State, rather than on the later date of the proclamation issued by the Secretary of State, and doubtless the same rule holds as to a similar proclamation by the Archivist.

\textbf{Judicial Review Under Article V}

Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the several States was conclusive upon the courts,\textsuperscript{72} it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown into confusion by the inconclusive decision in \textit{Coleman v. Miller}.\textsuperscript{73} This case came up on a writ of \textit{certiorari} to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution ratifying the proposed child labor amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds: (1) that

\textsuperscript{67}Leser v. Garnett, 258 U.S. 130, 137 (1922).
\textsuperscript{68}Act of April 20, 1818, § 2. The language quoted in the text is from \textit{Leser v. Garnett}, 258 U.S. 130, 137 (1922).
\textsuperscript{69}65 Stat. 710-711, § 2; Reorg. Plan No. 20 of 1950, § 1(c), 64 Stat. 1272.
\textsuperscript{71}256 U.S. 368, 376 (1921).
\textsuperscript{72}Leser v. Garnett, 258 U.S. 130 (1922).
\textsuperscript{73}307 U.S. 433 (1939). \textit{Cf.} \textit{Fairchild v. Hughes}, 258 U.S. 126 (1922), wherein the Court held that a private citizen could not sue in the federal courts to secure an indirect determination of the validity of a constitutional amendment about to be adopted.
the amendment had been previously rejected by the state legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the States, and (3) that the lieutenant governor had no right to cast the deciding vote in the Kansas Senate in favor of ratification.

Four opinions were written in the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement with regard to the grounds for their decision, a different majority affirmed the judgment of the Kansas court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process “is ‘political’ in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.”74 In an opinion reported as “the opinion of the Court,” but in which it appears that only two Justices joined Chief Justice Hughes, who wrote it, it was declared that the writ of mandamus was properly denied, because the question whether a reasonable time had elapsed since submission of the proposal was a nonjusticiable political question, the kinds of considerations entering into deciding being fit for Congress to evaluate, and the question of the effect of a previous rejection upon a ratification was similarly nonjusticiable, because the 1868 Fourteenth Amendment precedent of congressional determination “has been accepted.”75 But with respect to the contention that the lieutenant governor should not have been permitted to cast the deciding vote in favor of ratification, the Court found itself evenly divided, thus accepting the judgment of the Kansas Supreme Court that the state officer had acted validly.76 However, the unexplained decision

74 Coleman v. Miller, 307 U.S. 433, 456, 459 (1939) (Justices Black, Roberts, Frankfurter, and Douglas concurring). Because the four believed that the parties lacked standing to bring the action, id. at 456, 460 (Justice Frankfurter dissenting on this point, joined by the other three Justices), the further discussion of the applicability of the political question doctrine is, strictly speaking, dicta. Justice Stevens, then a circuit judge, also felt free to disregard the opinion because a majority of the Court in Coleman “refused to accept that position.” Dyer v. Blair, 390 F. Supp. 1291, 1299-1300 (N.D.Ill. 1975) (three-judge court). See also Idaho v. Freeman, 529 F. Supp. 1107, 1125-1126 (D.C.D.Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).


76 Justices Black, Roberts, Frankfurter, and Douglas thought this issue was nonjusticiable too. Id. at 456. Although all nine Justices joined the rest of the decision, see id. at 470, 474 (Justice Butler, joined by Justice McReynolds, dissenting), one
by Chief Justice Hughes and his two concurring Justices that the issue of the lieutenant governor’s vote was justiciable indicates at the least that their position was in disagreement with the view of the other four Justices in the majority that all questions surrounding constitutional amendments are nonjusticiable. 77

However, Coleman does stand as authority for the proposition that at least some decisions with respect to the proposal and ratifications of constitutional amendments are exclusively within the purview of Congress, either because they are textually committed to Congress or because the courts lack adequate criteria of determination to pass on them. 78 But to what extent the political question doctrine encompasses the amendment process and what the standards may be to resolve that particular issue remain elusive of answers.


78 In Baker v. Carr, 369 U.S. 186, 214 (1962), the Court, in explaining the political question doctrine and categorizing cases, observed that Coleman “held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp.” Both characteristics were features that the Court in Baker, 369 U.S. at 217, identified as elements of political questions, e.g., “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards or resolving it.” Later formulations have adhered to this way of expressing the matter. Powell v. McCormack, 395 U.S. 486 (1969); O’Brien v. Brown, 409 U.S. 1 (1972); Gilligan v. Morgan, 413 U.S. 1 (1973). However, it could be argued that, whatever the Court may say, what it did, particularly in Powell but also in Baker, largely drains the political question doctrine of its force. See Uhler v. AFL-CIO, 468 U.S. 1310 (1984) (Justice Rehnquist on Circuit) (dubbing Coleman’s vitality in amendment context). But see Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (opinion of Justices Rehnquist, Stewart, Stevens, and Chief Justice Burger) (relying heavily upon Coleman to find an issue of treaty termination nonjusticiable). Compare id. at 1001 (Justice Powell concurring) (viewing Coleman as limited to its context).
ARTICLE VI

PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

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PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

ARTICLE VI

Clause 1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

PRIOR DEBTS

There have been no interpretations of this clause.

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

NATIONAL SUPREMACY

Marshall's Interpretation of the National Supremacy Clause

Although the Supreme Court had held, prior to Marshall's appointment to the Bench, that the Supremacy Clause rendered null and void a state constitutional or statutory provision which was inconsistent with a treaty executed by the Federal Government, it was left for him to develop the full significance of the clause as applied to acts of Congress. By his vigorous opinions in *McCulloch v. Maryland* and *Gibbons v. Ogden*, he gave the principle a vitality which survived a century of vacillation under the doctrine of dual federalism. In the former case, he asserted broadly that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws

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1 Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
3 22 U.S. (9 Wheat.) 1 (1824).
enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.”

From this he concluded that a state tax upon notes issued by a branch of the Bank of the United States was void.

In *Gibbons v. Ogden*, the Court held that certain statutes of New York granting an exclusive right to use steam navigation on the waters of the State were null and void insofar as they applied to vessels licensed by the United States to engage in coastal trade. Said the Chief Justice: “In argument, however, it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of an act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”

**Task of the Supreme Court Under the Clause: Preemption**

In applying the Supremacy Clause to subjects which have been regulated by Congress, the primary task of the Court is to ascertain whether a challenged state law is compatible with the policy expressed in the federal statute. When Congress legislates with regard to a subject, the extent and nature of the legal consequences of the regulation are federal questions, the answers to which are to be derived from a consideration of the language and policy of the state. If Congress expressly provides for exclusive federal dominion or if it expressly provides for concurrent federal-state jurisdiction, the task of the Court is simplified, though, of course, there may still be doubtful areas in which interpretation will be necessary.
Where Congress is silent, however, the Court must itself decide whether the effect of the federal legislation is to oust state jurisdiction. 6

The Operation of the Supremacy Clause

When Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield. 7 Although the preemptive effect of federal legislation is best known in areas governed by the Commerce Clause, the same effect is present, of course, whenever Congress legislates constitutionally. And the operation of the Supremacy Clause may be seen as well when the authority of Congress is not express but implied, not plenary but dependent upon state acceptance. The latter may be seen in a series of cases concerning the validity of state legislation enacted to bring the States within the various programs authorized by Congress pursuant to the Social Security Act. 8 State participation in the programs is voluntary, technically speaking, and no State is compelled to enact legislation conforming with the requirements of federal law. Once a State is participating, however, any of its legislation which is contrary to federal requirements is void under the Supremacy Clause. 9

Federal Immunity Laws and State Courts.—An example of the former circumstance is the operation of federal immunity acts 10 to preclude the use in state courts of incriminating statements and testimony given by a witness before a committee of Congress or a...
federal grand jury. 11 Because Congress in pursuance of its paramount authority to provide for the national defense, as complemented by the Necessary and Proper Clause, is competent to compel testimony of persons which is needful for legislation, it is competent to obtain such testimony over a witness’s self-incrimination claim by immunizing him from prosecution on evidence thus revealed not only in federal courts but in state courts as well. 12

Priority of National Claims Over State Claims.—Anticipating his argument in *McCulloch v. Maryland*, 13 Chief Justice Marshall in 1805 upheld an act of 1792 asserting for the United States a priority of its claims over those of the States against a debtor in bankruptcy. 14 Consistent therewith, federal enactments providing that taxes due to the United States by an insolvent shall have priority in payment over taxes due by him to a State also have been sustained. 15 Similarly, the Federal Government was held entitled to prevail over a citizen enjoying a preference under state law as creditor of an enemy alien bank in the process of liquidation by state authorities. 16 A federal law providing that when a veteran dies in a federal hospital without a will or heirs his personal property shall vest in the United States as trustee for the General Post Fund was held to operate automatically without prior agreement of the veteran with the United States for such disposition and to take precedence over a state claim founded on its escheat law. 17

Obligation of State Courts Under the Supremacy Clause

The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. Their obligation “is imperative upon the state judges, in their official and not merely in their private capacities. From the

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15 Spokane County v. United States, 279 U.S. 80, 87 (1929). A state requirement that notice of a federal tax lien be filed in conformity with state law in a state office in order to be accorded priority was held to be controlling only insofar as Congress by law had made it so. Remedies for collection of federal taxes are independent of legislative action of the States. United States v. Union Central Life Ins. Co., 368 U.S. 291 (1961). See also United States v. Buffalo Savings Bank, 371 U.S. 228 (1963) (State may not avoid priority rules of a federal tax lien by providing that the discharge of state tax liens are to be part of the expenses of a mortgage foreclosure sale); United States v. Pioneer American Ins. Co., 374 U.S. 84 (1963) (Matter of federal law whether a lien created by state law has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien).
very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States—‘the supreme law of the land’. State courts are bound then to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and laws and treaties but also the interpretations of their meanings by the United States Supreme Court. While States need not specially create courts competent to hear federal claims or necessarily to give courts authority specially, it violates the Supremacy Clause for a state court to refuse to hear a category of federal claims when the court entertains state law actions of a similar nature. The existence of inferior federal courts sitting in the States and exercising often concurrent jurisdiction of subjects has created problems with regard to the degree to which state courts are bound by their rulings. Though the Supreme Court has directed and encouraged the lower federal courts to create a corpus of federal common law, it has not spoken to the effect of such lower court rulings on state courts.

Supremacy Clause Versus the Tenth Amendment

The logic of the Supremacy Clause would seem to require that the powers of Congress be determined by the fair reading of the express and implied grants contained in the Constitution itself, without reference to the powers of the States. For a century after Marshall’s death, however, the Court proceeded on the theory that the Tenth Amendment had the effect of withdrawing various matters of internal police from the reach of power expressly committed to Congress. This point of view was originally put forward in New York City v. Miln, which was first argued but not decided before Marshall’s death. The Miln case involved a New York statute which required the captains of vessels entering New York Harbor with aliens aboard to make a report in writing to the Mayor of the

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City, giving certain prescribed information. It might have been distinguished from Gibbons v. Ogden on the ground that the statute involved in the earlier case conflicted with an act of Congress, whereas the Court found that no such conflict existed in this case. But the Court was unwilling to rest its decision on that distinction.

Speaking for the majority, Justice Barbour seized the opportunity to proclaim a new doctrine. “But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.”

Justice Story, in dissent, stated that Marshall had heard the previous argument and reached the conclusion that the New York statute was unconstitutional.

The conception of a “complete, unqualified and exclusive” police power residing in the States and limiting the powers of the National Government was endorsed by Chief Justice Taney ten years later in the License Cases. In upholding state laws requiring licenses for the sale of alcoholic beverages, including those imported from other States or from foreign countries, he set up the Supreme Court as the final arbiter in drawing the line between the mutually exclusive, reciprocally limiting fields of power occupied by the national and state governments.

Until recently, it appeared that in fact and in theory the Court had repudiated this doctrine, but in National League of Cities v. United States.
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Usery, it revived part of this state police power limitation upon the exercise of delegated federal power. However, the decision was by a closely divided Court and subsequent interpretations closely cabined the development and then overruled the case.

Following the demise of the doctrine of “dual federalism” in the 1930s, the Court confronted the question whether Congress had the power to regulate state conduct and activities to the same extent, primarily under the Commerce Clause, as it did to regulate private conduct and activities to the exclusion of state law. In United States v. California, upholding the validity of the application of a federal safety law to a state-owned railroad being operated as a non-profit entity, the Court, speaking through Justice Stone, denied the existence of an implied limitation upon Congress’ “plenary power to regulate commerce” when a state instrumentality was involved. “The state can no more deny the power if its exercise has been authorized by Congress than can an individual.” While the State in operating the railroad was acting as a sovereign and within the powers reserved to the States, the Court said, its exercise was “in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution.”

A series of cases followed in which the Court refused to construct any state immunity from regulation when Congress acted pursuant to a delegated power. The culmination of this series had been thought to be Maryland v. Wirtz, in which the Court upheld the constitutionality of applying the federal wage and hour law to nonprofessional employees of state-operated schools and hos-

29 On the doctrine of “dual federalism,” see the commentary by the originator of the phrase, Professor Corwin. E. Corwin, The Twilight of the Supreme Court—A History of Our Constitutional Theory 10-51 (1934); The Commerce Power Versus States Rights 115-172 (1936); A Constitution of Powers in a Secular State 1-28 (1951).
30 297 U.S. 175 (1936).
31 Id. at 183-185.
32 California v. United States, 320 U.S. 577 (1944) (federal regulation of shipping terminal facilities owned by State); California v. Taylor, 353 U.S. 553 (1957) (Railway Labor Act applies on state-owned railroad); Case v. Bowles, 327 U.S. 92 (1946); Hubler v. Twin Falls County, 327 U.S. 103 (1946) (federal wartime price regulations applied to state transactions; Congress’ power effectively to wage war); Board of Trustees v. United States, 289 U.S. 48 (1933) (State university required to pay federal customs duties on imported educational equipment); Phillips v. Atkinson Co., 313 U.S. 508 (1941) (federal condemnation of state lands for flood control project); Sanitary Dist. v. United States, 206 U.S. 405 (1925) (prohibition of State from diverting water from Great Lakes).
pitals. In an opinion by Justice Harlan, the Court saw a clear connection between working conditions in these institutions and interstate commerce. Labor conditions in schools and hospitals affect commerce; strikes and work stoppages involving such employees interrupt and burden the flow across state lines of goods purchased by state agencies, and the wages paid have a substantial effect. The Commerce Clause being thus applicable, the Justice wrote, Congress was not constitutionally required to “yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no general ‘doctrine implied in the Federal Constitution that “the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.”’ . . . [I]t is clear that the Federal Government when acting within a delegated power, may override countervailing state interests whether these be described as ‘governmental’ or ‘proprietary’ in character. . . . [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.” 34

Wirtz was specifically reaffirmed in Fry v. United States, 35 in which the Court upheld the constitutionality of presidentially imposed wage and salary controls, pursuant to congressional statute, on all state governmental employees. In dissent, however, Justice Rehnquist propounded a doctrine which was to obtain majority approval in League of Cities. 36 In that opinion, he said for the Court:

34 Id. at 195, 196-197.
36 Id. at 549. Essentially, the Justice was required to establish an affirmative constitutional barrier to congressional action. Id. at 552-553. That is, if one asserts only the absence of congressional authority, one’s chances of success are dim because of the breadth of the commerce power. But when he asserts that, say, the First or Fifth Amendment bars congressional action concededly within its commerce power, one interposes an affirmative constitutional defense that has a chance of success. It was the Justice’s view that the State was “asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority.” Id. at 553. But whence the affirmative barrier? “[I]t is not the Tenth Amendment by its terms . . . .” Id. at 557 (emphasis supplied). Rather, the Amendment was an example of the Framers’ understanding that the sovereignty of the States imposed an implied affirmative barrier to the assertion of otherwise valid congressional powers. Id. at 557-559. But the difficulty with this construction is that the equivalence sought to be established by Justice Rehnquist lies not between an individual asserting a constitutional limit on delegated powers and a State asserting the same thing but is rather between an individual asserting a lack of authority and a State asserting a lack of authority; this equivalence is evident on the face of the Tenth Amendment, which states that the powers not delegated to the United States “are reserved to the States respectively, or to the people.” (emphasis supplied). The States are thereby accorded no greater interest in restraining the exercise of non-
“[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.”\(^37\) The standard apparently, in judging between permissible and impermissible federal regulation, is whether there is federal interference with “functions essential to separate and independent existence.”\(^38\) In the context of this case, state decisions with respect to the pay of their employees and the hours to be worked were essential aspects of their “freedom to structure integral operations in areas of traditional governmental functions.”\(^39\) The line of cases, exemplified by *United States v. California*, was distinguished and preserved on the basis that the state activities there regulated were so unlike the traditional activities of a State that Congress could reach them;\(^40\) *Case v. Bowles* was held distinguishable on the basis that Congress had acted pursuant to its war powers, and to have rejected the power would have impaired national defense;\(^41\) *Fry* was distinguished on the bases that it was emergency legislation tailored to combat a serious national emergency, the means were limited in time and effect, the freeze did not displace state discretion in structuring operations or force a restructuring, and the federal action “operated to reduce the pressure upon state budgets rather than increase them.”\(^42\) *Wirtz* was overruled; it permitted Congress to intrude into the conduct of integral and traditional state governmental functions and could not therefore stand.\(^43\)

*League of Cities* did not prove to be much of a restriction upon congressional power in subsequent decisions. First, its principle was held not to reach to state regulation of private conduct that affects interstate commerce, even as to such matters as state jurisdiction over land within its borders.\(^44\) Second, it was held not to immunize state conduct of a business operation, that is, proprietary activity not like “traditional governmental activities.”\(^45\) Third, it was held not to preclude Congress from regulating the way States regulate private activities within the State, even though such state delegated power than are the people. See *Massachusetts v. Mellon*, 262 U.S. 447 (1823).


\(^{38}\) Id.

\(^{39}\) Id. at 852.

\(^{40}\) Id. at 854.

\(^{41}\) Id. at 854 n.18.

\(^{42}\) Id. at 852-853.

\(^{43}\) Id. at 853-855.


activity is certainly traditional governmental action, on the theory that Congress could displace or preempt state regulation it may require the States to regulate in a certain way if they wish to continue to act in this field.\footnote{FERC v. Mississippi, 456 U.S. 742 (1982).} Fourth, it was held not to limit Congress when it acts in an emergency or pursuant to its war powers, so that Congress may indeed reach even traditional governmental activity.\footnote{National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).} Fifth, it was held not to apply at all to Congress’ enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments.\footnote{Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Rome v. United States, 446 U.S. 156, 178-180 (1980).} Sixth, it apparently was to have no application to the exercise of Congress’ spending power with conditions attached.\footnote{In Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 n.13 (1981), the Court suggested rather ambiguously that League of Cities may restrict the federal spending power, citing its reservation of the cases in League of Cities, 426 U.S. 852 n.17, but citing also spending clause cases indicating a rational basis standard of review of conditioned spending. Earlier, the Court had summarily affirmed a decision holding that the spending power was not affected by the case. North Carolina ex rel. Morrow v. Califano, 445 F.Supp. 532 (E.D.N.C. 1977) (three-judge court), aff’d, 435 U.S. 962 (1978). No hint of such a limitation is contained in more recent decisions (to be sure, in the aftermath of League of Cities’ demise). New York v. United States, 505 U.S. 144, 167, 171-72, 185 (1992); South Dakota v. Dole, 483 U.S. 203, 210-212 (1987).} Seventh, not because of the way the Court framed the statement of its doctrinal position, which is absolutist, but because of the way it accommodated precedent and because of Justice Blackmun’s concurrence, it was always open to interpretation that Congress was enabled to reach traditional governmental activities not involving employer-employee relations or is enabled to reach even these relations if the effect is “to reduce the pressures upon state budgets rather than increase them.”\footnote{National League of Cities v. Usery, 426 U.S. 833, 846-851 (1976). The quotation in the text is at 853 (one of the elements distinguishing the case from Fry).} In his concurrence, Justice Blackmun suggested his lack of agreement with “certain possible implications” of the opinion and recast it as a “balancing approach” which “does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.”\footnote{Id. at 856.} Indeed, Justice Blackmun’s deviation from League of Cities in the subsequent cases usually made the difference in the majority dispute.

The Court overruled National League of Cities in Garcia v. San Antonio Metropolitan Transit Auth.,\footnote{469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun’s qualified acceptance of the National League of Cities approach having
the conception of federal supremacy embodied in Wirtz and Fry.

For the most part, the Court indicated, States must seek protection from the impact of federal regulation in the political processes, and not in any limitations imposed on the commerce power or found in the Tenth Amendment. Justice Blackmun’s opinion for the Court in Garcia concluded that the National League of Cities test for “integral operations in areas of traditional governmental functions” had proven “both impractical and doctrinally barren.” 53 State autonomy is both limited and protected by the terms of the Constitution itself, hence—ordinarily, at least—exercise of Congress’ enumerated powers is not to be limited by “a priori definitions of state sovereignty.” 54 States retain a significant amount of sovereign authority “only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.” 55 There are direct limitations in Art. I, § 10, and “Section 8 . . . works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation.” 56 On the other hand, the principal restraints on congressional exercise of the commerce power are to be found not in the Tenth Amendment, in the Commerce Clause itself, or in “judicially created limitations on federal power,” but in the structure of the Federal Government and in the political processes. 57 “[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result.” 58

While continuing to recognize that “Congress’ authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system,” the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these “affirmative limits.” 59 Thus, argu-

53 Id. at 557.
54 Id. at 548.
55 Id. at 549.
56 Id. at 548.
57 “Apart from the limitation on federal authority inherent in the delegated nature of Congress’ Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.” Id. at 550. The Court cited as prime examples the role of states in selecting the President, and the equal representation of states in the Senate. Id. at 551.
58 Id. at 554.
59 Id. at 556.
ably, the Court has not totally abandoned the National League of Cities premise that there are limits on the extent to which federal regulation may burden States as States. Rather, it has stipulated that any such limits on exercise of federal power must be premised on a failure of the political processes to protect state interests, and “must be tailored to compensate for [such] failings . . . rather than to dictate a ‘sacred province of state autonomy.’”

Further indication of what must be alleged in order to establish affirmative limits to commerce power regulation was provided in South Carolina v. Baker. The Court expansively interpreted Garcia as meaning that there must be an allegation of “some extraordinary defects in the national political process” before the Court will intervene. A claim that Congress acted on incomplete information will not suffice, the Court noting that South Carolina had “not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.” Thus, the general rule is that “limits on Congress’ authority to regulate state activities . . . are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”

Dissenting in Garcia, Justice Rehnquist predicted that the doctrine propounded by the dissenters and by those Justices in National League of Cities “will . . . in time again command the support of a majority of the Court.” As the membership of the Court changed, it appeared that the prediction was proving true. Confronted with the opportunity in New York v. United States, to re-examine Garcia, the Court instead distinguished it, striking down a federal law on the basis that Congress could not “commandeer” the legislative and administrative processes of state gov-

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60 Id. at 554.
62 Id. at 512-513.
63 Id. at 512.
65 The shift was pronounced in Gregory v. Ashcroft, 501 U.S. 452 (1991), in which the Court, cognizant of the constraints of Garcia, chose to apply a “plain statement” rule to construction of a statute seen to be intruding into the heart of state autonomy. Id. at 463. To do otherwise, said Justice O’Connor, was to confront “a potential constitutional problem” under the Tenth Amendment and the guarantee clause of Article IV, § 4. Id. at 463-464.
67 The line of cases exemplified by Garcia was said to concern the authority of Congress to subject state governments to generally applicable laws, those covering private concerns as well as the States, necessitating no revisiting of those cases. 505 U.S. at 160.
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...ernment to compel the administration of federal programs.68 The line of analysis pursued by the Court makes clear, however, the result when a Garcia kind of federal law is reviewed.

That is, because the dispute involved the division of authority between federal and state governments, Justice O'Connor wrote for the Court, one could inquire whether Congress acted under a delegated power or one could ask whether Congress had invaded a state province protected by the Tenth Amendment. But, said the Justice, “the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”69

Powers delegated to the Nation, therefore, are subject to limitations that reserve power to the States. This limitation is not found in the text of the Tenth Amendment, which is, the Court stated, “but a truis...70 but is a direct constraint on Article I powers when an incident of state sovereignty is invaded. The “take title” provision was such an invasion. Both the Federal Government and the States owe political accountability to the people. When Congress encourages States to adopt and administer a federally-prescribed program, both governments maintain their accountability for their decisions. When Congress compels the States to act, state officials will bear the brunt of accountability that properly belongs at the national level.72 The “take title” provision, because it presented the States with “an unavoidable command”, transformed state governments into “regional offices” or “administrative agencies” of the Federal Government, impermissibly undermined the accountability owing the people and was void.73 Whether viewed as lying outside Congress’ enumerated powers or as infringing the core of state sovereignty reserved by the Tenth Amendment, “the provision is inconsistent with the federal structure of our Government established by the Constitution.”74

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68 Struck down was a provision of law providing for the disposal of radioactive wastes generated in the United States by government and industry. Placing various responsibilities on the States, the provision sought to compel performance by requiring that any State that failed to provide for the permanent disposal of wastes generated within its borders must take title to, take possession of, and assume liability for the wastes, id. at 505 U.S. at 161, obviously a considerable burden.
69 Id. at 156.
70 Id. (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).
71 505 U.S. at 156.
72 Id. at 168-69.
73 Id. at 175-77, 188.
74 Id. at 177.
Federal laws of general applicability, therefore, are surely subject to examination under the New York test rather than under the Garcia structural standard. The exercise of Congress’ commerce powers will likely be reviewed under a level of close scrutiny in the foreseeable future.

Expanding upon its anti-commandeering rule, the Court in Printz v. United States established “categorically” the rule that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.” At issue in Printz was a provision of the Brady Handgun Violence Prevention Act, which required, pending the development by the Attorney General of a national system by which criminal background checks on prospective firearms purchasers could be conducted, the chief law enforcement officers of state and local governments to conduct background checks to ascertain whether applicants were ineligible to purchase handguns. Confronting the absence of any textual basis for a “categorical” rule, the Court looked to history, which in its view demonstrated a paucity of congressional efforts to impose affirmative duties upon the States. More important, the Court relied on the “structural Constitution” to demonstrate that the Constitution of 1787 had not taken from the States “a residuary and inviolable sovereignty,” that it had, in fact and theory, retained a system of “dual sovereignty” reflected in many things but most notably in the constitutional conferral “upon Congress of not all governmental powers, but only discrete, enumerated ones,” which was expressed in the Tenth Amendment. Thus, while it had earlier rejected the commandeering of legislative assistance, the Court now made clear that administrative officers and resources were also fenced off from federal power.

The scope of the rule thus expounded was unclear. Particularly, Justice O’Connor in concurrence observed that Congress retained the power to enlist the States through contractual arrangements and on a voluntary basis. More pointedly, she stated that “the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on

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521 U.S. at 933 (internal quotation marks omitted) (quoting New York v. United States, 505 U.S. 144, 188 (1992)).
521 U.S. at 904-18. Notably, the Court expressly exempted from this rule the continuing role of the state courts in the enforcement of federal law. Id. at 905-08.
521 U.S. at 919 (quoting THE FEDERALIST, No. 39 (Madison)).
521 U.S. at 918.
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state and local authorities pursuant to its Commerce Clause powers are similarly invalid.”

A partial answer was provided in Reno v. Condon, in which the Court upheld the Driver’s Privacy Protection Act against a charge that it offended the anti-commandeering rule of New York and Printz. The Act in general limits disclosure and resale without a driver’s consent of personal information contained in the records of state motor vehicle departments, and requires disclosure of that information for specified government record-keeping purposes. While conceding that the Act “will require time and effort on the part of state employees,” the Court found this imposition permissible because the Act regulates state activities directly rather than requiring states to regulate private activities.

Federal Instrumentalities and Personnel and State Police Power

Federal instrumentalities and agencies have never enjoyed the same degree of immunity from state police regulation as from state taxation. The Court has looked to the nature of each regulation to determine whether it is compatible with the functions committed by Congress to the federal agency. This problem has arisen most often with reference to the applicability of state laws to the operation of national banks. Two correlative propositions have governed the decisions in these cases. The first was stated by Justice Miller in First National Bank v. Commonwealth. “[National banks are] subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts are all based on State law. It is only when the State law incapacitates the banks discharging their duties to the government that it becomes unconstitutional.” In Davis v. Elmira Savings Bank, the Court stated the second proposition thus: “National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties

80 521 U.S. at 936 (citing 42 U.S.C. § 5779(a) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice)).
82 528 U.S. at 150-51.
83 76 U.S. (9 Wall.) 353 (1870).
84 Id. at 362.
85 161 U.S. 275 (1896).
or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created.”

Similarly, a state law, insofar as it forbids national banks to use the word “saving” or “savings” in their business and advertising is void by reason of conflict with the Federal Reserve Act authorizing such banks to receive savings deposits. However, federal incorporation of a railroad company of itself does not operate to exempt it from control by a State as to business consummated wholly therein. Also, Treasury Department regulations, designed to implement the federal borrowing power (Art. I, § 8, cl. 2) by making United States Savings Bonds attractive to investors and conferring exclusive title thereto upon a surviving joint owner, override contrary state community property laws whereunder a one-half interest in such property remains part of the estate of a decedent co-owner. Similarly, the Patent Office having been granted by Congress an unqualified authorization to license and regulate the conduct throughout the United States of nonlawyers as patent agents, a State, under the guise of prohibiting unauthorized practice of law, is preempted from enjoining such activities of a licensed agent as entail the rendering of legal opinions as to patentability or infringement of patent rights and the preparation and prosecution of application for patents.

The extent to which States may go in regulating contractors who furnish goods or services to the Federal Government is not as clearly established as is their right to tax such dealers. In 1943, a closely divided Court sustained the refusal of the Pennsylvania Milk Control Commission to renew the license of a milk dealer who, in violation of state law, had sold milk to the United States for consumption by troops at an army camp located on land belonging to the State, at prices below the minimum established by the Commission. The majority was unable to find in congressional legislation, or in the Constitution, unaided by congressional enactment, any immunity from such price fixing regulations. On the same day, a different majority held that California could not penalize a milk dealer for selling milk to the War Department at less

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86 Id. at 283.
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The Doctrine of Federal Exemption From State Taxation

*McCulloch v. Maryland.*—Five years after the decision in *McCulloch v. Maryland* that a State may not tax an instrumentality of the Federal Government, the Court was asked to and did reexamine the entire question in *Osborn v. United States Bank.*

In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was “contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed, ought not to be implied by the Court.” To which Marshall replied: “It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control,

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94 North Dakota v. United States, 495 U.S. 423 (1990). The difficulty is that the case was five-to-four with a single Justice concurring with a plurality of four to reach the result. Id. at 444. Presumably, the concurrence agreed with the rationale set forth here, disagreeing only in other respects.
95 Id. at 435. Four dissenting Justices agreed with this principle, but they also would invalidate a state law that “actually and substantially interferes with specific federal programs.” Id. at 448, 451-452.
96 Id. That is, only when the overall effect, when balanced against other regulations applicable to similarly situated persons who do not deal with the government, imposes a discriminatory burden will they be invalidated. The concurring Justice was doubtful of this standard. Id. at 444 (Justice Scalia concurring).
97 22 U.S. (9 Wheat.) 738 (1824).
98 Id. at 865.
which is said to be so objectionable in this instance." 99 Secondly, the appellants relied "greatly on the distinction between the bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government. . . . Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors." 100 Marshall accepted this analogy but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the Government were entitled to immunity from taxation upon such transactions. 101 Thus, not only was the decision of McCulloch v. Maryland reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

Applicability of Doctrine to Federal Securities.—The first significant extension of the doctrine of the immunity of federal instrumentalities from state taxation came in Weston v. Charleston, 102 where Chief Justice Marshall also found in the Supremacy Clause a bar to state taxation of obligations of the United States. During the Civil War, when Congress authorized the issuance of legal tender notes, it explicitly declared that such notes, as well as United States bonds and other securities, should be exempt from state taxation. 103 A modified version of this section remains on the statute books today. 104 The right of Congress to exempt legal tender notes to the same extent as bonds was sustained in Bank v. Supervisors, 105 over the objection that such notes circulate as money and should be taxable in the same way as coin. But a state tax on checks issued by the Treasurer of the United States for interest accrued upon government bonds was sustained since it did not in any way affect the credit of the National Government. 106 Similarly, the assessment for an ad valorem property tax of an open account for money due under a federal contract, 107 and the inclusion of the value of United States bonds owed by a decedent,
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in measuring an inheritance tax,\textsuperscript{108} were held valid, since neither tax would substantially embarrass the power of the United States to secure credit.\textsuperscript{109} A state property tax levied on mutual savings banks and federal savings and loan associations and measured by the amount of their capital, surplus, or reserve and undivided profits, but without deduction of the value of their United States securities, was voided as a tax on obligations of the Federal Government. Apart from the fact that the ownership interest of depositors in such institutions was different from that of corporate stockholders, the tax was imposed on the banks which were solely liable for payment thereof.\textsuperscript{110}

Income from federal securities is also beyond the reach of the state taxing power as the cases now stand.\textsuperscript{111} Nor can such a tax be imposed indirectly upon the stockholders on such part of the corporate dividends as corresponds to the part of the corporation's income which is not assessed, i.e., income from tax exempt bonds.\textsuperscript{112} A State may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property of net income of the corporation, including tax exempt United States securities or the income derived therefrom.\textsuperscript{113} The designation of a tax is not controlling.\textsuperscript{114} Where a so-called "license tax" upon insurance companies, measured by gross income, including interest on government bonds, was, in effect, a commutation tax levied in lieu of other taxation upon the personal property of the taxpayer, it was still held to amount to an unconstitutional tax on the bonds themselves.\textsuperscript{115}

\textbf{Taxation of Government Contractors.}—In the course of his opinion in Osborn v. United States Bank,\textsuperscript{116} Chief Justice Marshall posed the question: "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the

\begin{footnotesize}
\textsuperscript{108} Plummer v. Coler, 178 U.S. 115 (1900); Blodgett v. Silberman, 277 U.S. 1, 12 (1928).
\textsuperscript{109} \textit{Accord}: Rockford Life Ins. Co. v. Illinois Dep't of Revenue, 482 U.S. 182 (1987) (Tax including in an investor's net assets the value of federally-backed securities ("Ginnie Maes") upheld, since it would have no adverse effect on Federal Government's borrowing ability).
\textsuperscript{112} Miller v. Milwaukee, 272 U.S. 713 (1927).
\textsuperscript{114} Macallen v. Massachusetts, 279 U.S. 620, 625 (1929).
\textsuperscript{116} 22 U.S. (9 Wheat.) 738 (1824).
\end{footnotesize}
troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.” 117 Today, the question insofar as taxation is concerned is answered in the affirmative. While the early cases looked toward immunity, 118 in James v. Dravo Contracting Co., 119 by a 5-to-4 vote, the Court established the modern doctrine. Upholding a state tax on the gross receipts of a contractor providing services to the Federal Government, the Court said that “[I]t is not necessary to cripple [the State’s power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.” 120 A state-imposed sales tax upon the purchase of goods by a private firm having a cost-plus contract with the Federal Government was sustained, it not being critical to the tax’s validity that it would be passed on to the Government. 121 Previously, it had sustained a gross receipts tax levied in lieu of a property tax upon the operator of an automobile stage line, who was engaged in carrying the mails as an independent contractor 122 and an excise tax on gasoline sold to a contractor with the Government and used to operate machinery in the construction of levees on the Mississippi River. 123 While the decisions have not set an unwavering line, 124 the Court has in recent years hewed to a very restrictive
doctrine of immunity. "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." \(^{125}\) Thus, *New Mexico* sustained a state gross receipts tax and a use tax imposed upon contractors with the Federal Government which operated on "advanced funding," drawing on federal deposits so that only federal funds were expended by the contractors to meet their obligations. \(^{126}\) Of course, Congress may statutorily provide for immunity from taxation of federal contractors generally or in particular programs. \(^{127}\)

**Taxation of Salaries of Employees of Federal Agencies.**—

Of a piece with *James v. Dravo Contracting Co.* was the decision in *Graves v. New York ex rel. O'Keefe*, \(^{128}\) handed down two years later. Repudiating the theory "that a tax on income is legally or economically a tax on its source," the Court held that a State could levy a nondiscriminatory income tax upon the salary of an employee of a government corporation. In the opinion of the Court, Justice Stone intimated that Congress could not validly confer such an immunity upon federal employees. "The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes; and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible ex-


\(^{126}\) "Immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." United States v. New Mexico, 455 U.S. 720, 734 (1982). Arizona Dept' of Revenue v. Blaze Constr. Co., 119 S. Ct. 957 (1999) (the same rule applies when the contractual services are rendered on an Indian reservation).


tent a restriction on the taxing power which the Constitution has reserved to the state governments.” 129 Chief Justice Hughes concurred in the result without opinion. Justices Butler and McReynolds dissented and Justice Frankfurter wrote a concurring opinion in which he reserved judgment as to “whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live.” 130

That question is academic, Congress having consented to state taxation of its employees’ compensation as long as the taxation “does not discriminate against the ... employee, because of the source of the ... compensation.” 131 This statute, the Court has held, “is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity.” 132

**Ad Valorem Taxes Under the Doctrine.**—Property owned by a federally chartered corporation engaged in private business is subject to state and local *ad valorem* taxes. This was conceded in *McCulloch v. Maryland*, 133 and confirmed a half century later with respect to railroads incorporated by Congress. 134 Similarly, a property tax may be levied against the lands under water which are owned by a person holding a license under the Federal Water Power Act. 135 However, when privately owned property erected by lessees on tax exempt state lands is taxed by a county at less than full value, and houses erected by contractors on land leased from a federal Air Force base are taxed at full value, the latter tax, sole-

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129 Id. at 487.
130 Id. at 492.
131 4 U.S.C. § 111. The statute, part of the Public Salary Tax Act of 1939, was considered and enacted contemporaneously with the alteration occurring in constitutional law, exemplified by *Graves*. That is, in Helvering v. Gerhardt, 304 U.S. 405 (1938), the Court had overruled precedents and held that Congress could impose nondiscriminatory taxes on the incomes of most state employees, and the 1939 Act had as its primary purpose the imposition of federal income taxes on the salaries of all state and local government employees. Feeling equity required it, Congress included a provision authorizing nondiscriminatory state taxation of federal employees. *Graves* came down while the provision was pending in Congress. See Davis v. Michigan Dept. of the Treasury, 489 U.S. 803, 810-814 (1989). For application of the Act to salaries of federal judges, see Jefferson County v. Acker, 527 U.S. 423 (1999) (upholding imposition of a local occupational tax).

132 Id. at 813. This case struck down, as violative of the provision, a state tax imposed on federal retirement benefits but exempting state retirement benefits. See also Barker v. Kansas, 503 U.S. 594 (1992) (similarly voiding a state tax on federal military retirement benefits but not reaching state and local government retirees).

133 17 U.S. (4 Wheat.) 316, 426 (1819).
ly by reason of the discrimination against the United States and its lessees, is rendered void. Likewise, when under state laws, a school district does not tax private lessees of state and municipal realty, whose leases are subject to termination at the lessor's option in the event of sale, but does levy a tax, measured by the entire value of the realty, on lessees of United States property utilized for private purposes and whose leases are terminable at the option of the United States in an emergency or upon sale, the discrimination voided the tax collected from the latter. “A state tax may not discriminate against the Government or those with whom it deals” in the absence of significant differences justifying levy of higher taxes on lessees of federal property. Land conveyed by the United States to a corporation for dry dock purposes was subject to a general property tax, despite a reservation in the conveyance of a right to free use of the dry dock and a provision for forfeiture in case of the continued unfitness of the dry dock for use or the use of land for other purposes. Also, where equitable title has passed to the purchaser of land from the Government, a State may tax the equitable owner on the full value thereof, despite retention of legal title; but, in the case of reclamation entries, the tax may not be collected until the equitable title passes. In the pioneer case of Van Brocklin v. Tennessee, the State was denied the right to sell for taxes lands which the United States owned at the time the taxes were levied, but in which it had ceased to have any interest at the time of sale. Similarly, a State cannot assess land in the hands of private owners for benefits from a road improvement completed while it was owned by the United States.

In 1944, with two dissents, the Court held that where the Government purchased movable machinery and leased it to a private contractor the lessee could not be taxed on the full value of the equipment. Twelve years later, and with a like number of Justices dissenting, the Court upheld the following taxes imposed on federal contractors: (1) a municipal tax levied pursuant to a state

137 Phillips Chemical Co. v. Dumas School Dist., 361 U.S. 376, 383, 387 (1960). In Offutt Housing Co. v. Sarpy County, 351 U.S. 253 (1956), a housing company was held liable for county personal property taxes on the ground that the Government had consented to state taxation of the company's interest as lessee. Upon its completion of housing accommodations at an Air Force Base, the company had leased the houses and the furniture therein from the Federal Government.
140 Irwin v. Wright, 258 U.S. 219 (1922).
141 117 U.S. 151 (1886).
law which stipulated that when tax exempt real property is used by a private firm for profit, the latter is subject to taxation to the same extent as if it owned the property, and based upon the value of real property, a factory, owned by the United States and made available under a lease permitting the contracting corporation to deduct such taxes from rentals paid by it; the tax was collectible only by direct action against the contractor for a debt owed, and was not applicable to federal properties on which payments in lieu of taxes are made; (2) a municipal tax, levied under the authority of the same state law, based on the value of the realty owned by the United States, and collected from a cost-plus-fixed-fee contractor, who paid no rent but agreed not to include any part of the cost of the facilities furnished by the Government in the price of goods supplied under the contract; (3) another municipal tax levied in the same State against a federal subcontractor, and computed on the value of materials and work in process in his possession, notwithstanding that title thereto had passed to the United States following his receipt of installment payments.\textsuperscript{144}

In sustaining the first tax, the Court held that it was imposed, not on the Government or on its property, but upon a private lessee, that it was computed by the value of the use to the contractor of the federally leased property, and that it was nondiscriminatory; that is, it was designed to equalize the tax burden carried by private business using exempt property with that of similar businesses using taxed property. Distinguishing the Allegheny case, the Court maintained that in this older decision, the tax invalidated was imposed directly on federal property and that the question of the legality of a privilege on use and possession of such property had been expressly reserved therein. Also insofar as the economic incidents of such tax on private use curtails the net rental accruing to the Government, such burden was viewed as insufficient to vitiate the tax.\textsuperscript{145}

Deeming the second and third taxes similar to the first, the Court sustained them as taxes on the privilege of using federal property in the conduct of private business for profit. With reference to the second, the Court emphasized that the Government had reserved no right of control over the contractor and, hence, the latter could not be viewed as an agent of the Government entitled

\textsuperscript{144}United States v. City of Detroit, 355 U.S. 466 (1958). The Court more recently has stated that Allegheny County “in large part was overruled” by Detroit. United States v. New Mexico, 455 U.S. 720, 732 (1982).

to the immunity derivable from that status. 146 As to the third tax, the Court asserted that there was no difference between taxing a private party for the privilege of using property he possesses, and taxing him for possessing property which he uses; for, in both instances, the use was private profit. Moreover, the economic burden thrust upon the Government was viewed as even more remote than in the administration of the first two taxes. 147

**Federal Property and Functions.**—Property owned by the United States is, of course, wholly immune from state taxation. 148 No State can regulate, by the imposition of an inspection fee, any activity carried on by the United States directly through its own agents and employees. 149 An early case, the authority of which is now uncertain, held invalid a flat rate tax on telegraphic messages, as applied to messages sent by public officers on official business. 150

**Federally Chartered Finance Agencies: Statutory Exemptions.**—Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress and only in conformity with the restrictions it has attached to its consent. 151 Immediately after the Supreme Court construed the statute authorizing the States to tax national bank shares as allowing a tax on the preferred shares of such a bank held by the Reconstruction Finance Corporation, 152 Congress passed a law exempting such shares from taxation. The Court upheld this measure, saying: “When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant re-
mained unimpaired, the grant of the privilege being only a declaration of legislative policy changable at will.”

In *Pittman v. Home Owners’ Corp.*, the Court sustained the power of Congress under the Necessary and Proper Clause to immunize the activities of the Corporation from state taxation; and in *Federal Land Bank v. Bismarck Lumber Co.*, the like result was reached with respect to an attempt by the State to impose a retail sales tax on a sale of lumber and other building materials to the bank for use in repairing and improving property that had been acquired by foreclosure or mortgages. The State’s principal argument proceeded thus: “Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositories and fiscal agents for the federal government and providing a market for government bonds; all other functions of the land banks are private; petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore § 26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner’s lending functions.” The Court rejected this argument and invalidated the tax saying: “The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental…. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental.”

Similarly, the lease by a federal land bank of oil and gas in a mineral estate, which it had reserved in land originally acquired through foreclosure and thereafter had conveyed to a third party, was held immune from a state personal property tax levied on the lease and on the royalties accruing thereunder. The fact that at the time of the conveyance and lease, the bank had recouped its entire loss resulting from the foreclosure did not operate to convert the mineral estate and lease into a non-governmental activity no longer entitled to exemption. However, in the absence of federal legislation, a state law laying a percentage tax on the users of safety de-
posit services, measured by the bank's charges therefore, was held valid as applied to national banks. The tax, being on the user, did not, the Court held, impose an intrinsically unconstitutional burden on a federal instrumentality. 159

**Royalties.**—In 1928, the Court went so far as to hold that a State could not tax as income royalties for the use of a patent issued by the United States. 160 This proposition was soon overruled in *Fox Film Corp. v. Doyal*, 161 where a privilege tax based on gross income and applicable to royalties from copyrights was upheld. Likewise a State may lay a franchise tax on corporations, measured by the net income from all sources and applicable to income from copyright royalties. 162

**Immunity of Lessees of Indian Lands.**—Another line of anomalous decisions conferring tax immunity upon lessees of restricted Indian lands was overruled in 1949. The first of these cases, *Choctaw, O. & G. R.R. v. Harrison*, 163 held that a gross production tax on oil, gas, and other minerals was an occupational tax, and, as applied to a lessee of restricted Indian lands, was an unconstitutional burden on such lessee, who was deemed to be an instrumentality of the United States. Next, the Court held the lease itself a federal instrumentality immune from taxation. 164 A modified gross production tax imposed in lieu of all ad valorem taxes was invalidated in two *per curiam* decisions. 165 In *Gillespie v. Oklahoma*, 166 a tax upon net income of the lessee derived from sales of his share of oil produced from restricted lands also was condemned. Finally a petroleum excise tax upon every barrel of oil produced in the State was held inapplicable to oil produced on restricted Indian lands. 167 In harmony with the trend to restricting immunity implied from the Constitution to activities of the Government itself, the Court overruled all these decisions in *Oklahoma Tax Comm’n v. Texas Co.* and held that a lessee of mineral rights in restricted Indian lands was subject to nondiscriminatory gross production and excise taxes, so long as Congress did not affirmatively grant him immunity. 168

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160 Long v. Rockwood, 277 U.S. 142 (1928).
161 286 U.S. 123 (1932).
163 235 U.S. 292 (1914).
168 336 U.S. 342 (1949). Justice Rutledge, speaking for the Court, sketched the history of the immunity lessees of Indian lands from state taxation, which he found
Summation and Evaluation

Although *McCulloch v. Maryland* and *Gibbons v. Ogden* were expressions of a single thesis, the supremacy of the National Government, their development after Marshall's death has been sharply divergent. During the period when *Gibbons v. Ogden* was eclipsed by the theory of dual federalism, the doctrine of *McCulloch v. Maryland* was not merely followed but greatly extended as a restraint on state interference with federal instrumentalities. Conversely, the Court's recent return to Marshall's conception of the powers of Congress has coincided with a retreat from the more extreme positions taken in reliance upon *McCulloch v. Maryland*. Today, the application of the Supremacy Clause is becoming, to an ever increasing degree, a matter of statutory interpretation; a determination whether state regulations can be reconciled with the language and policy of federal enactments. In the field of taxation, the Court has all but wiped out the private immunities previously implied from the Constitution without explicit legislative command. Broadly speaking, the immunity which remains is limited to activities of the Government itself, and to that which is explicitly created by statute, e.g., that granted to federal securities and to fiscal institutions chartered by Congress. But the term, activities, will be broadly construed.

Clause 3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

to stem from early rulings that tribal lands are themselves immune. The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); The New York Indians, 72 U.S. (5 Wall.) 761 (1867). One of the first steps taken to curtail the scope of the immunity was Shaw v. Oil Corp., 276 U.S. 575 (1928), which held that lands outside a reservation, though purchased with restricted Indian funds, were subject to state taxation. Congress soon upset the decision, however, and its act was sustained in Board of County Comm'rs v. Seber, 318 U.S. 705 (1943).
OATH OF OFFICE

Power of Congress in Respect to Oaths

Congress may require no other oath of fidelity to the Constitution, but it may add to this oath such other oath of office as its wisdom may require.\(^{169}\) It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an \textit{ex post facto} law,\(^ {170}\) and the same rule holds in the case of the States.\(^ {171}\)

National Duties of State Officers

Commenting in \textit{The Federalist} on the requirement that state officers, as well as members of the state legislatures, shall be bound by oath or affirmation to support the Constitution, Hamilton wrote: “Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government \textit{as far as its just and constitutional authority extends}; and it will be rendered auxiliary to the enforcement of its laws.”\(^ {172}\) The younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention: “They [the States] are the instruments upon which the Union must frequently depend for the support and execution of their powers . . .”\(^ {173}\) Indeed, the Constitution itself lays many duties, both positive and negative, upon the different organs of state government,\(^ {174}\) and Congress may frequently add others, provided it does not require the state authorities to act outside their normal jurisdiction. Early congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789\(^ {175}\) not only left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different States and in concurrent possession of the rest, and by other sections state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, examples of the principle that federal law is law to be applied by the state courts, but also...
any justice of the peace or other magistrates of any of the States were authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. From the beginning, Congress enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws. Pursuant to the same idea of treating state governmental organs as available to the National Government for administrative purposes, the act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials and the rendition of fugitives from justice from one State to another exclusively to the state executives.

With the rise of the doctrine of States Rights and of the equal sovereignty of the States with the National Government, the availability of the former as instruments of the latter in the execution of its power came to be questioned. In Prigg v. Pennsylvania, decided in 1842, the constitutionality of the provision of the act of 1793 making it the duty of state magistrates to act in the return of fugitive slaves was challenged; and in Kentucky v. Dennison, decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it “the duty” of the Chief Executive of a State to render up a fugitive from justice upon the demand of the Chief Executive of the State from which the fugitive had fled. The Court sustained both provisions, but upon the theory that the cooperation of the state authorities was purely voluntary. In the Prigg case the Court, speaking by Justice Story, said that “while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.” Subsequent cases confirmed the point that Congress could authorize willing state offici-
ters to perform such federal duties. Indeed, when Congress in the Selective Service Act of 1917 authorized enforcement to a great extent through state employees, the Court rejected “as too wanting in merit to require further notice” the contention that the Act was invalid because of this delegation. State officials were frequently employed in the enforcement of the National Prohibition Act, and suits to abate nuisances as defined by the statute were authorized to be brought, in the name of the United States, not only by federal officials, but also by “any prosecuting attorney of any State or any subdivision thereof.”

In the Dennison case, however, it was held that while Congress could delegate it could not require performance of an obligation. The “duty” of state executives in the rendition of fugitives from justice was construed to be declaratory of a “moral duty.” Said Chief Justice Taney for the Court: “The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it […] . . . It is true,” the Chief Justice conceded, “that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution.”

Eighteen years later, in Ex parte Siebold, the Court sustained the right of Congress, under Article I, § 4, cl. 1 of the Con-

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183 41 Stat. 314, § 22. In at least two States, the practice was approved by state appellate courts. Carse v. Marsh, 189 Cal. 743, 210 Pac. 257 (1922); United States v. Richards, 201 Wis. 130, 229 N.W. 675 (1930). On this and other issues under the Act, see Hart, Some Legal Questions Growing Out of the President’s Executive Order for Prohibition Enforcement, 13 VA. L. REV. 86 (1922).
185 100 U.S. 371 (1880).
stitution, to impose duties upon state election officials in connection with a congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. While the doctrine of the holding was expressly confined to cases in which the National Government and the States enjoy “a concurrent power over the same subject matter,” no attempt was made to catalogue such cases. Moreover, the outlook of Justice Bradley’s opinion for the Court was decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel “that the nature of sovereignty is such as to preclude the joint cooperation of two sovereigns, even in a matter in which they are mutually concerned.” To this Justice Bradley replied: “As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and fears and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity.”

Conflict thus developed early between these two doctrinal lines. But it was the *Siebold* line that was to prevail. Enforcement of obligations upon state officials through mandamus or through injunctions was readily available, even when the State itself was immune, through the fiction of *Ex parte Young*, under which a state official could be sued in his official capacity but without the immunities attaching to his official capacity. Although the obligations were, for a long period, in their origin based on the Federal Constitution, the capacity of Congress to enforce statutory obligations through judicial action was little doubted. Nonetheless, it was only recently that the Court squarely overruled *Dennison*. “If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that ‘the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,’ … basic constitutional prin-

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187 Id. at 392.
188 209 U.S. 123 (1908). See also Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876).
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ciples now point as clearly the other way." ¹⁹⁰ That case is doubly important, inasmuch as the Court spoke not only to the extradition clause and the federal statute directly enforcing it, but it also enforced a purely statutory right on behalf of a Territory that could not claim for itself rights under the clause.¹⁹¹

Even as the Court imposes new federalism limits upon Congress’ powers to regulate the States as States, it has reaffirmed the principle that Congress may authorize the federal courts to compel state officials to comply with federal law, statutory as well as constitutional. “[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.”¹⁹²

No doubt, there is tension between the exercise of Congress’ power to impose duties on state officials¹⁹³ and the developing doctrine under which the Court holds that Congress may not “commandeer” state legislative or administrative processes in the enforcement of federal programs.¹⁹⁴ However, the existence of the Supremacy Clause and the federal oath of office, as well as a body of precedent indicates that coexistence of the two lines of principles will be maintained.

¹⁹⁰Puerto Rico v. Branstad, 483 U.S. 219, 227 (1987) (Dennison “rests upon a foundation with which time and the currents of constitutional change have dealt much less favorably”).
RATIFICATION

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

IN GENERAL

In Owings v. Speed\(^1\) the question at issue was whether the Constitution of the United States operated upon an act of Virginia passed in 1788. The Court held it did not, stating in part:

“The Conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, ‘for commencing proceedings under the Constitution.’”

“Both Governments could not be understood to exist at the same time. The New Government did not commence until the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into operation. In fact, Congress did continue to act as a Government until it dissolved on the 1st of November, by the successive disappearance of its Members. It existed potentially until the 2d of March, the day proceeding that on which the Members of the new Congress were directed to assemble.”

“The resolution of the Convention might originally have suggested a doubt, whether the Government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March 1789.”

\(^1\) 18 U.S. (5 Wheat.) 420, 422-423 (1820).
AMENDMENTS TO THE CONSTITUTION
FIRST THROUGH TENTH AMENDMENTS
# BILL OF RIGHTS

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Bill of Rights

On September 12, five days before the Convention adjourned, Mason and Gerry raised the question of adding a bill of rights to the Constitution. Said Mason: “It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.” But the motion of Gerry and Mason to appoint a committee for the purpose of drafting a bill of rights was rejected. 1 Again, on September 14, Pinckney and Gerry sought to add a provision “that the liberty of the Press should be inviolably observed—.” But after Sherman observed that such a declaration was unnecessary, because “[t]he power of Congress does not extend to the Press,” this suggestion too was rejected. 2 It cannot be known accurately why the Convention opposed these suggestions. Perhaps the lateness of the Convention, perhaps the desire not to present more opportunity for controversy when the document was forwarded to the States, perhaps the belief, asserted by the defenders of the Constitution when the absence of a bill of rights became critical, that no bill was needed because Congress was delegated none of the powers which such a declaration would deny, perhaps all these contributed to the rejection. 3

In any event, the opponents of ratification soon made the absence of a bill of rights a major argument, 4 and some friends of the document, such as Jefferson, 5 strongly urged amendment to in-

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2 Id. at 617–618.
3 The argument most used by proponents of the Constitution was that inasmuch as Congress was delegated no power to do those things which a bill of rights would prescribe no bill of rights was necessary and that it might be dangerous because it would contain exceptions to powers not granted and might therefore afford a basis for claiming more than was granted. THE FEDERALIST No. 84 at 555–67 (Alexander Hamilton) (Modern Library ed. 1937).
4 Substantial excerpts from the debate in the country and in the ratifying conventions are set out in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 435–620 (B. Schwartz ed., 1971); 2 id. at 627–980. The earlier portions of volume 1 trace the origins of the various guarantees back to the Magna Carta.
5 In a letter to Madison, Jefferson indicated what he did not like about the proposed Constitution. “First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of the fact triable by the laws of the land and not by the law of Nations… Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.”
AMENDMENTS—RESTRICTING FEDERAL POWER

First Through Tenth Amendments

Bill of Rights

include a declaration of rights. Several state conventions ratified while urging that the new Congress to be convened propose such amendments, 124 amendments in all being put forward by these States. Although some dispute has occurred with regard to the obligation of the first Congress to propose amendments, Madison at least had no doubts and introduced a series of proposals, which

12 The Papers of Thomas Jefferson 438, 440 (J. Boyd ed., 1958). He suggested that nine States should ratify and four withhold ratification until amendments adding a bill of rights were adopted. Id. at 557, 570, 583. Jefferson still later endorsed the plan put forward by Massachusetts to ratify and propose amendments. 14 id. at 649.

6 Thus, George Washington observed in letters that a ratified Constitution could be amended but that making such amendments conditions for ratification was ill-advised. 11 The Writings of George Washington 249 (W. Ford ed., 1891).


Madison began as a doubter, writing Jefferson that while “my own opinion has always been in favor of a bill of rights,” still “I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment…” 5 The Writings of James Madison 269 (G. Hunt ed., 1904). His reasons were four. (1) The Federal Government was not granted the powers to do what a bill of rights would proscribe. (2) There was reason “to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.” (3) A greater security was afforded by the jealousy of the States of the national government. (4) “Experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State…. Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents…. Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince.” Id. at 272–73. Jefferson’s response acknowledged the potency of Madison’s reservations and attempted to answer them, in the course of which he called Madison’s attention to an argument in favor not considered by Madison “which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.” 14 The Papers of Thomas Jefferson 659 (J. Boyd ed., 1958). Madison was to assert this point when he introduced his proposals for a bill of rights in the House of Representatives. 1 Annals of Congress 439 (June 8, 1789).

In any event, following ratification, Madison in his successful campaign for a seat in the House firmly endorsed the proposal of a bill of rights. “[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants & c.” 5 The Writings of James Madison 319 (G. Hunt ed., 1904).

9 1 Annals of Congress 424–50 (June 8, 1789). The proposals as introduced are at pp. 433–36. The Members of the House were indisposed to moving on the proposals.
he had difficulty claiming the interest of the rest of Congress in considering. At length, the House of Representatives adopted 17 proposals; the Senate rejected two and reduced the remainder to twelve, which were accepted by the House and sent on to the States where ten were ratified and the other two did not receive the requisite number of concurring States.

**Bill of Rights and the States.**—One of the amendments which the Senate refused to accept—declared by Madison to be “the most valuable of the whole list”—read: “The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases shall not be infringed by any State.” In spite of this rejection, the contention that the Bill of Rights—or at least the first eight—was applicable to the States was repeatedly pressed upon the Supreme Court. By a long series of decisions, beginning with the opinion of Chief Justice Marshall in *Barron v. Baltimore*, the argument was consistently rejected. Nevertheless, the enduring vitality of natural law concepts encouraged renewed appeals for judicial protection through application of the Bill of Rights.

**The Fourteenth Amendment.**—Following the ratification of the Fourteenth Amendment, litigants disadvantaged by state laws and policies first resorted unsuccessfully to the privileges or immunities clause of § 1 for judicial protection. Then, claimants seized upon the due process clause of the Fourteenth Amendment as guaranteeing certain fundamental and essential safeguards, without

10 Debate in the House began on July 21, 1789, and final passage was had on August 24, 1789. 1 ANNALS OF CONGRESS 660–779. The Senate considered the proposals from September 2 to September 9, but no journal was kept. The final version compromised between the House and Senate was adopted September 24 and 25. See 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983–1167 (B. Schwartz ed., 1971).
11 The two not ratified dealt with the ratio of population to representatives and with compensation of Members of Congress. H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION 184, 185 (1896). The latter proposal was deemed ratified in 1992 as the 27th Amendment.
12 1 ANNALS OF CONGRESS 755 (August 17, 1789).
13 Id.
15 Thus, Justice Miller for the Court in Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 662, 663 (1875): “It must be conceded that there are . . . rights in every free government beyond the control of the State . . . There are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.”
16 Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
pressing the point of the applicability of the Bill of Rights.\textsuperscript{17} It was not until 1887 that a litigant contended that, although the Bill of Rights had not limited the States, yet so far as they secured and recognized the fundamental rights of man they were privileges and immunities of citizens of the United States and were now protected against state abridgment by the Fourteenth Amendment.\textsuperscript{18} This case the Court decided on other grounds, but in a series of subsequent cases it confronted the argument and rejected it,\textsuperscript{19} though over the dissent of the elder Justice Harlan, who argued that the Fourteenth Amendment in effect incorporated the Bill of Rights and made them effective restraints on the States.\textsuperscript{20} Until 1947,

\textsuperscript{17}Walker v. Sauvinet, 92 U.S. 90 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886). In \textit{Hurtado}, in which the Court held that indictment by information rather than by grand jury did not offend due process, the elder Justice Harlan entered a long dissent arguing that due process preserved the fundamental rules of procedural justice as they had existed in the past, but he made no reference to the possibility that the Fourteenth Amendment due process clause embodied the grand jury indictment guarantee of the Fifth Amendment.

\textsuperscript{18}Spies v. Illinois, 123 U.S. 131 (1887).

\textsuperscript{19}In \textit{re Kemmler}, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323 (1892).

\textsuperscript{20}In \textit{O'Neil} v. Vermont, 144 U.S. 323, 370 (1892), Justice Harlan, with Justice Brewer concurring, argued "that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." Justice Field took the same position. Id. at 337. Thus, he said: "While therefore, the ten Amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." Id. at 363. Justice Harlan reasserted this view in Maxwell v. Dow, 176 U.S. 581, 605 (1900) (dissenting opinion), and in Twining v. New Jersey, 211 U.S. 78, 114 (1908) (dissenting opinion). Justice Field was no longer on the Court and Justice Brewer did not in either case join Justice Harlan as he had done in \textit{O'Neil}.
this dissent made no headway, but in Adamson v. California a minority of four Justices adopted it. Justice Black, joined by three others, contended that his researches into the history of the Fourteenth Amendment left him in no doubt “that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights.” Scholarly research stimulated by Justice Black’s view tended to discount the validity of much of the history recited by him and to find in the debates in Congress and in the ratifying conventions no support for his contention. Other scholars, going beyond the immediate debates, found in the pre- and post-Civil War period a substantial body of abolitionist constitutional thought which could be shown to have greatly influenced the principal architects, and observed that all three formulations of § 1, privileges and immunities, due process, and equal protection, had long been in use as shorthand descriptions for the principal provisions of the Bill of Rights.

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Bill of Rights

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21 Cf. Palko v. Connecticut, 302 U.S. 319, 323 (1937), in which Justice Cardozo for the Court, including Justice Black, said: “We have said that in appellant’s view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.” See Frankfurter, Memorandum on ‘Incorporation,’ of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965). According to Justice Douglas’ calculations, ten Justices had believed that the Fourteenth Amendment incorporated the Bill of Rights, but a majority of the Court at any one particular time had never been of that view. Gideon v. Wainwright, 372 U.S. 335, 345–47 (1963) (concurring opinion). See also Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964). It must be said, however, that many of these Justices were not consistent in asserting this view. Justice Goldberg probably should be added to the list. Pointer v. Texas, 380 U.S. 400, 410–14 (1965) (concurring opinion).

22 332 U.S. 46 (1947).

23 Id. at 74, Justice Black’s contentsions, id. at 68–123, were concurred in by Justice Douglas. Justices Murphy and Rutledge also joined this view but went further. “I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.” Id. at 124. Justice Black rejected this extension as an invocation of “natural law due process.” For examples in which he and Justice Douglas split over the application of nonspecified due process limitations, see, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); In re Winship, 397 U.S. 358 (1970).

24 The leading piece is Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 STAN. L. REV. 5 (1949).

25 Graham, Early Antislavery Backgrounds of the Fourteenth Amendment, 1950 WISC. L. REV. 479, 610; Graham, Our ‘Declaratory’ Fourteenth Amendment, 7 STAN. L. REV. 3 (1954); J. TEN BROEK, EQUAL UNDER LAW (1965 enlarged ed.). The argu-
Unresolved perhaps in theory, the controversy in fact has been mostly mooted through the “selective incorporation” of a majority of the provisions of the Bill of Rights. This process seems to have had its beginnings in an 1897 case in which the Court, without mentioning the just compensation clause of the Fifth Amendment, held that the Fourteenth Amendment’s due process clause forbade the taking of private property without just compensation. Then, in Twining v. New Jersey the Court observed that “it is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law .... If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such nature that they are included in the conception of due process of law.” And in Gitlow v. New York, the Court in dictum said: “For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.” After quoting the language set out above from Twining v. New Jersey, the Court in 1932 said that “a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character.”

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26 Williams v. Florida, 399 U.S. 78, 130–32 (1970) (Justice Harlan concurring in part and dissenting in part). The language of this process is somewhat abstruse. Justice Frankfurter objected strongly to “incorporation” but accepted other terms. “The cases say the First Amendment is ‘made applicable’ by the Fourteenth or that it is taken up into the Fourteenth by ‘absorption,’ but not that the Fourteenth ‘incorporates’ the First. This is not a quibble. The phrase ‘made applicable’ is a neutral one. The concept of ‘absorption’ is a progressive one, i.e., over the course of time something gets absorbed into something else. The sense of the word ‘incorporate’ implies simultaneity. One writes a document incorporating another by reference at the time of the writing. The Court has used the first two forms of language, but never the third.” Frankfurter, Memorandum on ‘Incorporation’ of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746, 747–48 (1965). It remains true that no opinion of the Court has used “incorporation” to describe what it is doing, cf. Washington v. Texas, 388 U.S. 14, 18 (1967); Benton v. Maryland, 395 U.S. 784, 794 (1969), though it has regularly been used by dissenters. E.g., Pointer v. Texas, 380 U.S. 400, 408 (1965) (Justice Harlan); Williams v. Florida, 399 U.S. 78, 130 (1970) (Justice Harlan); Williams v. Florida, 399 U.S. at 143 (Justice Stewart).
mulated by Justice Cardozo, who observed that the due process clause of the Fourteenth Amendment might proscribe a certain state procedure, not because the proscription was spelled out in one of the first eight amendments, but because the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," because certain proscriptions were "implicit in the concept of ordered 'liberty.'"

As late as 1958, Justice Harlan was able to assert in an opinion of the Court that a certain state practice fell afoul of the Fourteenth Amendment because "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech ... ."

But this process of "absorption" into due process of rights which happened also to be specifically named in the Bill of Rights came to be supplanted by a doctrine which had for a time coexisted with it, the doctrine of "selective incorporation." This doctrine holds that the due process clause incorporates the text of certain of the provisions of the Bill of Rights. Thus in *Malloy v. Hogan*, Justice Brennan was enabled to say: "We have held that the guarantees of the First Amendment, ... the prohibition of unreasonable

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31 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
34 378 U.S. 1, 10 (1964). In *Washington v. Texas*, 388 U.S. 14, 18 (1967), Chief Justice Warren for the Court said that the Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." And in *Benton v. Maryland*, 395 U.S. 784, 794 (1969), Justice Marshall for the Court wrote: "[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." In this process, the Court has substantially increased the burden of showing that a procedure is fundamentally fair as carried by those who would defend a departure from the requirement of the Bill of Rights. That is, previously the Court has asked whether a civilized system of criminal justice could be imagined that did not accord the particular procedural safeguard. *E.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937). The present approach is to ascertain whether a particular guarantee is fundamental in the light of the system existent in the United States, which can make a substantial difference. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968). *Quaere*, the approach followed in *Williams v. Florida*, 399 U.S. 78 (1970), and *Apodaca v. Oregon*, 406 U.S. 404 (1972).
searches and seizures of the Fourth Amendment, ... and the right to counsel guaranteed by the Sixth Amendment, ... are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." And Justice Clark was enabled to say: "First, this Court has decisively settled that the First Amendment’s mandate that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’ has been made wholly applicable to the States by the Fourteenth Amendment." 35 Similar language asserting that particular provisions of the Bill of Rights have been applied to the States through the Fourteenth Amendment’s due process clause may be found in numerous cases. 36 Most of the provisions have now been so applied. 37


37 The following list does not attempt to distinguish between those Bill of Rights provisions which have been held to have themselves been incorporated or absorbed by the Fourteenth Amendment and those provisions which the Court indicated at the time were applicable against the States because they were fundamental and not merely because they were named in the Bill of Rights. Whichever formulation was originally used, the former is now the one used by the Court. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

First Amendment—
Religion—

Fourth Amendment—

Fifth Amendment—
Aside from the theoretical and philosophical considerations raised by the question whether the Bill of Rights is incorporated into the Fourteenth Amendment or whether due process subsumes certain fundamental rights that are named in the Bill of Rights, the principal relevant controversy is whether, once a guarantee or a right set out in the Bill of Rights is held to be a limitation on the States, the same standards which restrict the Federal Government restrict the States. The majority of the Court has consistently held that the standards are identical, whether the Federal Government or a State is involved, and “has rejected the notion that the Fourteenth Amendment applies to the State only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights.’” Those who have argued for the application of a dual-standard test of due process for the Federal Government and the

Sixth Amendment—
- Public trial—In re Oliver, 333 U.S. 257 (1948).
- Notice of charges—In re Oliver, 333 U.S. 257 (1948).

Eighth Amendment—

Provisions not applied are:

Second Amendment—

Third Amendment—
- Quartering troops in homes—No cases.

Fifth Amendment—

Seventh Amendment—


Eighth Amendment—
- Excessive Fines—But see Tate v. Short, 401 U.S. 395 (1971) (utilizing equal protection to prevent automatic jailing of indigents when others can pay a fine and avoid jail).


States, most notably Justice Harlan, but including Justice Stewart, Justice Fortas, Justice Powell, and Justice Rehnquist, have not only rejected incorporation, but have also argued that, if the same standards are to apply, the standards previously developed with the Federal Government in mind would have to be diluted in order to give the States more leeway in the operation of their criminal justice systems. The latter result seems to have been reached for application of the jury trial guarantee of the Sixth Amendment.
FIRST AMENDMENT

RELIGION AND EXPRESSION

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RELIGION AND FREE EXPRESSION

FIRST AMENDMENT

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

RELIGION

An Overview

Madison’s original proposal for a bill of rights provision concerning religion read: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed.” The language was altered in the House to read: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” In the Senate, the section adopted read: “Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, . . .” It was in the conference committee of the two bodies, chaired by Madison, that the present language was written with its somewhat

1 1 ANNALS OF CONGRESS 434 (June 8, 1789).

2 The committee appointed to consider Madison’s proposals, and on which Madison served, with Vining as chairman, had rewritten the religion section to read: “No religion shall be established by law, nor shall the equal rights of conscience be in any manner, or on any pretence, infringed.” After some debate during which Madison suggested that the word “national” might be inserted before the word “religion” as “point[ing] the amendment directly to the object it was intended to prevent,” the House adopted a substitute reading: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” 1 ANNALS OF CONGRESS 721–31 (August 15, 1789). On August 20, on motion of Fisher Ames, the language of the clause as quoted in the text was adopted. Id. at 766. According to Madison’s biographer, “[t]here can be little doubt that this was written by Madison.” I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 1787–1800 at 271 (1950).

3 This text, taken from the Senate Journal of September 9, 1789, appears in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153 (B. Schwartz ed., 1971). It was at this point that the religion clauses were joined with the freedom of expression clauses.
more indefinite “respecting” phraseology. Debate in Congress lends little assistance in interpreting the religion clauses; Madison’s position, as well as that of Jefferson, who influenced him, is fairly clear, but the intent, insofar as there was one, of the others in Congress who voted for the language and those in the States who voted to ratify is subject to speculation.

**Scholarly Commentary.**—The explication of the religion clauses by scholars in the nineteenth century gave a restrained sense of their meaning. Story, who thought that “the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice,” looked upon the prohibition simply as an exclusion from the Federal Government of all power to act upon the subject. “The situation ... of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by

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4 1 ANNALS OF CONGRESS 913 (September 24, 1789). The Senate concurred the same day. See I. BRANT, JAMES MADISON—FATHER OF THE CONSTITUTION 1787–1800 271–72 (1950).

5 During House debate, Madison told his fellow Members that “he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any Manner contrary to their conscience.” 1 ANNALS OF CONGRESS 730 (August 15, 1789). That his conception of “establishment” was quite broad is revealed in his veto as President in 1811 of a bill which in granting land reserved a parcel for a Baptist Church in Salem, Mississippi; the action, explained President Madison, “comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that ‘Congress shall make no law respecting a religious establishment.’” 8 THE WRITINGS OF JAMES MADISON (G. Hunt, ed.) 132–33 (1904). Madison’s views were no doubt influenced by the fight in the Virginia legislature in 1784–1785 in which he successfully led the opposition to a tax to support teachers of religion in Virginia and in the course of which he drafted his “Memorial and Remonstrance against Religious Assessments” setting forth his thoughts. Id. at 183–91; I. BRANT, JAMES MADISON—THE NATIONALIST 1780–1787 343–55 (1948). Acting on the momentum of this effort, Madison secured passage of Jefferson’s “Bill for Religious Liberty”. Id. at 354; D. MALONE, JEFFERSON THE VIRGINIAN 274–280 (1948). The theme of the writings of both was that it was wrong to offer public support of any religion in particular or of religion in general.

6 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1865 (1833).
a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.”

“Probably,” Story also wrote, “at the time of the adoption of the constitution and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifferenece, would have created universal disapprobation, if not universal indignation.” The object, then, of the religion clauses in this view was not to prevent general governmental encouragement of religion, of Christianity, but to prevent religious persecution and to prevent a national establishment.

Not until the Supreme Court held the religion clauses applicable to the states in the 1940s did it have much opportunity to interpret them. But it quickly gave them a broad construction. In Everson v. Board of Education, the Court, without dissent on this point, declared that the Establishment Clause forbids not only practices that “aid one religion” or “prefer one religion over another,” but also those that “aid all religions.” With respect to the Free Exercise Clause, it asserted in Wisconsin v. Yoder that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”

More recent decisions, however, evidence a narrower interpretation of the religion clauses. Indeed, in Employment Division, Oregon Department of Human Resources v. Smith the Court abandoned its earlier view and held that the Free Exercise Clause never “relieve(s) an individual of the obligation to comply with a ‘valid and neutral law of general applicability.” On the Establish-

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7 Id. at 1873.
8 Id. at 1868.
9 For a late expounding of this view, see T. Cooley, General Principles of Constitutional Law in the United States 224–25 (3d ed. 1898).
11 330 U.S. 1, 15 (1947). Establishment Clause jurisprudence since, whatever its twists and turns, maintains this view.
ment Clause the Court has not wholly repudiated its previous holdings, but recent decisions have evidenced a greater sympathy for the view that the clause bars "preferential" governmental promotion of some religions but allows governmental promotion of all religion in general. Nonetheless, the Court remains sharply split on how to interpret both clauses.

**Court Tests Applied to Legislation Affecting Religion.**—Before considering in detail the development of the two religion clauses by the Supreme Court, one should notice briefly the tests the Court has articulated to adjudicate the religion cases. At the same time it should be emphasized that the Court has noted that the language of earlier cases "may have [contained] too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." While later cases have relied on a series of well-defined, if difficult-to-apply, tests, the Court has cautioned that "the purpose [of the religion clauses] was to state an objective, not to write a statute." In 1802, President Jefferson wrote a letter to a group of Baptists in Danbury, Connecticut, in which he declared that it was the purpose of the First Amendment to build "a wall of separation between Church and State." In *Reynolds v. United States*, Chief Justice Waite for the Court characterized the phrase as "almost an authoritative declaration of the scope and effect of the amendment." In its first encounters with religion-based challenges to state programs, the Court looked to Jefferson's metaphor for substantial guidance. But a metaphor may obscure as well as illuminate, and the Court soon began to emphasize neutrality and vol-

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16 397 U.S. at 668.


18 98 U.S. 145, 164 (1879).

19 Everson v. Board of Education, 330 U.S. 1, 16 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 211, 212 (1948); cf. Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Justice Black dissenting). In *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), Chief Justice Burger remarked that "the line of separation, far from being a ‘wall,’ is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." Similar observations were repeated by the Chief Justice in his opinion for the Court in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (the metaphor is not "wholly accurate"; the Constitution does not "require complete separation of church and state [but] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").
untarism as the standard of restraint on governmental action. The concept of neutrality itself is “a coat of many colors,” and three standards that seemingly could be stated in objective fashion emerged as tests of Establishment Clause validity. The first two standards emerged together. “The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”

The third test emerged several years later and asks whether the governmental program results in “an excessive government entanglement with religion. The test is inescapably one of degree … [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.” In 1971 these three tests were combined and restated in Chief Justice Burger’s opinion for the Court in Lemon v. Kurtzman, and are frequently referred to by reference to that case name.

Although at one time accepted in principle by all of the Justices, the tests have sometimes been difficult to apply, have sometimes been difficult to apply,
ently come under direct attack by some Justices, and in several instances have not been applied at all by the Court. Nonetheless, the Court employed the Lemon tests in several of its most recent establishment clause decisions, and it remains the case that those tests have served as the primary standard of establishment clause validity for the past three decades. However, other tests have also been formulated and used. Justice Kennedy has proffered “coercion” as an alternative test for violations of the establishment clause, and the Court has used that test as the basis for decision from time to time. But that test has been criticized on the


28 See Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayers on the basis of historical practice); Lee v. Weisman, 505 U.S. 577, 587 (1992) (rejecting a request to reconsider Lemon because the practice of invocations at public high school graduations was invalid under established school prayer precedents). The Court has also held that the tripartite test is not applicable when law grants a denominational preference, distinguishing between religions; rather, the distinction is to be subjected to the strict scrutiny of a suspect classification. Larson v. Valente, 456 U.S. 228, 244–46 (1982). See also Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (upholding provision of sign-language interpreter to deaf student attending parochial school); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994) (invalidating law creating special school district for village composed exclusively of members of one religious sect); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (upholding the extension of a university subsidy of student publications to a student religious publication).

29 Agostini v. Felton, 521 U.S. 203 (1997) (upholding under the Lemon tests the provision of remedial educational services by public school teachers to sectarian elementary and secondary schoolchildren on the premises of the sectarian schools); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding unconstitutional under the Lemon tests as well as under the coercion and endorsement tests a school district policy permitting high school students to decide by majority vote whether to have a student offer a prayer over the public address system prior to home football games); and Mitchell v. Helms, 530 U.S. 793 (2000) (upholding under the Lemon tests a federally funded program providing instructional materials and equipment to public and private elementary and secondary schools, including sectarian schools).


grounds it would eliminate a principal distinction between the establishment clause and the free exercise clause and make the former a "virtual nullity." Justice O'Connor has suggested "endorsement" as a clarification of the Lemon test, i.e., that the establishment clause is violated if the government intends its action to endorse or disapprove of religion or if a "reasonable observer" would perceive the government's action as such an endorsement or disapproval. But others have criticized that test as too amorphous to provide certain guidance. Justice O'Connor has also suggested that it may be inappropriate to try to shoehorn all establishment clause cases into one test, and has called instead for recognition that different contexts may call for different approaches. In two of its most recent establishment clause decisions, it might be noted, the Court employed all three tests in one decision and relied primarily on a modified version of the Lemon tests in the other.

In interpreting and applying the Free Exercise Clause, the Court has consistently held religious beliefs to be absolutely immune from governmental interference. But it has used a number of standards to review government action restrictive of religiously motivated conduct, ranging from formal neutrality to clear and present danger to strict scrutiny. For cases of intentional governmental discrimination against religion, the Court still employs strict scrutiny. But for most other free exercise cases it has now reverted to a standard of formal neutrality. "[T]he right of free exercise," it recently stated, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applica-

bility on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”

**Government Neutrality in Religious Disputes.**—One value that both clauses of the religion section serve is to enforce governmental neutrality in deciding controversies arising out of religious disputes. Schism sometimes develops within churches or between a local church and the general church, resulting in secession or expulsion of one faction or of the local church. A dispute over which body is to have control of the property of the church will then often be taken into the courts. It is now established that both religion clauses prevent governmental inquiry into religious doctrine in settling such disputes, and instead require courts simply to look to the decision-making body or process in the church and to give effect to whatever decision is officially and properly made.

The first such case was *Watson v. Jones*, which was decided on common-law grounds in a diversity action without explicit reliance on the First Amendment. A constitutionalization of the rule was made in *Kedroff v. St. Nicholas Cathedral*, in which the Court held unconstitutional a state statute that recognized the autonomy and authority of those North American branches of the Russian Orthodox Church which had declared their independence from the general church. Recognizing that *Watson v. Jones* had been decided on nonconstitutional grounds, the Court thought nonetheless that the opinion “radiates . . . a spirit of freedom for religious organizations, and independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” The power of civil courts to resolve church property disputes was severely circumscribed, the Court held, because to permit resolution of doctrinal disputes in court was to jeopardize First Amendment values. What a court must do, it was held, is to look at the church rules: if the church is a hierarchical one which reposes determination of ecclesiastical issues in a certain body, the resolution by that body is determinative, while if the church is a congregational one prescribing action by a majority vote, that determination will prevail. On the other hand, a court
confronted with a church property dispute could apply “neutral principles of law, developed for use in all property disputes,” when to do so would not require resolution of doctrinal issues. In a later case the Court elaborated on the limits of proper inquiry, holding that an argument over a matter of internal church government, the power to reorganize the dioceses of a hierarchical church in this country, was “at the core of ecclesiastical affairs” and a court could not interpret the church constitution to make an independent determination of the power but must defer to the interpretation of the church body authorized to decide.

In Jones v. Wolf, however, a divided Court, while formally adhering to these principles, appeared to depart in substance from their application. A schism had developed in a local church which was a member of a hierarchical church, and the majority voted to withdraw from the general church. The proper authority of the general church determined that the minority constituted the “true congregation” of the local church and awarded them authority over it. But rather than requiring deference to the decision of the church body, the Court approved the approach of the state court in applying neutral principles by examining the deeds to the church property, state statutes, and provisions of the general church’s constitution concerning ownership and control of church property in order to determine that no language of trust in favor of the general church was contained in any of them and that the property thus belonged to the local congregational majority. Further, the Court held, the First Amendment did not prevent the state court from applying a presumption of majority rule to award control to the majority of the local congregation, provided that it permitted defeasance of the presumption upon a showing that the identity of the

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50 443 U.S. 595 (1979). In the majority were Justices Blackmun, Brennan, Marshall, Rehnquist, and Stevens. Dissenting were Justices Powell, Stewart, White, and Chief Justice Burger.

51 443 U.S. at 602-06.
local church is to be determined by some other means as expressed perhaps in the general church charter. The dissent argued that to permit a court narrowly to view only the church documents relating to property ownership permitted it to ignore the fact that the dispute was over ecclesiastical matters and that the general church had decided which faction of the congregation was the local church.

Thus, it is unclear where the Court is on this issue. Jones v. Wolf restated the rule that it is improper to review an ecclesiastical dispute and that deference is required in those cases, but by approving a neutral principles inquiry which in effect can filter out the doctrinal issues underlying a church dispute, the Court seems to have approved at least an indirect limitation of the authority of hierarchical churches.

Establishment of Religion

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." "[The] Court has long held that the First Amendment reaches more than classic, 18th century establishments." However, the Court's reading of the clause has never resulted in the barring of all assistance which aids, however incidentally, a religious institution. Outside this area, the decisions generally have more rigorously prohibited what may be deemed governmental promotion of religious doctrine.

Financial Assistance to Church-Related Institutions.— The Court's first opportunity to rule on the validity of governmental financial assistance to a religiously affiliated institution occurred in 1899, the assistance being a federal grant for the construction of a wing of a hospital owned and operated by a Roman

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52 443 U.S. at 606-10. Because it was unclear whether the state court had applied such a rule and applied it properly, the Court remanded.

53 443 U.S. at 610.

54 The Court indicated that the general church could always expressly provide in its charter or in deeds to property the proper disposition of disputed property. But here the general church had decided which faction was the "true congregation," and this would appear to constitute as definitive a ruling as the Court's suggested alternatives. 443 U.S. at 606.

55 Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools.... In my opinion both avenues were closed by the Constitution." Everson v. Board of Education, 330 U.S. 1, 63 (1947) (Justice Rutledge dissenting).

Catholic order which was to be devoted to the care of the poor. The Court viewed the hospital primarily as a secular institution so chartered by Congress and not as a religious or sectarian body, and thus avoided the constitutional issue. But when the right of local authorities to provide free transportation for children attending parochial schools reached the Court, it adopted a very broad view of the restrictions imposed by the establishment clause. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

But despite this interpretation, the majority sustained the provision of transportation. While recognizing that "it approaches the verge" of the State's constitutional power, still, Justice Black thought, the transportation was a form of "public welfare legislation" which was being extended "to all its citizens without regard to their religious belief." "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." Transportation benefited the

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child, just as did police protection at crossings, fire protection, connections for sewage disposal, public highways and sidewalks. Thus was born the “child benefit” theory.\(^{61}\)

The Court in 1968 relied on the “child benefit” theory to sustain state loans of textbooks to parochial school students.\(^{62}\) Utilizing the secular purpose and effect tests,\(^{63}\) the Court determined that the purpose of the loans was the “furtherance of the educational opportunities available to the young,” while the effect was hardly less secular. “The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.”\(^{64}\)

From these beginnings, the case law on the discretion of state and federal governmental assistance to sectarian elementary and secondary schools as well as other religious entities has multiplied. Through the 1970s, at least, the law became as restrictive in fact as the dicta in the early cases suggested, save for the provision of some assistance to children under the “child benefit” theory. Since that time the Court has gradually adopted a more accommodating approach. It has upheld direct aid programs that have been of only marginal benefit to the religious mission of the recipient elementary and secondary schools, tax benefit and scholarship aid programs where the schools have received the assistance as the result of the independent decisions of the parents or students who initially receive the aid, and in its most recent decisions direct aid programs which substantially benefit the educational function of such schools. Indeed, in its most recent decisions the Court has overturned several of the most restrictive school aid precedents from its earlier jurisprudence. Throughout, the Court has allowed

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greater discretion with respect to aid programs benefiting religiously affiliated colleges and social services agencies.

A secular purpose is the first requirement of the Lemon tripartite test to sustain the validity of legislation touching upon religion, and upon this standard the Justices display little disagreement. There are adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools: preservation of a healthy and safe educational environment for all school children, promotion of pluralism and diversity among public and nonpublic schools, and prevention of overburdening of the public school system that would accompany the financial failure of private schools.65

The primary secular effect and no excessive entanglement aspects of the Lemon test, however, have proven much more divisive. As a consequence, the Court's applications of these tests have not always been consistent, and the rules guiding their application have not always been easy to decipher. Moreover, in its most recent decisions the Court has substantially modified the strictures these tests have previously imposed on public aid to pervasively sectarian entities.

In applying the primary effect and excessive entanglement tests, the Court has drawn a distinction between public aid programs that directly aid sectarian entities and those that do so only indirectly. Aid provided directly, the Court has said, must be limited to secular use lest it have a primary effect of advancing religion. The establishment clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."66 The government may provide direct support to the secular services and programs sponsored by religious entities, but it cannot directly subsidize such organizations' religious activities or proselytizing.67 Thus, the Court has struck down as unconstitutional a program providing grants for the maintenance and repair of sectarian elementary and secondary school facilities, because the grants had no restrictions to prevent their use for such purposes as defraying the costs of building or maintaining

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chapels or classrooms in which religion is taught, and a program subsidizing field trip transportation for children attending sectarian elementary and secondary schools, because field trips are inevitably interwoven with the schools’ educational functions.

But the Court has not imposed a secular use limitation on aid programs that benefit sectarian entities only indirectly, i.e., as the result of decisions by someone other than the government itself. The initial beneficiaries of the public aid must be determined on the basis of religiously neutral criteria, and they must have a genuine choice about whether to use the aid at sectarian or nonsectarian entities. But where those standards have been met, the Court has upheld indirect aid programs even though the sectarian institutions that ultimately benefit may use the aid for religious purposes. Moreover, the Court has gradually broadened its understanding of what constitutes a genuine choice so that now most voucher or tax benefit programs benefiting the parents of children attending sectarian schools seem able to pass constitutional muster. Thus, the Court initially struck down tax benefit and educational voucher programs where the initial beneficiaries were limited to the universe of parents of children attending sectarian schools and where the aid, as a consequence, was virtually certain to go to sectarian schools. But subsequently it has upheld a state program allowing taxpayers to take a deduction from their gross income for educational expenses, including tuition, incurred in sending their children to public or private schools, because the deduction was “available for educational expenses incurred by all parents” and the aid became available to sectarian schools “only as a result of numerous, private choices of individual parents of school-age children.” It has upheld for the same reasons a vocational rehabilitation program that made a grant to a blind person for training at a Bible college for a religious vocation and another program that provided a sign-language interpreter for a deaf student attending a sectarian secondary school. Most recently, it upheld as constitutional a tuition voucher program made available to the parents of children attending failing public schools, notwithstanding the fact that most of the private schools at which the

72 Witters v. Washington Dept of Social Services, 474 U.S. 481 (1986). In this decision the Court also cited as important the factor that the program was not likely to provide “any significant portion of the aid expended under the ... program” for religious education. Id. at 488.
vouchers could be used were sectarian in nature.\(^74\) Whether the parents had a genuine choice among religious and secular options in using the vouchers, the Court said, had to be evaluated on the basis not only of the private schools where the vouchers could be redeemed but also by examining the full range of educational options open to them, including various public school options.

In applying the primary effect and excessive entanglement tests, the Court has also, until recently, drawn a distinction between religious institutions that are pervasively sectarian and those that are not. Organizations that are permeated by a religious purpose and character in all that they do have often been held by the Court to be constitutionally ineligible for direct public aid. Direct aid to religion-dominated institutions inevitably violates the primary effect test, the Court has said, because such aid generally cannot be limited to secular use in such entities and, as a consequence, it has a primary effect of advancing religion.\(^75\) Moreover, any effort to limit the use of public aid by such entities to secular use inevitably falls afoul of the excessive entanglement test, according to the Court, because the risk of diversion of the aid to religious use is so great that it necessitates an intrusive government monitoring.\(^76\) But direct aid to religious entities that are not pervasively sectarian, the Court has held, is constitutionally permissible, because the secular functions of such entities can be distinguished from their religious ones for purposes of public aid and because the risk of diversion of the aid to religious use is attenuated and does not require an intrusive government monitoring. As a practical matter, this distinction has had its most serious consequences for programs providing aid directly to sectarian elementary and secondary schools, because the Court has, until recently, presumed such schools to be pervasively sectarian and direct aid, as a consequence, to be severely limited.\(^77\) The Court has presumed to the contrary with respect to religiously-affiliated colleges, hospitals,

\(^74\) Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).
\(^77\) See cases cited in the preceding two footnotes.
and social services providers; and as a consequence it has found direct aid programs to such entities to be permissible.\(^78\)

In its most recent decisions the Court has modified both the primary effect and excessive entanglement prongs of the *Lemon* test as they apply to aid programs directly benefiting sectarian elementary and secondary schools; and in so doing it has overturned several prior decisions imposing tight constraints on aid to pervasively sectarian institutions. In *Agostini v. Felton*\(^79\) the Court, in a 5–4 decision, abandoned the presumptions that public school teachers giving instruction on the premises of sectarian elementary and secondary schools will be so affected by the religiosity of the environment that they will inculcate religion and that, consequently, an excessively entangling monitoring of their services is constitutionally necessary. In *Mitchell v. Helms*,\(^80\) in turn, it abandoned the presumptions that such schools are so pervasively sectarian that their secular educational functions cannot be differentiated from their religious educational functions and that direct aid to their educational functions, consequently, violates the establishment clause. In reaching these conclusions and upholding the aid programs in question, the Court overturned its prior decision in *Aguilar v. Felton*\(^81\) and parts of its decisions in *Meek v. Pittenger*,\(^82\) *Wolman v. Walter*,\(^83\) and *Grand Rapids School District v. Ball*.\(^84\)

Thus, the Court’s jurisprudence concerning public aid to sectarian organizations has evolved over time, particularly as it concerns public aid to sectarian elementary and secondary schools. That evolution has given some uncertainty to the rules that apply to any given form of aid; and in both *Agostini v. Felton*\(^85\) and *Mitchell v. Helms*\(^86\) the Court left open the possibility of a further

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\(^78\) Bradfield v. Roberts, 175 U.S. 291 (1899) (public subsidy of the construction of a wing of a Catholic hospital on condition that it be used to provide care for the poor upheld); Tilton v. Richardson, 403 U.S. 672 (1971) (program of grants to colleges, including religiously-affiliated ones, for the construction of academic buildings upheld); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976) (program of general purpose grants to colleges in the state, including religiously-affiliated ones, upheld); and Bowen v. Kendrick, 487 U.S. 589 (1988) (program of grants to public and private nonprofit organizations, including religious ones, for the prevention of adolescent pregnancies upheld).


\(^80\) 530 U.S. 793 (2000).


\(^82\) 421 U.S. 349 (1975).


\(^84\) 473 U.S. 373 (1985).

\(^85\) 521 U.S. 203 (1994).

\(^86\) 530 U.S. 793 (2000).
evolution in its thinking. Nonetheless, the cases give substantial guidance.

State aid to church-connected schools was first found to have gone over the “verge”\(^{87}\) in *Lemon v. Kurtzman*.\(^{88}\) Involved were two state statutes, one of which authorized the “purchase” of secular educational services from nonpublic elementary and secondary schools, a form of reimbursement for the cost to religious schools of the teaching of such things as mathematics, modern foreign languages, and physical sciences, and the other of which provided salary supplements to nonpublic school teachers who taught courses similar to those found in public schools, used textbooks approved for use in public schools, and agreed not to teach any classes in religion. Accepting the secular purpose attached to both statutes by the legislature, the Court did not pass on the secular effect test, but found excessive entanglement. This entanglement arose because the legislature “has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.”\(^{89}\) Because the schools concerned were religious schools, because they were under the control of the church hierarchy, because the primary purpose of the schools was the propagation of the faith, a “comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions [on religious utilization of aid] are obeyed and the First Amendment otherwise respected.”\(^{90}\) Moreover, the provision of public aid inevitably will draw religious conflict into the public arena as the contest for adequate funding goes on. Thus, the Court held, both programs were unconstitutional because the state supervision necessary to ensure a secular purpose and a secular effect inevitably involved the state authorities too deeply in the religious affairs of the aided institutions.\(^{91}\)

Two programs of assistance through provision of equipment and services to private, including sectarian, schools were invalidated in *Meek v. Pittenger*.\(^{92}\) First, the loan of instructional mate-

\(^{87}\) *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947).
\(^{88}\) 403 U.S. 602 (1971).
\(^{89}\) 403 U.S. at 619.
\(^{90}\) 403 U.S. at 619.
\(^{91}\) Only Justice White dissented. 403 U.S. at 661. In *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), the Court held that the State could reimburse schools for expenses incurred in reliance on the voided program up to the date the Supreme Court held the statute unconstitutional. *But see* *New York* v. *Cathedral Academy*, 494 U.S. 125 (1977).
rial and equipment directly to qualifying nonpublic elementary and secondary schools was voided as an impermissible extension of assistance of religion. This conclusion was reached on the basis that 75 percent of the qualifying schools were church-related or religiously affiliated educational institutions and the assistance was available without regard to the degree of religious activity of the schools. The materials and equipment loaned were religiously neutral, but the substantial assistance necessarily constituted aid to the sectarian school enterprise as a whole and thus had a primary effect of advancing religion. Second, the provision of auxiliary services—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—by public employees on nonpublic school premises was invalidated because the Court thought the program had to be policed closely to ensure religious neutrality and it saw no way that could be done without impermissible entanglement. The fact that the teachers would, under this program and unlike one of the programs condemned in *Lemon v. Kurtzman*, be public employees rather than employees of the religious schools and possibly under religious discipline was insufficient to permit the State to fail to make certain that religion was not inculcated by subsidized teachers.

The Court in two 1985 cases again struck down programs of public subsidy of instructional services provided on the premises of sectarian schools, and relied on the effects test as well as the entanglement test. In *Grand Rapids School District v. Ball*, the Court invalidated two programs conducted in leased private school classrooms, one taught during the regular school day by public school teachers, and the other taught after regular school hours by part-time “public” teachers otherwise employed as full-time teachers by the sectarian school. Both programs, the Court held, had the effect of promoting religion in three distinct ways. The teachers might be influenced by the “pervasively sectarian nature”

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93 421 U.S. at 362-66. See also Wolman v. Walter, 433 U.S. 229, 248–51 (1977). The Court in Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 661–62 (1980), held that *Meek* did not forbid all aid that benefited religiously pervasive schools to some extent, so long as it was conferred in such a way as to prevent any appreciable risk of being used to transmit or teach religious views. See also Wolman v. Walter, 433 U.S. at 262 (Justice Powell concurring in part and dissenting in part).


96 The vote on this “Shared Time” program was 5–4, the opinion of the Court by Justice Brennan being joined by Justices Marshall, Blackmun, Powell, and Stevens. The Chief Justice, and Justices White, Rehnquist, and O'Connor dissented.

97 The vote on this “Community Education” program was 7–2, Chief Justice Burger and Justice O'Connor concurring with the “Shared Time” majority.
of the environment and might “subtly or overtly indoctrinate the students in particular religious tenets at public expense”; use of the parochial school classrooms “threatens to convey a message of state support for religion” through “the symbolic union of government and religion in one sectarian enterprise”; and “the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.” In *Aguilar v. Felton*, the Court invalidated a program under which public school employees provided instructional services on parochial school premises to educationally deprived children. The program differed from those at issue in *Grand Rapids* because the classes were closely monitored for religious content. This “pervasive monitoring” did not save the program, however, because, by requiring close cooperation and day-to-day contact between public and secular authorities, the monitoring “infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement.”

A state program to reimburse nonpublic schools for a variety of services mandated by state law was voided because the statute did not distinguish between secular and potentially religious services the costs of which would be reimbursed. Similarly, a program of direct monetary grants to nonpublic schools to be used for the maintenance of school facilities and equipment failed to survive the primary effect test because it did not restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes and because “within the context of these religion-oriented institutions” the Court could not see how such restrictions could effectively be imposed. But a plan of direct monetary grants to nonpublic schools to reimburse them for the costs of state-mandated record-keeping and of administering and grading state-prepared tests and which contained safeguards against reli-

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98 473 U.S. at 397.
99 473 U.S. 402 (1985). This was another 5–4 decision, with Justice Brennan’s opinion of the Court being joined by Justices Marshall, Blackmun, Powell, and Stevens, and with Chief Justice Burger and Justices White, Rehnquist, and O’Connor dissenting.
100 473 U.S. at 413.
101 *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973). Justice White dissented, id. at 482. Among the services reimbursed was the cost of preparing and grading examinations in the nonpublic schools by the teachers there. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), the Court struck down a new statutory program entitling private schools to obtain reimbursement for expenses incurred during the school year in which the prior program was voided in *Levitt*.
religious utilization of the tests was sustained even though the Court recognized the incidental benefit to the schools.

The "child benefit" theory, under which it is permissible for government to render ideologically neutral assistance and services to pupils in sectarian schools without being deemed to be aiding the religious mission of the schools, has not proved easy to apply. A number of different forms of assistance to students were at issue in Wolman v. Walter. The Court approved the following: standardized tests and scoring services used in the public schools, with private school personnel not involved in the test drafting and scoring; speech, hearing, and psychological diagnostic services provided in the private schools by public employees; and therapeutic, guidance, and remedial services for students provided off the premises of the private schools. In all these, the Court thought the program contained adequate built-in protections against religious utilization. But while the Court adhered to its ruling permitting the States to loan secular textbooks used in the public schools to pupils attending religious schools, it declined to extend the precedent to permit the loan to pupils or their parents of instructional materials and equipment, such as projectors, tape recorders, maps, globes and science kits, although they were identical to those used in the

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103 Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980). Justices Blackmun, Brennan, Marshall, and Stevens dissented. Id. at 662, 671. The dissenters thought that the authorization of direct reimbursement grants was distinguishable from previously approved plans that had merely relieved the private schools of the costs of preparing and grading state-prepared tests. See Wolman v. Walter, 433 U.S. 229, 238–41 (1977).

104 433 U.S. 229 (1977). The Court deemed the situation in which these services were performed and the nature of the services to occasion little danger of aiding religious functions and thus requiring little supervision that would give rise to entanglement. All the services fell "within that class of general welfare services for children that may be provided by the States regardless of the incidental benefit that accrues to church-related schools." Id. at 243, quoting Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975). Justice Brennan would have voided all the programs because, considered as a whole, the amount of assistance was so large as to constitute assistance to the religious mission of the schools. 433 U.S. at 255. Justice Marshall would have approved only the diagnostic services, id. at 256, while Justice Stevens would generally approve closely administered public health services. Id. at 264.

105 Meek v. Pittenger, 421 U.S. 349, 359–72 (1975); Wolman v. Walter, 433 U.S. 229, 236–38 (1977). Allen was explained as resting on "the unique presumption" that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." There was "a tension" between Nyquist, Meek, and Wolman, on the one hand, and Allen on the other; while Allen was to be followed "as a matter of stare decisis," the "presumption of neutrality" embodied in Allen would not be extended to other similar assistance. Id. at 251 n.18. A more recent Court majority revived the Allen presumption, however, applying it to uphold tax deductions for tuition and other school expenses in Mueller v. Allen, 463 U.S. 388 (1983). Justice Rehnquist wrote the Court's opinion, joined by Justices White, Powell, and O'Connor, and by Chief Justice Burger.
public schools. Nor was a State permitted to expend funds to pay the costs to religious schools of field trip transportation such as was provided to public school students.

The Court’s more recent decisions, however, have rejected the reasoning and overturned the results of several of these decisions. In two rulings the Court reversed course with respect to the constitutionality of public school personnel providing educational services on the premises of pervasively sectarian schools. First, in Zobrest v. Catalina Foothills School District the Court held the public subsidy of a sign-language interpreter for a deaf student attending a parochial school to create no primary effect or entanglement problems. The payment did not relieve the school of an expense that it would otherwise have borne, the Court stated, and the interpreter had no role in selecting or editing the content of any of the lessons. Reviving the child benefit theory of its earlier cases, the Court said that “[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as ‘handicapped’ under the IDEA, without regard to the ‘sectarian-nonsectarian, or public-nonpublic nature’ of the school the child attends.”

Secondly, and more pointedly, the Court in Agostini v. Felton overturned both the result and the reasoning of its decision in Aguilar v. Felton striking down the Title I program as administered in New York City as well as the analogous parts of its decisions in Meek v. Pittenger and Grand Rapids School District v. Ball. The assumptions on which those decisions had rested, the Court explicitly stated, had been “undermined” by its more recent decisions. Decisions such as Zobrest and Witters v. Washington Department of Social Services, it said, had repudiated the notions that the placement of a public employee in a sectarian school creates an “impermissible symbolic link” between government and religion, that “all government aid that directly aids the educational function of religious schools” is constitutionally forbidden, that public teachers in a sectarian school necessarily pose a serious risk of inculcating religion, and that “pervasive monitoring of [such] teachers is required.” The proper criterion under the pri-
In Agostini the Court nominally eliminated entanglement as a separate prong of the Lemon test. “[T]he factors we use to assess whether an entanglement is ‘excessive,’” the Court stated, “are similar to the factors we use to examine ‘effect.’” “Thus,” it concluded, “it is simplest to recognize why entanglement is significant and treat it as we did in Walz as an aspect of the inquiry into a statute’s effect.” Agostini v. Felton, supra, at 232, 233.

Justice Souter, joined by Justices Stevens and Ginsburg, dissented from the Court’s ruling, contending that the establishment clause mandates a “flat ban on [the] subsidization” of religion (521 U.S. at 243) and that the Court’s contention that recent cases had undermined the reasoning of Aguilair as well as the portion of Ball addressing Grand Rapids’ Shared Time program, are no longer good law.”

Most recently, in Mitchell v. Helms the Court abandoned the presumptions that religious elementary and secondary schools are so pervasively sectarian that they are constitutionally ineligible to participate in public aid programs directly benefiting their educational functions and that direct aid to such institutions must be subject to an intrusive and constitutionally fatal monitoring. At issue in the case was a federal program providing funds to local educational agencies to provide instructional materials and equipment such as computer hardware and software, library books, movie projectors, television sets, VCRs, laboratory equipment, maps, and cassette recordings to public and private elementary and secondary schools. Virtually identical programs had previously been held unconstitutional by the Court in Meek v. Pittenger and Wolman v. Walter. But in this case the Court overturned those decisions and held the program to be constitutional.

The Justices could agree on no majority opinion in Mitchell but instead joined in three different opinions. The opinions of Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, and of Justice O’Connor, joined by Justice Breyer, found the program constitutional. They agreed that to pass muster under the primary effect prong of the Lemon test direct public aid has to be secular in nature and distributed on the basis of religiously neutral criteria. They also agreed, in contrast to past rulings, that sectarian elementary and secondary schools should not be deemed constitutionally ineligible for direct aid on the grounds their secular neutrality, i.e., whether “aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a non-discriminatory basis.” Finding the Title I program to meet that test, the Court concluded that “accordingly, we must acknowledge that Aguilair, as well as the portion of Ball addressing Grand Rapids’ Shared Time program, are no longer good law.”

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educational functions are “inextricably intertwined” with their religious educational functions, i.e., that they are pervasively sectarian. But their rationales for the program’s constitutionality then diverged. For Justice Thomas it was sufficient that the instructional materials were secular in nature and were distributed according to neutral criteria. It made no difference whether the schools used the aid for purposes of religious indoctrination or not. But that was not sufficient for Justice O’Connor. She adhered to the view that direct public aid has to be limited to secular use by the recipient institutions. She further asserted that a limitation to secular use could be honored by the teachers in the sectarian schools and that the risk that the aid would be used for religious purposes was not so great as to require an intrusive and entangling government monitoring.119

Justice Souter, joined by Justices Stevens and Ginsburg, dissented on the grounds the establishment clause bars “aid supporting a sectarian school’s religious exercise or the discharge of its religious mission.” Adhering to the “substantive principle of no aid” first articulated in the Everson case, he contended that direct aid to pervasively sectarian institutions inevitably results in the diversion of the aid for purposes of religious indoctrination. He further argued that the aid in this case had been so diverted.

As the opinion upholding the program’s constitutionality on the narrowest grounds, Justice O’Connor’s opinion provides the most current guidance on the standards governing the constitutionality of aid programs directly benefiting sectarian elementary and secondary schools.

The Court has similarly loosened the constitutional restrictions on public aid programs indirectly benefiting sectarian elementary and secondary schools. Initially, the Court in 1973 struck down substantially similar programs from New York and Pennsylvania providing for tuition reimbursement to parents of religious school children. New York’s program provided reimbursements out of general tax revenues for tuition paid by low-income parents to send their children to nonpublic elementary and secondary schools; the reimbursements were of fixed amounts but could not exceed 50 percent of actual tuition paid. Pennsylvania provided fixed-sum reimbursement for parents who sent their children to nonpublic elemen-

119 Justice O’Connor also cited several other factors as “sufficient” to ensure the program’s constitutionality, without saying whether they were “constitutionally necessary” – that the aid supplemented rather than supplanted the school’s educational functions, that no funds ever reached the coffers of the sectarian schools, and that there were various administrative regulations in place providing for some degree of monitoring of the schools’ use of the aid.
tary and secondary schools, so long as the amount paid did not exceed actual tuition, the funds to be derived from cigarette tax revenues. Both programs, it was held, constituted public financial assistance to sectarian institutions with no attempt to segregate the benefits so that religion was not advanced.\footnote{Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–798 (1973) (New York); Sloan v. Lemon, 413 U.S. 825 (1973) (Pennsylvania). The Court distinguished Everson and Allen on the grounds that in those cases the aid was given to all children and their parents and that the aid was in any event religiously neutral, so that any assistance to religion was purely incidental. 413 U.S. at 781–82. Chief Justice Burger thought that Everson and Allen were controlling. Id. at 798.}

New York had also enacted a separate program providing tax relief for low-income parents not qualifying for the tuition reimbursements; here relief was in the form of a deduction or credit bearing no relationship to the amounts of tuition paid, but keyed instead to adjusted gross income. This too was invalidated in Nyquist. “In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition [reimbursement] grant.... The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays’ dissenting statement below that ‘[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.’”\footnote{Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–94 (1973). The quoted paragraph is at 790–91.} Some difficulty, however, was experienced in distinguishing this program from the tax exemption approved in Walz.\footnote{212 Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–94 (1973). The quoted paragraph is at 790–91.}

Two subsidiary arguments were rejected by the Court in these cases. First, it had been argued that the tuition reimbursement program promoted the free exercise of religion in that it permitted low-income parents desiring to send their children to school in accordance with their religious views to do so. The Court agreed that “tension inevitably exists between the Free Exercise and the Establishment Clauses,” but explained that the tension is ordinarily resolved through application of the “neutrality” principle: government may neither advance nor inhibit religion. The tuition program ines-
capably advanced religion and thereby violated this principle. In the Pennsylvania case, it was argued that because the program reimbursed parents who sent their children to nonsectarian schools as well as to sectarian ones, the portion respecting the former parents was valid and “parents of children who attended sectarian schools are entitled to the same aid as a matter of equal protection. The argument is thoroughly spurious.... The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution.”

The limits of the Nyquist holding were clarified in 1983. In Mueller v. Allen, the Court upheld a Minnesota deduction from state income tax available to parents of elementary and secondary school children for expenses incurred in providing tuition, transportation, textbooks, and various other school supplies. Because the Minnesota deduction was available to parents of public and private schoolchildren alike, the Court termed it “vitaly different from the scheme struck down in Nyquist,” and more similar to the benefits upheld in Everson and Allen as available to all schoolchildren. The Court declined to look behind the “facial neutrality” of the law and consider empirical evidence of its actual impact, citing a need for “certainty” and the lack of “principled standards” by which to evaluate such evidence. Also important to the Court’s refusal to


124 Sloan v. Lemon, 413 U.S. 825, 833–35 (1973). In any event, the Court sustained the district court’s refusal to sever the program and save that portion as to children attending non-sectarian schools on the basis that since so large a portion of the children benefitted attended religious schools it could not be assumed the legislature would have itself enacted such a limited program.

In Wheeler v. Barrera, 417 U.S. 402 (1974), the Court held that States receiving federal educational funds were required by federal law to provide “comparable” but not equal services to both public and private school students within the restraints imposed by state constitutional restrictions on aid to religious schools. In the absence of specific plans, the Court declined to review First Amendment limitations on such services.


126 463 U.S. at 398. Nyquist had reserved the question of “whether the significantly religious character of the statute’s beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.” 413 U.S. at 782–83 n.38.

127 463 U.S. at 401. Justice Marshall’s dissenting opinion, joined by Justices Brennan, Blackmun, and Stevens, argued that the tuition component of the deduction, unavailable to parents of most public schoolchildren, was by far the most significant, and that the deduction as a whole “was little more that a subsidy of tuition masquerading as a subsidy of general educational expenses.” 463 U.S. at 408–09. Cf. Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985), where the Court emphasized that 40 of 41 nonpublic schools at which publicly funded programs operated were sectarian in nature; and Widmar v. Vincent, 454 U.S. 263, 275 (1981), holding that a college’s open forum policy had no primary effect of advancing religion “at
consider the alleged disproportionate benefits to parents of parochial schools was the assertion that, “whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits … provided to the State and all taxpayers by parents sending their children to parochial schools.”

A second factor important in Mueller, present but not controlling in Nyquist, was that the financial aid was provided to the parents of schoolchildren rather than to the school, and thus in the Court’s view was “attenuated” rather than direct; since aid was “available only as a result of decisions of individual parents,” there was no “imprimatur of state approval.” The Court noted that, with the exception of Nyquist, “all … of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves.” Thus Mueller seemingly stands for the proposition that state subsidies of tuition expenses at sectarian schools are permissible if contained in a facially neutral scheme providing benefits, at least nominally, to parents of public and private schoolchildren alike.

The Court confirmed this proposition three years later in Witters v. Washington Department of Social Services for the Blind. At issue was the constitutionality of a grant made by a state vocational rehabilitation program to a blind person who wanted to use the grant to attend a religious school and train for a religious ministry. Again, the Court emphasized that in the vocational rehabilitation program “any aid provided is ‘made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited’” and “ultimately flows to religious institutions … only as a result of the genuinely independent and private choices of aid recipients.” The program, the Court stated, did not have the purpose of providing support for nonpublic, sectarian institutions; created no financial incentive for students to undertake religious education; and gave recipients “full opportunity to expend vocational rehabilitation aid on wholly secular education.” “In this case,” the Court found, “the fact that the aid goes to individuals means that the decision to support religious education is made by the individual, not by the State.” Finally, the Court concluded, there was no evidence that “any significant por-

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\(^{128}\) 463 U.S. at 399.
\(^{129}\) 463 U.S. at 402.
\(^{130}\) 474 U.S. 481 (1986).
tion of the aid expended under the Washington program as a whole will end up flowing to religious education.”

In *Zobrest v. Catalina Foothills School District* 131 the Court reaffirmed this line of reasoning. The case involved the provision of a sign language interpreter pursuant to the Individuals with Disabilities Act (IDEA) 132 to a deaf high school student who wanted to attend a Catholic high school. In upholding the assistance as constitutional, the Court emphasized that “the service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as ‘handicapped’ under the IDEA, without regard to the ‘sectarian-nonsectarian, or public-nonpublic nature’ of the school the child attends.” Thus, it held that the presence of the interpreter in the sectarian school resulted not from a decision of the state but from the “private decision of individual parents.”

Finally, the Court in *Zelman v. Simmons-Harris* 133 interpreted the genuine private choice criterion in a manner that seems to render most voucher programs constitutional. At issue in the case was an Ohio program providing vouchers to the parents of children in failing public schools in Cleveland for use at private schools in the city. The Court upheld the program notwithstanding that, as in *Nyquist*, most of the schools at which the vouchers could be redeemed were religious and most of the voucher students attended such schools. But the Court found that the program still involved “true private choice.” “Cleveland schoolchildren,” the Court said, “enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating all of the options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.” 134

In contrast to its rulings concerning direct aid to sectarian elementary and secondary schools, the Court, although closely divided

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132 20 U.S.C. 1400 et seq.
133 122 S.Ct. 2460 (2002).
134 122 S.Ct. at 2460, 2472.
at times, has from the start approved quite extensive public assistance to institutions of higher learning. On the same day that it first struck down an assistance program for elementary and secondary private schools, the Court sustained construction grants to church-related colleges and universities.\textsuperscript{135} The specific grants in question were for construction of two library buildings, a science building, a music, drama, and arts building, and a language laboratory. The law prohibited the financing of any facility for, or the use of any federally-financed building for, religious purposes, although the restriction on use ran for only twenty years.\textsuperscript{136} The Court found that the purpose and effect of the grants were secular and that, unlike elementary and secondary schools, religious colleges were not so devoted to inculcating religion.\textsuperscript{137} The supervision required to ensure conformance with the non-religious-use requirement was found not to constitute “excessive entanglement,” inasmuch as a building is nonideological in character, unlike teachers, and inasmuch as the construction grants were onetime things and did not continue as did the state programs.

Also sustained was a South Carolina program under which a state authority would issue revenue bonds for construction projects on campuses of private colleges and universities. The Court did not decide whether this special form of assistance could be otherwise sustained, because it concluded that religion was neither advanced nor inhibited, nor was there any impermissible public entanglement. “Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.”\textsuperscript{138} The colleges involved, though they were affiliated with religious institutions, were not shown to be so pervasively religious—no religious test existed for faculty or student body, a substantial part of the student body was not of the religion of the affiliation—and state

\textsuperscript{135} Tilton v. Richardson, 403 U.S. 672 (1971). This was a 5–4 decision.

\textsuperscript{136} Because such buildings would still have substantial value after twenty years, the Court found that a religious use then would be an unconstitutional aid to religion, and it struck down the period of limitation. 403 U.S. at 682-84.

\textsuperscript{137} It was no doubt true, Chief Justice Burger conceded, that construction grants to religious-related colleges did in some measure benefit religion, since the grants freed money that the colleges would be required to spend on the facilities for which the grants were made. Bus transportation, textbooks, and tax exemptions similarly benefited religion and had been upheld. “The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.” 403 U.S. at 679.

\textsuperscript{138} Hunt v. McNair, 413 U.S. 734, 743 (1973).
law precluded the use of any state-financed project for religious activities.\footnote{439}{139 U.S. at 739-40, 741-45. Justices Brennan, Douglas, and Marshall, dissenting, rejected the distinction between elementary and secondary education and higher education and foresaw a greater danger of entanglement than did the Court. Id. at 749.}

The kind of assistance permitted by \textit{Tilton} and by \textit{Hunt v. McNair} seems to have been broadened when the Court sustained a Maryland program of annual subsidies to qualifying private institutions of higher education; the grants were noncategorical but could not be used for sectarian purposes, a limitation to be policed by the administering agency.\footnote{440}{140 Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976). Justice Blackmun's plurality opinion was joined only by Chief Justice Burger and Justice Powell. Justices White and Rehnquist concurred on the basis of secular purpose and no primary religious benefit, rejecting entanglement. Id. at 767. Justice Brennan, joined by Justice Marshall, dissented, and Justices Stewart and Stevens each dissented separately. Id. at 770, 772, 775.} The plurality opinion found a secular purpose; found that the limitation of funding to secular activities was meaningful,\footnote{441}{141 426 U.S. at 755. In some of the schools mandatory religion courses were taught, the significant factor in Justice Stewart's view, id. at 773, but outweighed by other factors in the plurality's view.} since the religiously affiliated institutions were not so pervasively sectarian that secular activities could not be separated from sectarian ones; and determined that excessive entanglement was improbable, given the fact that aided institutions were not pervasively sectarian. The annual nature of the subsidy was recognized as posing the danger of political entanglement, but the plurality thought that the character of the aided institutions—"capable of separating secular and religious functions"—was more important.\footnote{442}{142 426 U.S. at 755-66. The plurality also relied on the facts that the student body was not local but diverse, and that large numbers of non-religioulsly affiliated institutions received aid. A still further broadening of governmental power to extend aid affecting religious institutions of higher education occurred in several subsequent decisions. First, the Court summarily affirmed two lower-court decisions upholding programs of assistance—scholarships and tuitions grants—to students at college and university as well as vocational programs in both public and private—including religious—institutions; one of the programs contained no secular use restriction at all and in the other one the restriction seemed somewhat pro forma. Smith v. Board of Governors of Univ. of North Carolina, 434 U.S. 803 (1977), affg 429 F. Supp. 871 (W.D.N.C. 1977); Americans United v. Blanton, 434 U.S. 803 (1977), affg 433 F. Supp. 97 (M.D. Tenn. 1977). Second, in Witters v. Washington Dept of Services for the Blind, 474 U.S. 481 (1986), the Court upheld use of a vocational rehabilitation scholarship at a religious college, emphasizing that the religious institution received the public money as a result of the "genuinely independent and private choices of the aid recipients," and not as the result of any decision by the State to sponsor or subsidize religion. Third, in Rosenberger v. The Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), the Court held that a public university cannot exclude a student religious publication from a program subsidizing the printing costs of all other student publications. The Court said...}
Finally, in the only case since *Bradfield v. Roberts* 143 to challenge the constitutionality of public aid to non-educational religious institutions, the Court in *Bowen v. Kendrick* 144 by a 5–4 vote upheld the Adolescent Family Life Act (AFLA) 145 against facial challenge. The Act permits direct grants to religious organizations for provision of health care and for counseling of adolescents on matters of pregnancy prevention and abortion alternatives, and requires grantees to involve other community groups, including religious organizations, in delivery of services. All of the Justices agreed that AFLA had valid secular purposes; their disagreement related to application of the effects and entanglement tests. The Court relied on analogy to the higher education cases rather than the cases involving aid to elementary and secondary schools. 146 The case presented conflicting factual considerations. On the one hand, the class of beneficiaries was broad, with religious groups not predominant among the wide range of eligible community organizations. On the other hand, there were analogies to the parochial school aid cases: secular and religious teachings might easily be mixed, and the age of the targeted group (adolescents) suggested susceptibility. The Court resolved these conflicts by holding that AFLA is facially valid, there being insufficient indication that a significant proportion of the AFLA funds would be disbursed to “pervasively sectarian” institutions, but by remanding to the district court to determine whether particular grants to pervasively sectarian institutions were invalid. The Court emphasized in both parts of its opinion that the fact that “views espoused [during counseling] on matters of premarital sex, abortion, and the like happen to coincide with the religious views of the AFLA grantee would not be sufficient to show [an Establishment Clause violation].” 147

At the time it was rendered, *Bowen* differed from the Court’s decisions concerning direct aid to sectarian elementary and secondary schools primarily in that it refused to presume that religiously affiliated social welfare entities are pervasively sectarian. That difference had the effect of giving greater constitutional latitude to the fund was essentially a religiously neutral subsidy promoting private student speech without regard to content.

143 175 U.S. 291 (1899).
144 487 U.S. 589 (1988). Chief Justice Rehnquist wrote the Court’s opinion, and was joined by Justices White, O’Connor, Scalia, and Kennedy; in addition, Justice O’Connor and Justice Kennedy, joined by Justice Scalia, filed separate concurring opinions. Justice Blackmun’s dissenting opinion was joined by Justices Brennan, Marshall, and Stevens.
146 The Court also noted that the 1899 case of *Bradfield v. Roberts* had established that religious organizations may receive direct aid for support of secular social-welfare cases.
147 487 U.S. at 621.
tude to public aid to such entities than was afforded direct aid to religious elementary and secondary schools. As noted above, the Court in its recent decisions has now eliminated the presumption that such religious schools are pervasively sectarian and has extended the same constitutional latitude to aid programs benefiting such schools as it gives to aid programs benefiting religiously affiliated social welfare programs.

**Governmental Encouragement of Religion in Public Schools: Released Time.**—Introduction of religious education into the public schools, one of Justice Rutledge’s “great drives,” has also occasioned a substantial amount of litigation in the Court. In its first two encounters, the Court voided one program and upheld another, in which the similarities were at least as significant as the differences. Both cases involved “released time” programs, the establishment of a period during which pupils in public schools were to be allowed, upon parental request, to receive religious instruction. In the first, the religious classes were conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval or supervision of the superintendent of schools. Attendance reports were kept and reported to the school authorities in the same way as for other classes, and pupils not attending the religious instruction classes were required to continue their regular studies. “The operation of the State’s compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . .”

The case was also noteworthy because of the Court’s express rejection of the contention “that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions.”

Four years later, the Court upheld a different released-time program. In this one, schools released pupils during school hours, on written request of their parents, so that they might leave

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148 Everson v. Board of Education, 330 U.S. 1, 63 (Justice Rutledge dissenting) (quoted supra).
150 333 U.S. at 211.
the school building and go to religious centers for religious instruction or devotional exercises. The churches reported to the schools the names of children released from the public schools who did not report for religious instruction; children not released remained in the classrooms for regular studies. The Court found the differences between this program and the program struck down in *McCollum* to be constitutionally significant. Unlike *McCollum*, where “the classrooms were used for religious instruction and force of the public school was used to promote that instruction,” religious instruction was conducted off school premises and “the public schools do no more than accommodate their schedules.”

“*We are a religious people whose institutions presuppose a Supreme Being,*” Justice Douglas wrote for the Court. “When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.”

**Governmental Encouragement of Religion in Public Schools: Prayers and Bible Reading.**—Upon recommendation of the state governing board, a local New York school required each class to begin each school day by reading aloud the following prayer in the presence of the teacher: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country.” Students who wished to do so could remain silent or leave the room. Said the Court: “*We think that by using its public school system to encourage recitation of the Regents’ prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer is a religious activity.... W*e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by*

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152 343 U.S. at 315. See also Abington School Dist. v. Schempp, 374 U.S. 203, 261–63 (1963) (Justice Brennan concurring) (suggesting that the important distinction was that “the *McCollum* program placed the religious instruction in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not”).
Neither the fact that the prayer may be nondenominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause. The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.  

Following the prayer decision came two cases in which parents and their school age children challenged the validity under the Establishment Clause of requirements that each school day begin with readings of selections from the Bible. Scripture reading, like prayers, the Court found, was a religious exercise. “Given that finding the exercises and the law requiring them are in violation of the Establishment Clause.” Rejected were contentions by the State that the object of the programs was the promotion of secular purposes, such as the expounding of moral values, the contradiction of the materialistic trends of the times, the perpetuation of traditional institutions, and the teaching of literature and that to forbid the particular exercises was to choose a “religion of secularism” in their place. Though the “place of religion in our society is an exalted one,” the Establishment Clause, the Court continued, prescribed government.”  


154 370 U.S. at 430. Justice Black for the Court rejected the idea that the prohibition of religious services in public schools evidenced “a hostility toward religion or toward prayer.” Id. at 434. Rather, such an application of the First Amendment protected religion from the coercive hand of government and government from control by a religious sect. Dissenting alone, Justice Stewart could not “see how an ‘official religion’ is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.” Id. at 444, 445.

155 Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963). “[T]he States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord’s Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in Zorach v. Clauson.” Id.

156 374 U.S. at 223-24. The Court thought the exercises were clearly religious.

157 374 U.S. at 225. “We agree of course that the State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” Zorach v. Clauson, 343 U.S. at 314. “We do not agree, however, that this decision in any sense has that effect.”
that in “the relationship between man and religion,” the State must be “firmly committed to a position of neutrality.”

In Wallace v. Jaffree, the Court held invalid an Alabama statute authorizing a 1-minute period of silence in all public schools “for meditation or prayer.” Because the only evidence in the record indicated that the words “or prayer” had been added to the existing statute by amendment for the sole purpose of returning voluntary prayer to the public schools, the Court found that the first prong of the Lemon test had been violated, i.e. that the statute was invalid as being entirely motivated by a purpose of advancing religion. The Court characterized the legislative intent to return prayer to the public schools as “quite different from merely protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence during the schoolday,” and Justice Stewart again dissented alone, feeling that the claims presented were essentially free exercise contentions which were not supported by proof of coercion or of punitive official action for nonparticipation.

While numerous efforts were made over the years to overturn these cases, through constitutional amendment and through limitations on the Court’s jurisdiction, the Supreme Court itself has had no occasion to review the area again. But see Stone v. Graham, 449 U.S. 39 (1980) (summarily reversing state court and invalidating statute requiring the posting of the Ten Commandments, purchased with private contributions, on the wall of each public classroom, on the grounds the Ten Commandments are “undeniably a sacred text” and the “pre-eminent purpose” of the posting requirement was “plainly religious in nature”).

158 374 U.S. at 226. Justice Brennan contributed a lengthy concurrence in which he attempted to rationalize the decisions of the Court on the religion clauses and to delineate the principles applicable. He concluded that what the establishment clause foreclosed “are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.” Id. at 230, 295. Justice Stewart again dissented alone, feeling that the claims presented were essentially free exercise contentions which were not supported by proof of coercion or of punitive official action for nonparticipation.

160 472 U.S. at 59.

161 Justice O’Connor’s concurring opinion is notable for its effort to synthesize and refine the Court’s Establishment and Free Exercise tests (see also the Justice’s concurring opinion in Lynch v. Donnelly), and Justice Rehnquist’s dissent for its effort to redirect Establishment Clause analysis by abandoning the tripartite test, discarding any requirement that government be neutral between religion and “irreligion,” and confining the scope to a prohibition on establishing a national church or otherwise favoring one religious group over another.

[to be] pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school.” State officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of nonsectarian prayers. The Court, in an opinion by Justice Kennedy, viewed this state participation as coercive in the elementary and secondary school setting. The state “in effect required participation in a religious exercise,” since the option of not attending “one of life’s most significant occasions” was no real choice. “At a minimum,” the Court concluded, the Establishment Clause “guarantees that government may not coerce anyone to support or participate in religion or its exercise.”

In Santa Fe Independent School District v. Doe the Court held a school district’s policy permitting high school students to vote on whether to have an “invocation and/or prayer” delivered prior to home football games by a student elected for that purpose to violate the establishment clause. It found the policy to violate each one of the tests it has formulated for establishment clause cases. The preference given for an “invocation” in the text of the school district’s policy, the long history of pre-game prayer led by a student “chaplain” in the school district, and the widespread perception that “the policy is about prayer,” the Court said, made clear that its purpose was not secular but was to preserve a popular state-sponsored religious practice in violation of the first prong of the Lemon test. Moreover, it said, the policy violated the coercion test by forcing unwilling students into participating in a religious exercise. Some students – the cheerleaders, the band, football players – had to attend, it noted, and others were compelled to do so by peer pressure. “The constitutional command will not permit the District ‘to exact religious conformity from a student as the price’ of joining her classmates at a varsity football game,” the Court held. Finally, it said, the speech sanctioned by the policy was not private speech but government-sponsored speech that would be perceived as a government endorsement of religion. The long history of pre-game prayer, the bias toward religion in the policy itself, the fact that the message would be “delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property” and over the school’s public address.
system, the Court asserted, all meant that the speech was not genuine private speech but would be perceived as “stamped with the school’s seal of approval.” The Court concluded that “the policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.”

**Governmental Encouragement of Religion in Public Schools: Curriculum Restriction.**—In *Epperson v. Arkansas*, the Court struck down a state statute which made it unlawful for any teacher in any state-supported educational institution “to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,” or “to adopt or use in any such institution a textbook that teaches” this theory. Agreeing that control of the curriculum of the public schools was largely in the control of local officials, the Court nonetheless held that the motivation of the statute was a fundamentalist belief in the literal reading of the Book of Genesis and that this motivation and result required the voiding of the law. “The law’s effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First . . . Amendment to the Constitution.”

Similarly invalidated as having the improper purpose of advancing religion was a Louisiana statute mandating balanced treatment of “creation-science” and “evolution-science” in the public schools. “The preeminent purpose of the Louisiana legislature,” the Court found in *Edwards v. Aguillard*, “was clearly to advance the religious viewpoint that a supernatural being created humankind.” The Court viewed as a “sham” the stated purpose of protecting academic freedom, and concluded instead that the legislature’s purpose was to narrow the science curriculum in order to discredit evolution “by counterbalancing its teaching at every turn with the teaching of creation science.”

**Access of Religious Groups to Public Property.**—Although government may not promote religion through its educational facilities, it may not bar student religious groups from meeting on public school property if it makes those facilities available to non-

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165 393 U.S. 97 (1968).
166 393 U.S. at 109.
168 482 U.S. at 589. The Court’s conclusion was premised on its finding that “the term ‘creation science,’ as used by the legislature . . . embodies the religious belief that a supernatural creator was responsible for the creation of humankind.” Id. at 592.
religious student groups. In the case of *Widmar v. Vincent*\(^ {169}\) the Court held that allowing student religious groups equal access to a public college’s facilities would further a secular purpose, would not constitute an impermissible benefit to religion, and would pose little hazard of entanglement. Subsequently, the Court has held that these principles apply to public secondary schools as well as to institutions of higher learning. In *Westside Community Board of Education v. Mergens*\(^ {170}\) in 1990 the Court upheld application of the Equal Access Act\(^ {171}\) to prevent a secondary school from denying access to school premises to a student religious club while granting access to such other “noncurriculum” related student groups as a scuba diving club, a chess club, and a service club.\(^ {172}\) Justice O’Connor stated in a plurality opinion that “there is a crucial difference between government speech endorsing religion and private speech endorsing religion. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.”\(^ {173}\)

Similarly, public schools may not rely on the Establishment Clause as grounds to discriminate against religious groups in after-hours use of school property otherwise available for non-religious social, civic, and recreational purposes. In *Lamb’s Chapel v. Center Moriches School District*,\(^ {174}\) the Court held that a school district could not, consistent with the free speech clause, refuse to allow a religious group to use school facilities to show a film series on family life when the facilities were otherwise available for community use. “It discriminates on the basis of viewpoint,” the Court ruled, “to permit school property to be used for the presentation of all

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\(^{170}\) 496 U.S. 226 (1990). The Court had noted in *Widmar* that university students “are less impressionable than younger students and should be able to appreciate that the University’s policy is one of neutrality toward religion,” 454 U.S. at 274 n.14. The *Mergens* plurality ignored this distinction, suggesting that secondary school students are also able to recognize that a school policy allowing student religious groups to meet in school facilities is one of neutrality toward religion. 496 U.S. at 252.

\(^{171}\) Pub. L. 98–377, title VIII, 98 Stat. 1302 (1984); 20 U.S.C. §§ 4071–74. The Act requires secondary schools that receive federal financial assistance to allow student religious groups to meet in school facilities during noncurricular time to the same extent as other student groups and had been enacted by Congress in 1984 to apply the *Widmar* principles to the secondary school setting.

\(^{172}\) There was no opinion of the Court on Establishment Clause issues, a plurality of four led by Justice O’Connor applying the three-part *Lemon* test, and concurring Justices Kennedy and Scalia proposing a less stringent test under which “neutral” accommodations of religion would be permissible as long as they do not in effect establish a state religion, and as long as there is no coercion of students to participate in a religious activity.

\(^{173}\) 496 U.S. at 242.

views about family issues and child-rearing except those dealing with the subject matter from a religious viewpoint.” In response to the school district’s claim that the establishment clause required it to deny use of its facilities to a religious group, the Court said that there was “no realistic danger” in this instance that “the community would think that the District was endorsing religion or any particular creed” and that such permission would satisfy the requirements of the Lemon test. Similarly, in Good News Club v. Milford Central School, the Court held the free speech clause to be violated by a school policy that barred a religious children’s club from meeting on school premises after school. Given that other groups teaching morals and character development to young children were allowed to use the school’s facilities, the exclusion, the Court said, “constitutes unconstitutional viewpoint discrimination.” Moreover, it said, the school had “no valid Establishment Clause interest” because permitting the religious club to meet would not show any favoritism toward religion but would simply “ensure neutrality.”

Finally, the Court has made clear that public colleges may not exclude student religious organizations from benefits otherwise provided to a full spectrum of student “news, information, opinion, entertainment, or academic communications media groups.” In Rosenberger v. Board of Visitors of the University of Virginia, the Court struck down a university policy that afforded a school subsidy to all student publications except religious ones. Once again, the Court held the denial of the subsidy to constitute viewpoint discrimination violative of the free speech clause of the First Amendment. In response to the University’s argument that the Establishment Clause required it not to subsidize an enterprise that promotes religion, the Court emphasized that the forum created by the University’s subsidy policy had neither the purpose nor the effect of advancing religion and, because it was open to a variety of viewpoints, was neutral toward religion.

These cases make clear that the Establishment Clause does not necessarily trump the First Amendment’s protection of freedom of speech. In regulating private speech in a public forum, govern-
ment may not justify discrimination against religious viewpoints as necessary to avoid creating an “establishment” of religion.

**Tax Exemptions of Religious Property.**—Every State and the District of Columbia provide for tax exemptions for religious institutions, and the history of such exemptions goes back to the time of our establishment as a polity. The only expression by a Supreme Court Justice prior to 1970 was by Justice Brennan, who deemed tax exemptions constitutional because the benefit conferred was incidental to the religious character of the institutions concerned. Then, in 1970, a nearly unanimous Court sustained a state exemption from real or personal property taxation of “property used exclusively for religious, educational or charitable purposes” owned by a corporation or association which was conducted exclusively for one or more of these purposes and did not operate for profit. The first prong of a two-prong argument saw the Court adopting Justice Brennan’s rationale. Using the secular purpose and effect test, Chief Justice Burger noted that the purpose of the exemption was not to single out churches for special favor; instead, the exemption applied to a broad category of associations having many common features and all dedicated to social betterment. Thus, churches as well as museums, hospitals, libraries, charitable organizations, professional associations, and the like, all non-profit, and all having a beneficial and stabilizing influence in community life, were to be encouraged by being treated specially in the tax laws. The primary effect of the exemptions was not to aid religion; the primary effect was secular and any assistance to religion was merely incidental.

For the second prong, the Court created a new test, the entanglement test, by which to judge the program. There was some entanglement whether there were exemptions or not, Chief Justice Burger continued, but with exemptions there was minimal involvement. But termination of exemptions would deeply involve government in the internal affairs of religious bodies, because evaluation of religious properties for tax purposes would be required and there would be tax liens and foreclosures and litigation concerning such matters.

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178 “If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups.” Abington School Dist. v. Schempp, 374 U.S. 203, 301 (1963) (concurring opinion).
180 397 U.S. at 672–74.
182 397 U.S. at 674–76.
While the general issue is now settled, it is to be expected that variations of the exemption upheld in *Walz* will present the Court with an opportunity to elaborate the field still further.\textsuperscript{183} For example, the Court determined that a sales tax exemption applicable only to religious publications constituted a violation of the Establishment Clause,\textsuperscript{184} and, on the other hand, that application of a general sales and use tax provision to religious publications violates neither the Establishment Clause nor the Free Exercise Clause.\textsuperscript{185}

**Exemption of Religious Organizations from Generally Applicable Laws.**—The Civil Rights Act’s exemption of religious organizations from the prohibition against religious discrimination in employment\textsuperscript{186} does not violate the Establishment Clause when applied to a religious organization’s secular, nonprofit activities. The Court held in *Corporation of the Presiding Bishop v. Amos*\textsuperscript{187} that a church-run gymnasium operated as a nonprofit facility open to the public could require that its employees be church members. Declaring that “there is ample room for accommodation of religion under the Establishment Clause,”\textsuperscript{188} the Court identified a legitimate purpose in freeing a religious organization from the burden of predicting which of its activities a court will consider to be secular and which religious. The rule applying across-the-board to nonprofit activities and thereby “avoid[ing] . . . intrusive inquiry into religious belief” also serves to lessen entanglement of church and state.\textsuperscript{189} The exemption itself does not have a principal effect

\textsuperscript{183} For example, the Court subsequently accepted for review a case concerning property tax exemption for church property used as a commercial parking lot, but state law was changed, denying exemption for purely commercial property and requiring a pro rata exemption for mixed use, and the Court remanded so that the change in the law could be considered. *Differdfer v. Central Baptist Church*, 404 U.S. 412 (1972).


\textsuperscript{186} Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, makes it unlawful for any employer to discriminate in employment practices on the basis of an employee’s religion. Section 702, 42 U.S.C. § 2000e–1, exempts from the prohibition “a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities.”

\textsuperscript{187} 483 U.S. 327 (1987).

\textsuperscript{188} 483 U.S. at 338.

\textsuperscript{189} 483 U.S. at 339.
of advancing religion, the Court concluded, but merely allows churches to advance religion.  

**Sunday Closing Laws.**—The history of Sunday Closing Laws goes back into United States colonial history and far back into English history. Commonly, the laws require the observance of the Christian Sabbath as a day of rest, although in recent years they have tended to become honeycombed with exceptions. The Supreme Court rejected an Establishment Clause challenge to Sunday Closing Laws in *McGowan v. Maryland*. The Court acknowledged that historically the laws had a religious motivation and were designed to effectuate concepts of Christian theology. However, "[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion...." 

"[T]he fact that this [prescribed day of rest] is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." Valid secular reasons existed for not simply requiring one day of rest and leaving to each individual to choose the day, reasons of ease of enforcement and of assuring

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190 "For a law to have forbidden 'effects' ... it must be fair to say that the government itself has advanced religion through its own activities and influence." 483 U.S. at 337. Justice O'Connor's concurring opinion suggests that practically any benefit to religion can be "recharacterized as simply 'allowing' a religion to better advance itself," and that a "necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." Id. at 347, 348.

191 The history is recited at length in the opinion of the Court in *McGowan v. Maryland*, 366 U.S. 420, 431–40 (1961), and in Justice Frankfurter's concurrence. Id. at 459, 470–551 and appendix.


194 366 U.S. at 445.

195 366 U.S. at 449-52.
a common day in the community for rest and leisure. More recently, a state statute mandating that employers honor the Sabbath day of the employee’s choice was held invalid as having the primary effect of promoting religion by weighing the employee’s Sabbath choice over all other interests.

Conscientious Objection.—Historically, Congress has provided for alternative service for men who had religious scruples against participating in either combat activities or in all forms of military activities; the fact that Congress chose to draw the line of exemption on the basis of religious belief confronted the Court with a difficult constitutional question, which, however, the Court chose to avoid by a somewhat disingenuous interpretation of the statute. In Gillette v. United States, a further constitutional problem arose in which the Court did squarely confront and validate the congressional choice. Congress had restricted conscientious objection status to those who objected to “war in any form” and the Court conceded that there were religious or conscientious objectors who were not opposed to all wars but only to particular wars based upon evaluation of a number of factors by which the “justness” of any particular war could be judged; “properly construed,” the Court said, the statute did draw a line relieving from military service some religious objectors while not relieving others. Purporting to apply the secular purpose and effect test, the Court looked almost exclusively to purpose and hardly at all to effect. Although it is not clear, the Court seemed to require that a classification must be religiously based “on its face” or lack any “neutral, secular basis for the lines government has drawn” in order that it be held to violate the Establishment Clause. The classification here was not

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196 366 U.S. at 449-52. Justice Frankfurter, with whom Justice Harlan concurred, arrived at the same conclusions by a route that did not require approval of Everson v. Board of Education, from which he had dissented.


198 In United States v. Seeger, 380 U.S. 163 (1965), a unanimous Court construed the language of the exemption limiting the status to those who by “religious training and belief” (that is, those who believed in a “Supreme Being”), to mean that a person must have some belief which occupies in his life the place or role which the traditional concept of God occupies in the orthodox believer. After the “Supreme Being” clause was deleted, a plurality in Welsh v. United States, 398 U.S. 333 (1970), construed the religion requirement as inclusive of moral, ethical, or religious grounds. Justice Harlan concurred on constitutional grounds, believing that the statute was clear that Congress had intended to restrict conscientious objection status to those persons who could demonstrate a traditional religious foundation for their beliefs and that this was impermissible under the Establishment Clause. Id. at 344. The dissent by Justices White and Stewart and Chief Justice Burger rejected both the constitutional and the statutory basis. 398 U.S. at 367.


200 401 U.S. at 449.

201 401 U.S. at 450.

202 401 U.S. at 452.
religiously based “on its face,” and served “a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions.” These purposes, related to the difficulty in separating sincere conscientious objectors to particular wars from others with fraudulent claims, included the maintenance of a fair and efficient selective service system and protection of the integrity of democratic decision-making.

Regulation of Religious Solicitation.—Although the solicitation cases have generally been decided under the free exercise or free speech clauses, in one instance the Court, intertwining establishment and free exercise principles, voided a provision in a state charitable solicitations law that required only those religious organizations that received less than half their total contributions from members or affiliated organizations to comply with the registration and reporting sections of the law. Applying strict scrutiny equal protection principles, the Court held that by distinguishing between older, well-established churches that had strong membership financial support and newer bodies lacking a contributing constituency or that may favor public solicitation over general reliance on financial support from the members, the statute granted denominational preference forbidden by the Establishment Clause.

Religion in Governmental Observances.—The practice of opening legislative sessions with prayers by paid chaplains was upheld in *Marsh v. Chambers*, a case involving prayers in the Nebraska Legislature. The Court relied almost entirely on historical practice. Congress had paid a chaplain and opened sessions with prayers for almost 200 years; the fact that Congress had continued the practice after considering constitutional objections in the Court’s view strengthened rather than weakened the historical argument. Similarly, the practice was well rooted in Nebraska and in most other states. Most importantly, the First Amendment had been drafted in the First Congress with an awareness of the chaplaincy system.
laynicy practice, and this practice was not prohibited or discontinued. The Court did not address the lower court’s findings, amended in Justice Brennan’s dissent, that each aspect of the Lemon v. Kurtzman tripartite test had been violated. Instead of constituting an application of the tests, therefore, Marsh can be read as representing an exception to their application.210

**Religious Displays on Government Property.**—A different form of governmentally sanctioned religious observance—inclusion of religious symbols in governmentally sponsored holiday displays—was twice before the Court, with varying results. In 1984, in Lynch v. Donnelly,211 the Court found no violation of the Establishment Clause occasioned by inclusion of a Nativity scene (creche) in a city’s Christmas display; in 1989, in Allegheny County v. Greater Pittsburgh ACLU,212 inclusion of a creche in a holiday display was found to constitute a violation. Also at issue in Allegheny County was inclusion of a menorah in a holiday display; here the Court found no violation. The setting of each display was crucial to the varying results in these cases, the determinant being whether the Court majority believed that the overall effect of the display was to emphasize the religious nature of the symbols, or whether instead the emphasis was primarily secular. Perhaps equally important for future cases, however, was the fact that the four dissenters in Allegheny County would have upheld both the creche and menorah displays under a more relaxed, deferential standard.

Chief Justice Burger’s opinion for the Court in Lynch began by expanding on the religious heritage theme exemplified by Marsh; other evidence that “[w]e are a religious people whose institutions presuppose a Supreme Being”213 was supplied by reference to the national motto “In God We Trust,” the affirmation “one nation under God” in the pledge of allegiance, and the recognition of both Thanksgiving and Christmas as national holidays. Against that background, the Court then determined that the city’s inclusion of the creche in its Christmas display had a legitimate secular pur-

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209 Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).
210 School prayer cases were distinguished on the basis that legislators, as adults, are presumably less susceptible than are schoolchildren to religious indoctrination and peer pressure, 463 U.S. at 792, but there was no discussion of the tests themselves.
211 465 U.S. 668 (1984). Lynch was a 5–4 decision, with Justice Blackmun, who voted with the majority in Marsh, joining the Marsh dissenters in this case. Again, Chief Justice Burger wrote the opinion of the Court, joined by the other majority Justices, and again Justice Brennan wrote a dissent, joined by the other dissenters. A concurring opinion was added by Justice O’Connor, and a dissenting opinion was added by Justice Blackmun.
pose in recognizing “the historical origins of this traditional event long [celebrated] as a National Holiday,” and that its primary effect was not to advance religion. The benefit to religion was called “indirect, remote, and incidental,” and in any event no greater than the benefit resulting from other actions that had been found to be permissible, e.g. the provision of transportation and textbooks to parochial school students, various assistance to church-supported colleges, Sunday closing laws, and legislative prayers. The Court also reversed the lower court’s finding of entanglement based only on “political divisiveness.”

Allegheny County was also decided by a 5–4 vote, Justice Blackmun writing the opinion of the Court on the creche issue, and there being no opinion of the Court on the menorah issue. To the majority, the setting of the creche was distinguishable from that in Lynch. The creche stood alone on the center staircase of the county courthouse, bore a sign identifying it as the donation of a Roman Catholic group, and also had an angel holding a banner proclaiming “Gloria in Excelsis Deo.” Nothing in the display “detract[ed] from the creche’s religious message,” and the overall effect was to endorse that religious message. The menorah, on the other hand, was placed outside a government building alongside a Christmas tree and a sign saluting liberty, and bore no religious messages. To Justice Blackmun, this grouping merely recognized “that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status”; to concurring Justice O’Connor, the display’s “message of pluralism” did not endorse religion over nonreligion even though Chanukah is primarily a religious holiday and even though the menorah is a religious symbol. The dissenters, critical of the endorsement test proposed by Justice O’Connor and of the three-part Lemon test, would instead distill two principles from the Establishment Clause: “government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in

214 465 U.S. at 680.
215 465 U.S. at 681-82. Note that, while the extent of benefit to religion was an important factor in earlier cases, it was usually balanced against the secular effect of the same practice rather than the religious effects of other practices.
216 465 U.S. at 683-84.
217 Justice O’Connor, who had concurred in Lynch, was the pivotal vote, joining the Lynch dissenters to form the majority in Allegheny County. Justices Scalia and Kennedy, not on the Court in 1984, replaced Chief Justice Burger and Justice Powell in voting to uphold the creche display; Justice Kennedy authored the dissenting opinion, joined by the other three.
218 492 U.S. at 698, 699.
219 492 U.S. at 616.
220 492 U.S. at 635.
such a degree that it in fact ‘establishes a state religion or religious faith, or tends to do so.’”

In *Capitol Square Review Bd. v. Pinette*,\(^{222}\) the Court distinguished privately sponsored from governmentally sponsored religious displays on public property. There the Court ruled that Ohio violated free speech rights by refusing to allow the Ku Klux Klan to display an unattended cross in a publicly owned plaza outside the Ohio Statehouse. Because the plaza was a public forum in which the State had allowed a broad range of speakers and a variety of unattended displays, the State could regulate the expressive content of such speeches and displays only if the restriction was necessary, and narrowly drawn, to serve a compelling state interest. The Court recognized that compliance with the Establishment Clause can be a sufficiently compelling reason to justify content-based restrictions on speech, but saw no need to apply this principle when permission to display a religious symbol is granted through the same procedures, and on the same terms, required of other private groups seeking to convey non-religious messages.

**Miscellaneous.**—In *Larkin v. Grendel’s Den*,\(^{223}\) the Court held that the Establishment Clause is violated by a delegation of governmental decisionmaking to churches. At issue was a state statute permitting any church or school to block issuance of a liquor license to any establishment located within 500 feet of the church or school. While the statute had a permissible secular purpose of protecting churches and schools from the disruptions often associated with liquor establishments, the Court indicated that these purposes could be accomplished by other means, e.g. an outright ban on liquor outlets within a prescribed distance, or the vesting of discretionary authority in a governmental decisionmaker required to consider the views of affected parties. However, the conferral of a veto authority on churches had a primary effect of advancing religion both because the delegation was standardless (thereby permitting a church to exercise the power to promote parochial interests), and because “the mere appearance of a joint ex-

\(^{221}\) 492 U.S. at 659.
\(^{222}\) 515 U.S. 753 (1995). The Court was divided 7–2 on the merits of *Pinette*, a vote that obscured continuing disagreement over analytical approach. The portions of Justice Scalia’s opinion that formed the opinion of the Court were joined by Chief Justice Rehnquist and by Justices O’Connor, Kennedy, Souter, Thomas, and Breyer. A separate part of Justice Scalia’s opinion, joined only by the Chief Justice and by Justices Kennedy and Thomas, disputed the assertions of Justices O’Connor, Souter, and Breyer that the “endorsement” test should be applied. Dissenting Justice Stevens thought that allowing the display on the Capitol grounds did carry “a clear image of endorsement” (id. at 811), and Justice Ginsburg’s brief opinion seemingly agreed with that conclusion.
exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some.” 224 Moreover, the Court determined, because the veto “enmeshes churches in the processes of government,” it represented an entanglement offensive to the “core rationale underlying the Establishment Clause”— “[to prevent] ‘a fusion of governmental and religious functions.’” 225

Using somewhat similar reasoning, the Court in Board of Education of Kiryas Joel Village v. Grumet,226 invalidated a New York law creating a special school district for an incorporated village composed exclusively of members of one small religious sect. The statute failed “the test of neutrality,” the Court concluded, since it delegated power “to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism.” It was the “anomalously case-specific nature of the legislature’s exercise of authority” that left the Court “without any direct way to review such state action” for conformity with the neutrality principle. Because the village did not receive its governmental authority simply as one of many communities eligible under a general law, the Court explained, there was no way of knowing whether the legislature would grant similar benefits on an equal basis to other religious and nonreligious groups.

FREE EXERCISE OF RELIGION

“The Free Exercise Clause … withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority.” 227 It bars “governmental regulation of religious beliefs as such,” 228 prohibiting misuse of secular governmental programs “to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect.” 229 Freedom of conscience is the basis of the free exercise clause, and government may not penalize

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226 512 U.S. 687 (1994). Only four Justices (Souter, Blackmun, Stevens, and Ginsburg) thought that the Grendel’s Den principle applied; in their view the distinction that the delegation was to a village electorate rather than to a religious body “lack[ed] constitutional significance” under the peculiar circumstances of the case.


or discriminate against an individual or a group of individuals because of their religious views nor may it compel persons to affirm any particular beliefs. Interpretation is complicated, however, by the fact that exercise of religion usually entails ritual or other practices that constitute “conduct” rather than pure “belief.” When it comes to protecting conduct as free exercise, the Court has been inconsistent. It has long been held that the Free Exercise Clause does not necessarily prevent government from requiring the doing of some act or forbidding the doing of some act merely because religious beliefs underlie the conduct in question. What has changed over the years is the Court’s willingness to hold that some religiously motivated conduct is protected from generally applicable prohibitions.

The relationship between the Free Exercise and Establishment Clauses varies with the expansiveness of interpretation of the two clauses. In a general sense both clauses proscribe governmental involvement with and interference in religious matters, but there is possible tension between a requirement of governmental neutrality derived from the Establishment Clause and a Free-Exercise-derived requirement that government accommodate some religious practices. So far, the Court has harmonized interpretation by denying that free-exercise-mandated accommodations create establishment violations, and also by upholding some legislative accommodations not mandated by free exercise requirements. “This Court has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.”


231 Academics as well as the Justices grapple with the extent to which religious practices as well as beliefs are protected by the Free Exercise Clause. For contrasting academic views of the origins and purposes of the Free Exercise Clause, compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1410 (1990) (concluding that constitutionally compelled exemptions from generally applicable laws are consistent with the Clause’s origins in religious pluralism) with Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 Case W. Res. L. Rev. 357 (1989–90) (arguing that such exemptions establish an invalid preference for religious beliefs over non-religious beliefs).


233 “The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.” Walz v. Tax Comm’n, 397 U.S. 668–69 (1970).

234 Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 144–45 (1987). A similar accommodative approach was suggested in Walz: “there is room for play in
not deny unemployment benefits to Sabbatarians who refused Saturday work, for example, the Court denied that it was “fostering an establishment of the Seventh-Day Adventist religion, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.” Legislation granting religious exemptions not held to have been required by the Free Exercise Clause has also been upheld against Establishment Clause challenge, although it is also possible for legislation to go too far in promoting free exercise.

The Belief-Conduct Distinction

While the Court has consistently affirmed that the Free Exercise Clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years. The Free Exercise Clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years. The Free Exercise Clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years. The Free Exercise Clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years.

\[235\] Sherbert v. Verner, 374 U.S. 398, 409 (1963). Accord, Thomas v. Review Bd., 450 U.S. 707, 719–20 (1981). Dissenting in Thomas, Justice Rehnquist argued that Sherbert and Thomas created unacceptable tensions between the Establishment and Free Exercise Clauses, and that requiring the States to accommodate persons like Sherbert and Thomas because of their religious beliefs ran the risk of “establishing” religion under the Court’s existing tests. He argued further, however, that less expansive interpretations of both clauses would eliminate this artificial tension. Thus, Justice Rehnquist would have interpreted the Free Exercise Clause as not requiring government to grant exemptions from general requirements that may burden religious exercise but that do not prohibit religious practices outright, and would have interpreted the Establishment Clause as not preventing government from voluntarily granting religious exemptions. 450 U.S. at 720–27. By 1990 these views had apparently gained ascendance, Justice Scalia’s opinion for the Court in the “peyote” case suggesting that accommodation should be left to the political process, i.e., that states could constitutionally provide exceptions in their drug laws for sacramental peyote use, even though such exceptions are not constitutionally required. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).


exercise Clause “embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.” In its first free exercise case, involving the power of government to prohibit polygamy, the Court invoked a hard distinction between the two, saying that although laws “cannot interfere with mere religious beliefs and opinions, they may with practices.” The rule thus protected freedom of belief, inasmuch as religiously motivated action was to be subjected to the police power of the state to the same extent as would similar action springing from other motives. The Reynolds no-protection rule was applied in a number of cases, but later cases established that religiously grounded conduct is not always outside the protection of the free exercise clause. Instead, the Court began to balance the secular interest asserted by the government against the claim of religious liberty asserted by the person affected; only if the governmental interest was “compelling” and if no alternative forms of regulation would serve that interest was the claimant required to yield. Thus, while freedom to engage in religious practices was not absolute, it was entitled to considerable protection.

Recent cases evidence a narrowing of application of the compelling interest test, and a corresponding constriction on the freedom to engage in religiously motivated conduct. First, the Court pur-
ported to apply strict scrutiny, but upheld the governmental action anyhow. 243 Next the Court held that the test is inappropriate in the contexts of military and prison discipline. 244 Then, more importantly, the Court ruled in Employment Division v. Smith that “if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” 245 Therefore, the Court concluded, the Free Exercise Clause does not prohibit a state from applying generally applicable criminal penalties to the use of peyote in a religious ceremony, or from denying unemployment benefits to persons dismissed from their jobs because of religious ceremonial use of peyote. Accommodation of such religious practices must be found in “the political process,” the Court noted; statutory religious-practice exceptions are permissible, but not “constitutionally required.” 246 The result is tantamount to a return to the Reynolds belief-conduct distinction.

The Mormon Cases

The Court’s first encounter with free exercise claims occurred in a series of cases in which the Federal Government and the territories moved against the Mormons because of their practice of polygamy. Actual prosecutions and convictions for bigamy presented little problem for the Court, inasmuch as it could distinguish between beliefs and acts. 247 But the presence of large numbers of Mormons in some of the territories made convictions for bigamy difficult to obtain, and in 1882 Congress enacted a statute which barred “bigamists,” “polygamists,” and “any person cohabiting with more than one woman” from voting or serving on juries. The Court sustained the law, even as applied to persons entering the state prior to enactment of the original law prohibiting bigamy and to persons as to whom the statute of limitations had run. 248 Subse-

243 United States v. Lee, 455 U.S. 252 (1982) (holding mandatory participation in the Social Security system by an Amish employer religiously opposed to such social welfare benefits to be “indispensable” to the fiscal vitality of the system); Bob Jones Univ. v. United States, 461 U.S. 754 (1983) (holding government’s interest in eradicating racial discrimination in education to outweigh the religious interest of a private college whose racial discrimination was founded on religious beliefs); and Hernandez v. Commissioner, 490 U.S. 680 (1989) (holding that government has a compelling interest in maintaining a uniform tax system “free of ‘myriad exceptions flowing from a wide variety of religious beliefs’”)


246 494 U.S. at 890.


quently, an act of a territorial legislature which required a prospective voter not only to swear that he was not a bigamist or polygamist but also that "I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy ... or which practices bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy ...," was upheld in an opinion that condemned plural marriage and its advocacy as equal evils. 249 And, finally, the Court sustained the revocation of the charter of the Mormon Church and confiscation of all church property not actually used for religious worship or for burial. 250

The Jehovah's Witnesses Cases

In contrast to the Mormons, the sect known as Jehovah's Witnesses, in many ways as unsettling to the conventional as the Mormons were, 251 provoked from the Court a lengthy series of decisions 252 expanding the rights of religious proselytizers and other advocates to utilize the streets and parks to broadcast their ideas, though the decisions may be based more squarely on the speech clause than on the free exercise clause. The leading case is Cantwell v. Connecticut. 253 Three Jehovah's Witnesses were convicted under a statute which forbade the unlicensed soliciting of funds for religious or charitable purposes, and also under a general charge of breach of the peace. The solicitation count was voided as an infringement on religion because the issuing officer was authorized to inquire whether the applicant did have a religious cause and to

249 Davis v. Beason, 133 U.S. 333 (1890). "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries.... To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases." Id. at 341-42.

250 The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). "[T]he property of the said corporation ... [is to be used to promote] the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world.... The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity had produced in the Western world." Id. at 48-49.


252 Most of the cases are collected and categorized by Justice Frankfurter in Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion).

253 310 U.S. 296 (1940).
decline a license if in his view the cause was not religious. Such power amounted to a previous restraint upon the exercise of religion and was invalid, the Court held. \(^{254}\) The breach of the peace count arose when the three accosted two Catholics in a strongly Catholic neighborhood and played them a phonograph record which grossly insulted the Christian religion in general and the Catholic Church in particular. The Court voided this count under the clear-and-present danger test, finding that the interest sought to be upheld by the State did not justify the suppression of religious views that simply annoyed listeners. \(^{255}\)

There followed a series of sometimes conflicting decisions. At first, the Court sustained the application of a non-discriminatory license fee to vendors of religious books and pamphlets, \(^{256}\) but eleven months later it vacated its former decision and struck down such fees. \(^{257}\) A city ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature was held in violation of the First Amendment when applied to distributors of leaflets advertising a religious meeting. \(^{258}\) But a state child labor law was held to be validly applied to punish the guardian of a nine-year old child who permitted her to engage in “preaching work” and the sale of religious publications after hours. \(^{259}\)

\(^{254}\) 310 U.S. at 303-07. “The freedom to act must have appropriate definition to preserve the enforcement of that protection [of society]. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom…. [A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.” Id. at 304.

\(^{255}\) 310 U.S. at 307-11. “In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probabilities of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.” Id. at 310.

\(^{256}\) Jones v. Opelika, 316 U.S. 584 (1942).


\(^{259}\) Prince v. Massachusetts, 321 U.S. 158 (1944).
Court decided a number of cases involving meetings and rallies in public parks and other public places by upholding licensing and permit requirements which were premised on nondiscriminatory “times, places, and manners” terms and which did not seek to regulate the content of the religious message to be communicated. Most recently, the Court struck down on free speech grounds a town ordinance requiring door-to-door solicitors, including persons seeking to proselytize about their faith, to register with the town and obtain a solicitation permit. The Court stated that the requirement was “offensive ... to the very notion of a free society.”

Free Exercise Exemption From General Governmental Requirements

As described above, the Court gradually abandoned its strict belief-conduct distinction, and developed a balancing test to determine when a uniform, nondiscriminatory requirement by government mandating action or nonaction by citizens must allow exceptions for citizens whose religious scruples forbid compliance. Then, in 1990, the Court reversed direction in Employment Division v. Smith, confining application of the “compelling interest” test to a narrow category of cases.

In early cases the Court sustained the power of a State to exclude from its schools children who because of their religious beliefs would not participate in the salute to the flag, only within a short time to reverse itself and condemn such exclusions, but on speech grounds rather than religious grounds. Also, the Court seemed to be clearly of the view that government could compel those persons religiously opposed to bearing arms to take an oath to do so or to receive training to do so, only in later cases to cast

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264 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). On the same day, the Court held that a State may not forbid the distribution of literature urging and advising on religious grounds that citizens refrain from saluting the flag. Taylor v. Mississippi, 319 U.S. 583 (1943).

265 See United States v. Schwimmer, 279 U.S. 644 (1929); United States v. Macintosh, 283 U.S. 605 (1931); and United States v. Bland, 283 U.S. 636 (1931) (all interpreting the naturalization law as denying citizenship to a conscientious objector who would not swear to bear arms in defense of the country), all three of which were overruled by Girouard v. United States, 328 U.S. 61 (1946), on strictly statutory grounds. See also Hamilton v. Board of Regents, 293 U.S. 245 (1934) (upholding expulsion from state university for a religiously based refusal to take a required
doubt on this resolution by statutory interpretation,\(^2^{66}\) and still more recently to leave the whole matter in some doubt.\(^2^{67}\)

*Braunfeld v. Brown*\(^2^{68}\) held that the free exercise clause did not mandate an exemption from Sunday Closing Laws for an Orthodox Jewish merchant who observed Saturday as the Sabbath and was thereby required to be closed two days of the week rather than one. This requirement did not prohibit any religious practices, the Court’s plurality pointed out, but merely regulated secular activity in a manner making religious exercise more expensive.\(^2^{69}\) “If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State’s secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.”\(^2^{70}\)

Within two years the Court in *Sherbert v. Verner*\(^2^{71}\) reversed this line of analysis to require a religious exemption from a secular, regulatory piece of economic legislation. Sherbert was disqualified from receiving unemployment compensation because, as a Seventh Day Adventist, she would not accept Saturday work; according to state officials, this meant she was not complying with the statutory requirement to stand ready to accept suitable employment. This denial of benefits could be upheld, the Court said, only if “her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or [if] any incidental burden on the free exercise of appellant’s religions may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate . . .’.”\(^2^{72}\) First, the disqualification was held to impose a burden on the free exercise of Sherbert’s religion; it was an indirect burden and it did

\(^{266}\) United States v. Seeger, 380 U.S. 163 (1965); see id. at 188 (Justice Douglas concurring); Welsh v. United States, 398 U.S. 333 (1970); and see id. at 344 (Justice Harlan concurring).

\(^{267}\) Gillette v. United States, 401 U.S. 437 (1971) (holding that secular considerations overbalanced free exercise infringement of religious beliefs of objectors to particular wars).


\(^{269}\) 366 U.S. at 605-06.

\(^{270}\) 366 U.S. at 607 (plurality opinion). The concurrence balanced the economic disadvantage suffered by the Sabbatarians against the important interest of the State in securing its day of rest regulation. McGowan v. Maryland, 366 U.S. at 512–22. Three Justices dissented. Id. at 561 (Justice Douglas); Braunfeld v. Brown, 366 U.S. at 610 (Justice Brennan), 616 (Justice Stewart).


not impose a criminal sanction on a religious practice, but the disqualification derived solely from her practice of her religion and constituted a compulsion upon her to forgo that practice.\footnote{374 U.S. at 403–06.} Second, there was no compelling interest demonstrated by the State. The only interest asserted was the prevention of the possibility of fraudulent claims, but that was merely a bare assertion. Even if there was a showing of demonstrable danger, “it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”\footnote{374 U.S. at 407.} 

\textit{Sherbert} was reaffirmed and applied in subsequent cases involving denial of unemployment benefits. \textit{Thomas v. Review Board}\footnote{450 U.S. 707 (1981).} involved a Jehovah’s Witness who quit his job when his employer transferred him from a department making items for industrial use to a department making parts for military equipment. While his belief that his religion proscribed work on war materials was not shared by all other Jehovah’s Witnesses, the Court held that it was inappropriate to inquire into the validity of beliefs asserted to be religious so long as the claims were made in good faith (and the beliefs were at least arguably religious). The same result was reached in a 1987 case, the fact that the employee’s religious conversion rather than a job reassignment had created the conflict between work and Sabbath observance not being considered material to the determination that free exercise rights had been burdened by the denial of unemployment compensation.\footnote{Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136 (1987).} Also, a state may not deny unemployment benefits solely because refusal to work on the Sabbath was based on sincere religious beliefs held independently of membership in any established religious church or sect.\footnote{Frazee v. Illinois Dept of Employment Security, 489 U.S. 829 (1989). Cf. United States v. Seeger, 380 U.S. 163 (1965) (interpreting the religious objection exemption from military service as encompassing a broad range of formal and personal religious beliefs).}
The Court applied the *Sherbert* balancing test in several areas outside of unemployment compensation. The first two such cases involved the Amish, whose religion requires them to lead a simple life of labor and worship in a tight-knit and self-reliant community largely insulated from the materialism and other distractions of modern life. *Wisconsin v. Yoder* held that a state compulsory attendance law, as applied to require Amish children to attend ninth and tenth grades of public schools in contravention of Amish religious beliefs, violated the Free Exercise Clause. The Court first determined that the beliefs of the Amish were indeed religiously based and of great antiquity. Next, the Court rejected the State's arguments that the Free Exercise Clause extends no protection because the case involved "action" or "conduct" rather than belief, and because the regulation, neutral on its face, did not single out religion. Instead, the Court went on to analyze whether a "compelling" governmental interest required such "grave interference" with Amish belief and practices. The governmental interest was not the general provision of education, inasmuch as the State and the Amish were in agreement on education through the first eight grades and since the Amish provided their children with additional education of a primarily vocational nature. The State's interest was really that of providing two additional years of public schooling. Nothing in the record, felt the Court, showed that this interest outweighed the great harm which it would do to traditional Amish religious beliefs to impose the compulsory ninth and tenth grade attendance.

But a subsequent decision involving the Amish reached a contrary conclusion. In *United States v. Lee*, the Court denied the Amish exemption from compulsory participation in the Social Security system. The objection was that payment of taxes by Amish employers and employees and the receipt of public financial assistance were forbidden by their religious beliefs. Accepting that this was true, the Court nonetheless held that the governmental interest was compelling and therefore sufficient to justify the burdening of religious beliefs. Compulsory payment of taxes was necessary for

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279 406 U.S. at 215-19. Why the Court felt impelled to make these points is unclear, since it is settled that it is improper for courts to inquire into the interpretation of religious belief. *E.g.*, *United States v. Lee*, 455 U.S. 252, 257 (1982).
281 406 U.S. at 221.
282 406 U.S. at 221-29.
284 The Court's formulation was whether the limitation on religious exercise was "essential to accomplish an overriding governmental interest." 455 U.S. at 257-58. *Accord*, *Hernandez v. Commissioner*, 490 U.S. 680, 699-700 (1989) (any burden on
the vitality of the system; either voluntary participation or a pattern of exceptions would undermine its soundness and make the program difficult to administer.

“A compelling governmental interest” was also found to outweigh free exercise interests in *Bob Jones University v. United States*, 285 in which the Court upheld the I.R.S.’s denial of tax exemptions to church-run colleges whose racially discriminatory admissions policies derived from religious beliefs. The Federal Government’s “fundamental, overriding interest in eradicating racial discrimination in education”—found to be encompassed in common law standards of “charity” underlying conferral of the tax exemption on “charitable” institutions—“substantially outweighs” the burden on free exercise. Nor could the schools’ free exercise interests be accommodated by less restrictive means. 286

In other cases the Court found reasons not to apply compelling interest analysis. Religiously motivated speech, like other speech, can be subjected to reasonable time, place, or manner regulation serving a “substantial” rather than “compelling” governmental interest. 287 *Sherbert*’s threshold test, inquiring “whether government has placed a substantial burden on the observation of a central religious belief or practice,” 288 eliminates other issues. As long as a particular religion does not proscribe the payment of taxes (as was the case with the Amish in *Lee*), the Court has denied that there is any constitutionally significant burden resulting from “imposition of a generally applicable tax [that] merely decreases the amount of money [adherents] have to spend on [their] religious activities.” 289 The one caveat the Court left—that a generally applicable tax might be so onerous as to “effectively choke off an adher-

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286 461 U.S. at 604.
287 *Heffron v. ISKCON*, 452 U.S. 640 (1981). Requiring Krishnas to solicit at fixed booth sites on county fair grounds is a valid time, place, and manner regulation, although, as the Court acknowledged, id. at 652, peripatetic solicitation was an element of Krishna religious rites.
289 *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378, 391 (1990). *See also* *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (the Court failing to perceive how application of minimum wage and overtime requirements would burden free exercise rights of employees of a religious foundation, there being no assertion that the *amount* of compensation was a matter of religious import); and *Hernandez v. Commissioner*, 490 U.S. 680 (1989) (questioning but not deciding whether any burden was imposed by administrative disallowal of deduction for payments deemed to be for commercial rather than religious or charitable purposes).
ent’s religious practices” —may be a moot point in light of the Court’s general ruling in Employment Division v. Smith, discussed below.

The Court also drew a distinction between governmental regulation of individual conduct, on the one hand, and restraint of governmental conduct as a result of individuals’ religious beliefs, on the other. Sherbert’s compelling interest test has been held inapplicable in cases viewed as involving attempts by individuals to alter governmental actions rather than attempts by government to restrict religious practices. Emphasizing the absence of coercion on religious adherents, the Court in Lyng v. Northwest Indian Cemetery Protective Ass’n held that the Forest Service, even absent a compelling justification, could construct a road through a portion of a national forest held sacred and used by Indians in religious observances. The Court distinguished between governmental actions having the indirect effect of frustrating religious practices and those actually prohibiting religious belief or conduct: “the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.” Similarly, even a sincerely held religious belief that assignment of a social security number would rob a child of her soul was held insufficient to bar the government from using the number for purposes of its own recordkeeping. It mattered not how easily the government could accommodate the religious beliefs or practices (an exemption from the social security number requirement might have been granted with only slight impact on the government’s recordkeeping capabilities), since the nature of the governmental actions did not implicate free exercise protections.

Compelling interest analysis is also wholly inapplicable in the context of military rules and regulations, where First Amendment review “is far more deferential than … review of similar laws or regulations designed for civilian society.” Thus the Court did not question the decision of military authorities to apply uniform dress code standards to prohibit the wearing of a yarmulke by an officer.

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290 Jimmy Swaggart Ministries, 493 U.S. at 392.
294 “In neither case … would the affected individuals be coerced by the Government’s action into violating their religious beliefs; nor would either governmental action penalize religious activity.” Lyng, 485 U.S. at 449.
compelled by his Orthodox Jewish religious beliefs to wear the yarmulke. 296

A high degree of deference is also due decisions of prison administrators having the effect of restricting religious exercise by inmates. The general rule is that prison regulations impinging on exercise of constitutional rights by inmates are “valid if . . . reasonably related to legitimate penological interests.” 297 Thus because general prison rules requiring a particular category of inmates to work outside of buildings where religious services were held, and prohibiting return to the buildings during the work day, could be viewed as reasonably related to legitimate penological concerns of security and order, no exemption was required to permit Muslim inmates to participate in Jumu’ah, the core ceremony of their religion. 298 The fact that the inmates were left with no alternative means of attending Jumu’ah was not dispositive, the Court being “unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end.” 299

Finally, in Employment Division v. Smith 300 the Court indicated that the compelling interest test may apply only in the field of unemployment compensation, and in any event does not apply to require exemptions from generally applicable criminal laws. Criminal laws are “generally applicable” when they apply across the board regardless of the religious motivation of the prohibited conduct, and are “not specifically directed at . . . religious practices.” 301 The unemployment compensation statute at issue in Sherbert was peculiarly suited to application of a balancing test because denial of benefits required a finding that an applicant had refused work “without good cause.” Sherbert and other unemployment compensation cases thus “stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hard-

296 Congress reacted swiftly by enacting a provision allowing military personnel to wear religious apparel while in uniform, subject to exceptions to be made by the Secretary of the relevant military department for circumstances in which the apparel would interfere with performance of military duties or would not be “neat and conservative.” Pub. L. 100–180, § 508(a)(2), 101 Stat. 1086 (1987); 10 U.S.C. § 774.
299 482 U.S. at 351-52 (also suggesting that the ability of the inmates to engage in other activities required by their faith, e.g., individual prayer and observance of Ramadan, rendered the restriction reasonable).
300 494 U.S. 872 (1990) (holding that state may apply criminal penalties to use of peyote in a religious ceremony, and may deny unemployment benefits to persons dismissed from their jobs because of religiously inspired use of peyote).
301 494 U.S. at 878.
ship without compelling reason.” 302 Wisconsin v. Yoder and other decisions holding “that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action” were distinguished as involving “not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections” such as free speech or “parental rights.” 303 Except in the relatively uncommon circumstance when a statute calls for individualized consideration, then, the Free Exercise Clause affords no basis for exemption from a “neutral, generally applicable law.” As the Court concluded in Smith, accommodation for religious practices incompatible with general requirements must ordinarily be found in “the political process.” 304

The ramifications of Smith are potentially widespread. The Court has apparently returned to a belief-conduct dichotomy under which religiously motivated conduct is not entitled to special protection. Laws may not single out religiously motivated conduct for adverse treatment, 305 but formally neutral laws of general applicability may regulate religious conduct (along with other conduct) regardless of the adverse or prohibitory effects on religious exercise. That the Court views the principle as a general one, not limited to criminal laws, seems evident from its restatement in Church of the Lukumi Babalu Aye v. City of Hialeah: “our cases establish the general proposition that a law that is neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” 306 Similar rules govern taxation. Under the Court’s rulings in Smith and Swaggart, religious exemptions from most taxes are a matter of legislative grace rather than constitutional command, since most important taxes (e.g., income, property, sales and use) satisfy the criteria of formal neutrality and general applicability, and are not license fees that can be viewed as prior restraints on expression. 307 The result is equal protection, but not substantive protection, for religious exercise. 308 The Court’s ap-

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302 494 U.S. at 884.
303 494 U.S. at 881.
304 494 U.S. at 889.
305 This much was made clear by Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), striking down a city ordinance that prohibited ritual animal sacrifice but that allowed other forms of animal slaughter.
307 This latter condition derives from the fact that the Court in Swaggart distinguished earlier decisions by characterizing them as applying only to flat license fees. 493 U.S. at 386. See also Laycock, The Remnants of Free Exercise, 1990 SUP. CT. REV. 1, 39–41.
308 Justice O’Connor, concurring in Smith, argued that “the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause.” 494 U.S. at 901.
proach also accords less protection to religiously-based conduct than is accorded expressive conduct that implicates speech but not religious values.\footnote{\textsuperscript{309}} On the practical side, relegation of free exercise claims to the political process may, as concurring Justice O'Connor warned, result in less protection for small, unpopular religious sects.\footnote{\textsuperscript{310}}

Because of the broad ramifications of \textit{Smith}, the political processes were soon used in an attempt to provide additional legislative protection for religious exercise. In the Religious Freedom Restoration Act of 1993 (RFRA),\footnote{\textsuperscript{311}} Congress sought to supersede \textit{Smith} and substitute a statutory rule of decision for free exercise cases. The Act provides that laws of general applicability—federal, state, and local—may substantially burden free exercise of religion only if they further a compelling governmental interest and constitute the least restrictive means of doing so. The purpose, Congress declared in the Act itself, was “to restore the compelling interest test as set forth in \textit{Sherbert v. Verner} and \textit{Wisconsin v. Yoder} and to guarantee its application in all cases where free exercise of religion is substantially burdened.”\footnote{\textsuperscript{312}} But this legislative effort was partially frustrated in 1997 when the Court in \textit{City of Boerne v. Flores} held the Act to be unconstitutional as applied to the states. In applying RFRA to the states Congress had utilized its power under § 5 of the Fourteenth Amendment to enact “appropriate legislation” to enforce the substantive protections of the Amendment, including the religious liberty protections incorporated in the due process clause. But the Court held that RFRA exceeded Congress’ power under § 5, because the measure did not simply enforce a constitutional right but substantively altered that right. “Congress,” the Court said, “does not enforce a constitutional right by changing what the right is.”\footnote{\textsuperscript{313}} Moreover, it said, RFRA “reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved ... [and] is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”\footnote{\textsuperscript{314}} “RFRA,” the Court concluded, “contradicts vital principles

\footnote{\textsuperscript{309}} Although neutral laws affecting expressive conduct are not measured by a “compelling interest” test, they are “subject to a balancing, rather than categorical, approach.” \textit{Smith}, 494 U.S. at 902 (O’Connor, J., concurring).

\footnote{\textsuperscript{310}} 494 U.S. at 902-03.


\footnote{\textsuperscript{312}} Pub. L. 103–141, § 2(b)(1) (citations omitted). Congress also avowed a purpose of providing “a claim or defense to persons whose religious exercise is substantially burdened by government.” §2(b)(2).

\footnote{\textsuperscript{313}} 521 U.S. 507 (1997).

\footnote{\textsuperscript{314}} 521 U.S. at 519.

\footnote{\textsuperscript{315}} 521 U.S. at 533–34.
necessary to maintain separation of powers and the federal balance." 1075

_Boerne_ does not close the books on _Smith_, however. It remains an open issue whether RFRA remains valid as applied to the federal government, and Congress has recently relied on its power over interstate commerce and its power to attach conditions to federal financial assistance to enact legislation providing a higher level of protection than that afforded by _Smith_ to religious institutions involved in land use disputes and to religious practices by persons in state institutions. 317 These issues ensure continuing litigation over the appropriate test for free exercise cases. 318

### Religious Test Oaths

However, the Court has been divided in dealing with religiously-based conduct and governmental compulsion of action or nonaction, it was unanimous in voiding a state constitutional provision which required a notary public, as a condition of perfecting his appointment, to declare his belief in the existence of God. The First Amendment, considered with the religious oath provision of Article VI, makes it impossible “for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly, profess to have, a belief in some particular kind of religious concept.” 319

### Religious Disqualification

Unanimously, but with great differences of approach, the Court declared invalid a Tennessee statute barring ministers and priests from service in a specially called state constitutional convention. 320

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316 521 U.S. at 536.
317 The "Religious Land Use and Institutionalized Persons Act," P.L. 106-274 (2000); 42 U.S.C. 2000cc et seq. The Act utilizes Congress' spending power and its power over interstate commerce to impose a strict scrutiny test on state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's exercise of religion. It utilizes the same powers to impose a strict scrutiny test on state and local governments for any substantial burdens they impose on the exercise of religion by persons in state or locally run institutions such as prisons, mental hospitals, juvenile detention facilities, and nursing homes.
318 _See_, e.g., _In re Young_, 141 F.3d 854 (8th Cir.), cert. denied, 525 U.S. 811 (1998) (lower court held RFRA to be constitutional as applied to federal bankruptcy law).
320 _McDaniel v. Paty_, 435 U.S. 618 (1978). The plurality opinion by Chief Justice Burger, joined by Justices Powell, Rehnquist, and Stevens, found the case governed by _Sherbert v. Verner's_ strict scrutiny test. The State had failed to show that its view of the dangers of clergy participation in the political process had any validity; _Torcaso v. Watkins_ was distinguished because the State was acting on the status...
The Court's decision necessarily implied that the constitutional provision on which the statute was based, barring ministers and priests from service as state legislators, was also invalid.

FREEDOM OF EXPRESSION—SPEECH AND PRESS

Adoption and the Common Law Background

Madison's version of the speech and press clauses, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." The special committee rewrote the language to some extent, adding other provisions from Madison's draft, to make it read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed." In this form it went to the Senate, which rewrote it to read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances." Subsequently, the religion clauses and these clauses were combined by the Senate. The final language was agreed upon in conference.

Debate in the House is unenlightening with regard to the meaning the Members ascribed to the speech and press clause and there is no record of debate in the Senate. In the course of debate, Madison warned against the dangers which would arise "from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say, that if we confine..."
ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty.”

That the “simple, acknowledged principles” embodied in the First Amendment have occasioned controversy without end both in the courts and out should alert one to the difficulties latent in such spare language. Insofar as there is likely to have been a consensus, it was no doubt the common law view as expressed by Blackstone. “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licensor, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects.”

Whatever the general unanimity on this proposition at the time of the proposal of and ratification of the First Amendment,

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326 Id. at 738.
327 4 W. Blackstone’s Commentaries on the Laws of England 151–52 (T. Cooley, 2d rev. ed. 1872). See 3 J. Story, Commentaries on the Constitution of the United States 1874–86 (1833). The most comprehensive effort to assess theory and practice in the period prior to and immediately following adoption of the Amendment is L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960), which generally concluded that the Blackstonian view was the prevailing one at the time and probably the understanding of those who drafted, voted for, and ratified the Amendment.
328 It would appear that Madison advanced libertarian views earlier than his Jeffersonian compatriots, as witness his leadership of a move to refuse officially to concur in Washington’s condemnation of “[c]ertain self-created societies,” by which the President meant political clubs supporting the French Revolution, and his success in deflecting the Federalist intention to censure such societies. I. Brant, James Madison—Father of the Constitution 1787–1800 416–20 (1950). “If we advert to the nature of republican government,” Madison told the House, “we shall find that the censorial power is in the people over the government, and not in the gov-
it appears that there emerged in the course of the Jeffersonian counterattack on the Sedition Act and the use by the Adams Administration of the Act to prosecute its political opponents, something of a libertarian theory of freedom of speech and press, which, however much the Jeffersonians may have departed from it upon assuming power, was to blossom into the theory undergirding Supreme Court First Amendment jurisprudence in modern times. Full acceptance of the theory that the Amendment operates not only to bar most prior restraints of expression but subsequent punishment of all but a narrow range of expression, in political discourse and indeed in all fields of expression, dates from a quite re-

329 The Act, 1 Stat. 596 (1798), punished anyone who would “write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute.” See J. SMITH, FREEDOM’S FETTERS—THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

330 Id., at 159 et seq.

331 L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY ch. 6 (1960); New York Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964). But compare L. LEVY, EMERGENCE OF A FREE PRESS (1985), a revised and enlarged edition of LEGACY OF EXPRESSION, in which Professor Levy modifies his earlier views, arguing that while the intention of the Framers to outlaw the crime of seditious libel, in pursuit of a free speech principle, cannot be established and may not have been the goal, there was a tradition of robust and rowdy expression during the period of the framing that contradicts his prior view that a modern theory of free expression did not begin to emerge until the debate over the Alien and Sedition Acts.

332 L. LEVY, JEFFERSON AND CIVIL LIBERTIES—THE DARKER SIDE (1963). Thus President Jefferson wrote to Governor McKeans of Pennsylvania in 1803: “The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is, by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. . . . This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the press. Not a general prosecution, for that would look like persecution; but a selected one.” 9 WORKS OF THOMAS JEFFERSON 449 (P. Ford ed., 1905).
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cent period, although the Court's movement toward that position began in its consideration of limitations on speech and press in the period following World War I.\footnote{333} Thus, in 1907, Justice Holmes could observe that, even if the Fourteenth Amendment embodied prohibitions similar to the First Amendment, "still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare . . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all."\footnote{334} But as Justice Holmes also observed, "[t]here is no constitutional right to have all general propositions of law once adopted remain unchanged."\footnote{335} New York Times Co. v. Sullivan, 376 U.S. 254 (1964), provides the principal doctrinal justification for the development, although the results had long since been fully applied by the Court. In Sullivan, Justice Brennan discerned in the controversies over the Sedition Act a crystallization of "a national awareness of the central meaning of the First Amendment," id. at 273, which is that the "right of free public discussion of the stewardship of public officials . . . [is] a fundamental principle of the American form of government." Id. at 275. This "central meaning" proscribes either civil or criminal punishment for any but the most maliciously, knowingly false criticism of government. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . . The historical record reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." Id. at 276. Madison's Virginia Resolutions of 1798 and his Report in support of them brought together and expressed the theories being developed by the Jeffersonians and represent a solid doctrinal foundation for the point of view that the First Amendment superseded the common law on speech and press, that a free, popular government cannot be libeled, and that the First Amendment absolutely protects speech and press. 6 WRITINGS OF JAMES MADISON, 341–406 (G. Hunt ed., 1908).

\footnote{333} Patterson v. Colorado, 205 U.S. 454, 462 (1907) (emphasis original). Justice Frankfurter had similar views in 1951: "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest . . . . The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.' That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years," Dennis v. United States, 341 U.S. 494, 521–522, 524 (1951) (concurring opinion). The internal quotation is from Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

\footnote{334} Patterson v. Colorado, 205 U.S. 454, 461 (1907).
But in *Schenck v. United States*, the first of the post-World War I cases to reach the Court, Justice Holmes, in the opinion of the Court, while upholding convictions for violating the Espionage Act by attempting to cause insubordination in the military service by circulation of leaflets, suggested First Amendment restraints on subsequent punishment as well as prior restraint. “It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints although to prevent them may have been the main purpose .... We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. ... The question in every case is whether the words used are used in such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Justice Holmes along with Justice Brandeis soon went into dissent in their views that the majority of the Court was misapplying the legal standards thus expressed to uphold suppression of speech which offered no threat of danger to organized institutions. But it was with the Court’s assumption that the Fourteenth Amendment restrained the power of the States to suppress speech and press that the doctrines developed. At first, Holmes and Brandeis remained in dissent, but in *Fiske v. Kansas*, the Court sustained a First Amendment type of claim in a state case, and in *Stromberg v. California*, a state law was voided on grounds of its interference with free speech. State common law was also voided, the Court in an opinion by Justice Black asserting that the First Amendment enlarged protections for speech, press,
and religion beyond those enjoyed under English common law.\textsuperscript{342} Development over the years since has been uneven, but by 1964 the Court could say with unanimity: “we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”\textsuperscript{343} And in 1969, the Court said that the cases “have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”\textsuperscript{344} This development and its myriad applications are elaborated in the following sections.

The First Amendment by its terms applies only to laws enacted by Congress, and not to the actions of private persons.\textsuperscript{345} This leads to a “state action” (or “governmental action”) limitation similar to that applicable to the Fourteenth Amendment.\textsuperscript{346} The limitation has seldom been litigated in the First Amendment context, but there is no obvious reason why analysis should differ markedly from Fourteenth Amendment state action analysis. Both contexts require “cautious analysis of the quality and degree of Government relationship to the particular acts in question.”\textsuperscript{347} In holding that the National Railroad Passenger Corporation (Amtrak) is a governmental entity for purposes of the First Amendment, the Court declared that “[t]he Constitution constrains governmental action ‘by whatever instruments or in whatever modes that action may be taken.’ . . . [a]nd under whatever congressional label.”\textsuperscript{348} The relationship of the government to broadcast licensees

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\item \textsuperscript{342} Bridges v. California, 314 U.S. 252, 263–68 (1941) (overturning contempt convictions of newspaper editor and others for publishing commentary on pending cases).
\item \textsuperscript{343} New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
\item \textsuperscript{344} Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
\item \textsuperscript{345} Through interpretation of the Fourteenth Amendment, the prohibition extends to the States as well. See discussion on incorporation under Bill of Rights, Fourteenth Amendment, infra.
\item \textsuperscript{346} See discussion on state action under the Fourteenth Amendment.
\item \textsuperscript{348} Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 392 (1995) (quoting Ex parte Virginia, 100 U.S. 339, 346–47 (1880)). The Court refused to be bound by the statement in Amtrak’s authorizing statute that the corporation is "not . . . an agency or establishment of the United States Government." This assertion can be effective “only for purposes of matters that are within Congress’ control,” the Court explained. “It is not for Congress to make the final determination of Amtrak’s status as a governmental entity for purposes of determining the constitutional rights of citizens affected by its actions.” 513 U.S. at 392.
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In CBS v. Democratic Nat’l Comm., 412 U.S. 94 (1973), the Court held that a broadcast licensee could refuse to carry a paid editorial advertisement. Chief Justice Burger, joined only by Justices Stewart and Rehnquist in that portion of his opinion, reasoned that a licensee’s refusal to accept such an ad did not constitute “governmental action” for purposes of the First Amendment. “The First Amendment does not reach acts of private parties in every instance where the Congress or the [Federal Communications] Commission has merely permitted or failed to prohibit such acts.” Id. at 119.

While “expression” is not found in the text of the First Amendment, it is used herein, first, as a shorthand term for the freedoms of speech, press, assembly, petition, association, and the like, which are comprehended by the Amendment, and, second, as a recognition of the fact that judicial interpretation of the clauses of the First Amendment has greatly enlarged the definition commonly associated with “speech,” as the following discussion will reveal. The term seems well settled, see, e.g., T. Emerson, The System of Freedom of Expression (1970), although it has been criticized. F. Schauer, Free Speech: A Philosophical Inquiry 50–52 (1982). The term also, as used here, conflates the speech and press clauses, explicitly assuming they are governed by the same standards of interpretation and that, in fact, the press clause itself adds nothing significant to the speech clause as interpreted, an assumption briefly defended in the next topic.


T. Emerson, The System of Freedom of Expression 6–7 (1970). For Emerson, the four values are (1) assuring individuals self-fulfillment, (2) promoting discovery of truth, (3) providing for participation in decisionmaking by all members of society, and (4) promoting social stability through discussion and compromise of differences. For a persuasive argument in favor of an “eclectic” approach, see Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 NW. U.L. REV. 1212 (1983). A compressive discussion of all the theories may be found in F. Schauer, Free Speech: A Philosophical Inquiry (1982).
and press clauses. For example, one school of thought believes that, because of the constitutional commitment to free self-government, only political speech is within the core protected area, although some commentators tend to define more broadly the concept of “political” than one might suppose from the word alone. Others recur to the writings of Milton and Mill and argue that protecting speech, even speech in error, is necessary to the eventual ascertainment of the truth, through conflict of ideas in the marketplace, a view skeptical of our ability to ever know the truth.  

Freedom of Expression: Is There a Difference Between Speech and Press?

Use of the single word “expression” to reach speech, press, petition, association, and the like, raises the central question of whether the free speech clause and the free press clause are coextensive; does one perhaps reach where the other does not? It has been much debated, for example, whether the “institutional press”

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353 E.g., A. M EIKLEJOHN, POLITICAL FREEDOM (1960); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971); BeVier, The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle, 30 Stan. L. Rev. 299 (1978). This contention does not reflect the Supreme Court’s view. “It is no doubt true that a central purpose of the First Amendment ‘was to protect the free discussion of governmental affairs.’ . . . But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection.” Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).


may assert or be entitled to greater freedom from governmental regulations or restrictions than are non-press individuals, groups, or associations. Justice Stewart has argued: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively." 357 But as Chief Justice Burger wrote: "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from governmental restraint not enjoyed by all others." 358

Several Court holdings do firmly point to the conclusion that the press clause does not confer on the press the power to compel government to furnish information or to give the press access to information that the public generally does not have. 359 Nor in many respects is the press entitled to treatment different in kind from the treatment any other member of the public may be subjected to. 360 "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects." 361 Yet, it does seem clear that to some extent the press, because of the role it plays in keeping the public informed and in the dissemination of news and information, is entitled to particular if not special deference that others are not similarly entitled to, that its role constitutionally entitles it to governmental "sensitivity," to use Justice Stewart's word. 362 What difference such "sensitivity" might make in deciding cases is difficult to say.

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358 435 U.S. at 798. The Chief Justice's conclusion was that the institutional press had no special privilege as the press.


The most interesting possibility lies in the area of First Amendment protection of good faith defamation. Justice Stewart argued that the Sullivan privilege is exclusively a free press right, denying that the "constitutional theory of free speech gives an individual any immunity from liability for libel or slander." To be sure, in all the cases to date that the Supreme Court has resolved, the defendant has been, in some manner, of the press, but the Court's decision that corporations are entitled to assert First Amendment speech guarantees against federal and, through the Fourteenth Amendment, state regulations causes the evaporation of the supposed "conflict" between speech clause protection of individuals only and of press clause protection of press corporations as well as of press individuals. The issue, the Court wrote, was not what constitutional rights corporations have but whether the speech that is being restricted is expression that the First Amendment protects because of its societal significance. Because the speech concerned the enunciation of views on the conduct of governmental affairs, it was protected regardless of its source; while the First Amendment protects and fosters individual self-expression as a worthy goal, it also and as importantly affords the public access to discussion, debate, and the dissemination of information and ideas. Despite Bellotti's emphasis upon the nature of the contested speech being political, it is clear that the same principle, the

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365 In Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979), the Court noted that it has never decided whether the Times standard applies to an individual defendant. Some think they discern in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), intimations of such leanings by the Court.

366 First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The decision, addressing a question not previously confronted, was 5–to–4. Justice Rehnquist would have recognized no protected First Amendment rights of corporations because, as entities entirely the creation of state law, they were not to be accorded rights enjoyed by natural persons. Id. at 822. Justices White, Brennan, and Marshall thought the First Amendment implicated but not dispositive because of the state interests asserted. Id. at 802. Previous decisions recognizing corporate free speech had involved either press corporations, id. at 781–83; and see id. at 795 (Chief Justice Burger concurring), or corporations organized especially to promote the ideological and associational interests of their members. E.g., NAACP v. Button, 371 U.S. 415 (1963).
right of the public to receive information, governs nonpolitical, corporate speech. 367

With some qualifications, therefore, it is submitted that the speech and press clauses may be analyzed under an umbrella “expression” standard, with little, if any, hazard of missing significant doctrinal differences.

The Doctrine of Prior Restraint

“[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship.” 368 “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” 369 Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.” 370 Under the English licensing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities. The great struggle for liberty of the press was for the right to publish without a license that which for a long time could be published only with a license. 371

The United States Supreme Court’s first encounter with a law imposing a prior restraint came in Near v. Minnesota ex rel. Olson, 372 in which a five-to-four majority voided a law authorizing the permanent enjoining of future violations by any newspaper or periodical once found to have published or circulated an “obscene, lewd and lascivious” or a “malicious, scandalous and defamatory” issue. An injunction had been issued after the newspaper in question had printed a series of articles tying local officials to gangsters. While the dissenters maintained that the injunction constituted no prior restraint, inasmuch as that doctrine applied to prohibitions of publication without advance approval of an executive official, 373 the majority deemed the difference of no consequence, since in order to avoid a contempt citation the newspaper would have to clear future publications in advance with the

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367 Commercial speech when engaged in by a corporation is subject to the same standards of protection as when natural persons engage in it. Consolidated Edison Co. v. PSC, 447 U.S. 530, 533–35 (1980). Nor does the status of a corporation as a government-regulated monopoly alter the treatment. Id. at 534 n.1; Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566–68 (1980).

368 Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).


369 Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.” 370 Under the English licensing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities. The great struggle for liberty of the press was for the right to publish without a license that which for a long time could be published only with a license. 371


372 283 U.S. 697 (1931).

373 283 U.S. at 723, 733–36 (Justice Butler dissenting).
judge.\footnote{283 U.S. at 712-13.} Liberty of the press to scrutinize closely the conduct of public affairs was essential, said Chief Justice Hughes for the Court. \"[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.\"\footnote{283 U.S. at 719–20.} The Court did not undertake to explore the kinds of restrictions to which the term \"prior restraint\" would apply nor to do more than assert that only in \"exceptional circumstances\" would prior restraint be permissible.\footnote{283 U.S. at 715-16.} Nor did subsequent cases substantially illuminate the murky interior of the doctrine. The doctrine of prior restraint was called upon by the Court as it struck down a series of loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them, and as it voided other restrictions on First Amendment rights.\footnote{E.g., Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958). For other applications, see Grosjean v. American Press Co., 297 U.S. 233 (1936); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944).} The doctrine that generally emerged was that permit systems—prior licensing, if you will—were constitutionally valid so long as the discretion of the issuing official was limited to questions of times, places, and manners.\footnote{Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953). In Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968), the Court held invalid the issuance of an ex parte injunction to restrain the holding of a protest meeting, holding that usually notice must be given the parties to be restrained and an opportunity for them to rebut the contentions presented to justify the sought-for restraint. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Court held invalid as a prior restraint an injunction preventing the petitioners from distributing 18,000 pamphlets attacking respondent's alleged \"blockbusting\" real estate activities; he was held not to have borne the \"heavy burden\" of justifying the restraint. \"No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy ... is not sufficient to support an injunction...\"}
national security area occurred when the Government attempted to
enjoin press publication of classified documents pertaining to the
Vietnam War and, although the Court rejected the effort, at
least five and perhaps six Justices concurred on principle that in
some circumstances prior restraint of publication would be con-
stitutional. But no cohesive doctrine relating to the subject, its
applications, and its exceptions has yet emerged.

**Injunctions and the Press in Fair Trial Cases.**—Con-
fronting a claimed conflict between free press and fair trial guaran-
tees, the Court unanimously set aside a state court injunction bar-
ring the publication of information that might prejudice the sub-
sequent trial of a criminal defendant. Though agreed on result, the
Justices were divided with respect to whether “gag orders” were
ever permissible and if so what the standards for imposing them
were. The opinion of the Court used the Learned Hand formulation
of the “clear and present danger” test and considered as factors

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379 New York Times Co. v. United States, 403 U.S. 713 (1971). The vote was six
to three, with Justices Black, Douglas, Brennan, Stewart, White, and Marshall in
the majority and Chief Justice Burger and Justices Harlan and Blackmun in the
minority. Each Justice issued an opinion.

380 The three dissenters thought such restraint appropriate in this case. Id. at
748, 752, 759. Justice Stewart thought restraint would be proper if disclosure “will
surely result in direct, immediate, and irreparable damage to our Nation or its
people,” id. at 730, while Justice White did not endorse any specific phrasing of a stand-
ard. Id. at 730–33. Justice Brennan would preclude even interim restraint except
upon “governmental allegation and proof that publication must inevitably, directly,
and immediately cause the occurrence of an event kindred to imperiling the safety
of a transport already at sea.” Id. at 712–13.

The same issues were raised in United States v. Progressive, Inc., 467 F. Supp.
990 (W.D. Wis. 1979), in which the United States obtained an injunction prohibiting
publication of an article it claimed would reveal information about nuclear weapons,
thus increasing the dangers of nuclear proliferation. The injunction was lifted when
the same information was published elsewhere and thus no appellate review was
had of the order.

With respect to the right of the Central Intelligence Agency to prepublication
review of the writings of former agents and its enforcement through contractual re-
lationships, see Snepp v. United States, 444 U.S. 507 (1980); Alfred A. Knopf, Inc.
v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975); United States


382 427 U.S. at 562, quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir.
in any decision on the imposition of a restraint upon press reporters (a) the nature and extent of pretrial news coverage, (b) whether other measures were likely to mitigate the harm, and (c) how effectively a restraining order would operate to prevent the threatened danger. One seeking a restraining order would have a heavy burden to meet to justify such an action, a burden that could be satisfied only on a showing that with a prior restraint a fair trial would be denied, but the Chief Justice refused to rule out the possibility of showing the kind of threat that would possess the degree of certainty to justify restraints. Justice Brennan’s major concurring opinion flatly took the position that such restraining orders were never permissible. Commentary and reporting on the criminal justice system is at the core of First Amendment values, he would hold, and secrecy can do so much harm “that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained.” The extremely narrow exceptions under which prior restraints might be permissible relate to probable national harm resulting from publication, the Justice continued; because the trial court could adequately protect a defendant’s right to a fair trial through other means even if there were conflict of constitutional rights the possibility of damage to the fair trial right would be so speculative that the burden of justification could not be met. While the result does not foreclose the possibility of further

383 Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 562 (1976) (opinion of Chief Justice Burger, concurred in by Justices Blackmun and Rehnquist, and, also writing brief concurrences, Justices White and Powell). Applying the tests, the Chief Justice agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant’s rights. Id. at 562–67.

384 The Court differentiated between two kinds of information, however: (1) reporting on judicial proceedings held in public, which has “special” protection and requires a much higher justification than (2) reporting of information gained from other sources as to which the burden of justifying restraint is still high. 427 U.S. at 567-68, 570. See also Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977) (setting aside injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); Smith v. Daily Mail Pub. Co., 433 U.S. 97 (1979).

385 427 U.S. at 572, 588. Justices Stewart and Marshall joined this opinion and Justice Stevens noted his general agreement except that he reserved decision in particularly egregious situations, even though stating that he might well agree with Justice Brennan there also. Id. at 617. Justice White, while joining the opinion of the Court, noted that he had grave doubts that “gag orders” could ever be justified but he would refrain from so declaring in the Court’s first case on the issue. Id. at 570.

386 427 U.S. at 588-95.
ture "gag orders," it does lessen the number to be expected and shifts the focus to other alternatives for protecting trial rights.\(^{387}\)

On a different level, however, are orders restraining the press as a party to litigation in the dissemination of information obtained through pretrial discovery. In *Seattle Times Co. v. Rhinehart*,\(^{388}\) the Court determined that such orders protecting parties from abuses of discovery require "no heightened First Amendment scrutiny."\(^{389}\)

**Obscenity and Prior Restraint.**—Only in the obscenity area has there emerged a substantial consideration of the doctrine of prior restraint, and the doctrine's use there may be based upon the proposition that obscenity is not a protected form of expression.\(^{390}\) In *Kingsley Books v. Brown*,\(^{391}\) the Court upheld a state statute that, while it embodied some features of prior restraint, was seen as having little more restraining effect than an ordinary criminal statute; that is, the law's penalties applied only after publication. But in *Times Film Corp. v. City of Chicago*,\(^{392}\) a divided Court specifically affirmed that, at least in the case of motion pictures, the First Amendment did not proscribe a licensing system under which a board of censors could refuse to license for public exhibition films that it found obscene. Books and periodicals may also be subjected to some forms of prior restraint,\(^{393}\) but the thrust of the Court's opinions in this area with regard to all forms of communication has been to establish strict standards of procedural protections to ensure that the censoring agency bears the burden of proof on obscenity, that only a judicial order can restrain exhibition, and that a prompt final judicial decision is assured.\(^{394}\)

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\(^{387}\) One such alternative is the banning of communication with the press on trial issues by prosecution and defense attorneys, police officials, and court officers. This, of course, also raises First Amendment issues. See, e.g., Chicago Council of Lawyers v. Bauer, 522 F. 2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).


\(^{389}\) 467 U.S. at 36. The decision was unanimous, all other Justices joining Justice Powell's opinion for the Court, but Justices Brennan and Marshall noting additionally that under the facts of the case important interests in privacy and religious freedom were being protected. Id. at 37, 38.

\(^{390}\) See discussion of "Obscenity," infra.


\(^{392}\) 365 U.S. 43 (1961). See also Young v. American Mini Theatres, 427 U.S. 50 (1976) (zoning ordinance prescribing distances adult theaters may be located from residential areas and other theaters is not an impermissible prior restraint).


Subsequent Punishment: Clear and Present Danger and Other Tests

Granted that the context of the controversy over freedom of expression at the time of the ratification of the First Amendment was almost exclusively limited to the problem of prior restraint, still the words speak of laws “abridging” freedom of speech and press, and the modern cases have been largely fought over subsequent punishment. “The mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications . . . .”

“[The purpose of the speech-press clauses] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them . . . . The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.”

A rule of law permitting criminal or civil liability to be imposed upon those who speak or write on public issues would lead to “self-censorship” by all which would not be relieved by permitting a defense of truth. “Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved

prompt judicial review); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) (seizure of books and films based on ex parte probable cause hearing under state RICO law’s forfeiture procedures constitutes invalid prior restraint; instead, there must be a determination in an adversarial proceeding that the materials are obscene or that a RICO violation has occurred). But cf. Alexander v. United States, 509 U.S. 544 (1993) (RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses, based on the predicate acts of selling four magazines and three videotapes, does not constitute a prior restraint and is not invalid as “chilling” protected expression that is not obscene).

in court or fear of the expense of having to do so.... The rule thus dampens the vigor and limits the variety of public debate.”

“Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”

“Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by

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law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral." The fixing of a standard is necessary, by which it can be determined what degree of evil is sufficiently substantial to justify resort to abridgment of speech and press and assembly as a means of protection and how clear and imminent and likely the danger is. That standard has fluctuated over a period of some fifty years now and it cannot be asserted with a great degree of confidence that the Court has yet settled on any firm standard or any set of standards for differing forms of expression. The cases are instructive of the difficulty.

**Clear and Present Danger.**—Certain expression, oral or written, may incite, urge, counsel, advocate, or importune the commission of criminal conduct; other expression, such as picketing, demonstrating, and engaging in certain forms of "symbolic" action, may either counsel the commission of criminal conduct or itself constitute criminal conduct. Leaving aside for the moment the problem of "speech-plus" communication, it becomes necessary to determine when expression that may be a nexus to criminal conduct is subject to punishment and restraint. At first, the Court seemed disposed in the few cases reaching it to rule that if the conduct could be made criminal, the advocacy of or promotion of the conduct could be made criminal. Then, in *Schenck v. United States*, in which defendants had been convicted of seeking to disrupt recruitment of military personnel by dissemination of certain leaflets, Justice Holmes formulated the "clear and present danger" test which has ever since been the starting point of argument. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and

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399 274 U.S. at 373.
400 274 U.S. at 374.
degree.” The convictions were unanimously affirmed. One week later, the Court again unanimously affirmed convictions under the same Act with Justice Holmes speaking. “[W]e think it necessary to add to what has been said in Schenck v. United States . . . only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.” And in Debs v. United States, Justice Holmes was found referring to “the natural and intended effect” and “probable effect” of the condemned speech in common-law tones.

But in Abrams v. United States, Justices Holmes and Brandeis dissented upon affirmance of the convictions of several alien anarchists who had printed leaflets seeking to encourage discontent with United States participation in the War. The majority simply referred to Schenck and Frohwerk to rebut the First Amendment argument, but the dissenters urged that the Government had made no showing of a clear and present danger. Another affirmance by the Court of a conviction, the majority simply saying that “[t]he tendency of the articles and their efficacy were enough for the offense,” drew a similar dissent. Moreover, in Gitlow v. New York, a conviction for distributing a manifesto in violation of a law making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, the Court affirmed in the absence of any evidence regarding the effect of the distribution and in the absence of any contention that it created any immediate threat to the security of the State. In so doing, the Court discarded Holmes’ test. “It is clear that the question in such cases [as this] is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. . . . In such cases it has been held that the general provisions of the statute may be constitutionally applied to

403 249 U.S. at 52.
404 Frohwerk v. United States, 249 U.S. 204, 206 (1919) (citations omitted).
405 250 U.S. 616 (1919).
406 251 U.S. 466, 479 (1920). See also Pierce v. United States, 252 U.S. 239 (1920).
407 259 U.S. 250 (1926).
408 268 U.S. 652 (1925)
the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. . . . The general statement in the Schenck Case . . . was manifestly intended . . . to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character." 409 Thus, a state legislative determination "that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil that they may be penalized in the exercise of its police power" was almost conclusive on the Court. 410 It is not clear what test, if any, the majority would have used, although the "bad tendency" test has usually been associated with the case. In Whitney v. California, 411 the Court affirmed a conviction under a criminal syndicalism statute based on defendant's association with and membership in an organization that advocated the commission of illegal acts, finding again that the determination of a legislature that such advocacy involves "such danger to the public peace and the security of the State" was entitled to almost conclusive weight. In a technical concurrence which was in fact a dissent from the opinion of the Court, Justice Brandeis restated the "clear and present danger" test. "[E]ven advocacy of violation [of the law] . . . is not a justification for denying free speech where the advocacy fails short of incitement and there is nothing to indicate that the advocacy would be immediately acted on . . . In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." 412

409 268 U.S. at 670-71.
410 268 U.S. at 668. Justice Holmes dissented. "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who share the defendant's views. It is said that this Manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief, and, if believed, is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they would be given their chance and have their way." Id. at 673.

412 274 U.S. at 376.
The Adoption of Clear and Present Danger.—The Court did not invariably affirm convictions during this period in cases like those under consideration. In *Fiske v. Kansas*, it held that a criminal syndicalism law had been invalidly applied to convict one against whom the only evidence was the “class struggle” language of the constitution of the organization to which he belonged. A conviction for violating a “red flag” law was voided as the statute was found unconstitutionally vague. Neither case mentioned clear and present danger. An “incitement” test seemed to underlie the opinion in *De Jonge v. Oregon*, upsetting a conviction under a criminal syndicalism statute for attending a meeting held under the auspices of an organization which was said to advocate violence as a political method, although the meeting was orderly and no violence was advocated during it. In *Herndon v. Lowry*, the Court narrowly rejected the contention that the standard of guilt could be made the “dangerous tendency” of one’s words, and indicated that the power of a State to abridge speech “even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government.”

Finally, in *Thornhill v. Alabama*, a state anti-picketing law was invalidated because “no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.” During the same term, the Court reversed the breach of the peace conviction of a Jehovah’s Witness who had played an inflammatory phonograph record to persons on the street, the Court discerning no clear and present danger of disorder.

The stormiest fact situation faced by the Court in applying clear and present danger occurred in *Terminiello v. City of Chicago*, in which a five-to-four majority struck down a conviction obtained after the judge instructed the jury that a breach of the peace could be committed by speech that “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a dis-

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413 274 U.S. 280 (1927).
416 301 U.S. 242, 258 (1937). At another point, clear and present danger was alluded to without any definite indication it was the standard. Id. at 261.
417 310 U.S. 88, 105 (1940). The Court admitted that the picketing did result in economic injury to the employer, but found such injury “neither so serious nor so imminent” as to justify restriction. The doctrine of clear and present danger was not to play a future role in the labor picketing cases.
419 337 U.S. 1 (1949).
turbance.” “A function of free speech under our system of government,” wrote Justice Douglas for the majority, “is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”420 The dissenters focused on the disorders that had actually occurred as a result of Terminiello’s speech, Justice Jackson saying: “Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish .... In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate.”421 The Jackson position was soon adopted in Feiner v. New York,422 in which Chief Justice Vinson said that “[t]he findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner’s deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.”

Contempt of Court and Clear and Present Danger.—The period during which clear and present danger was the standard by which to determine the constitutionality of governmental suppression of or punishment for expression was a brief one, extending roughly from Thornhill to Dennis.423 But in one area it was vigorously, though not without dispute, applied to enlarge freedom of utterance and it is in this area that it remains viable. In early contempt-of-court cases in which criticism of courts had been punished as contempt, the Court generally took the position that even if freedom of speech and press was protected against governmental abridgment, a publication tending to obstruct the administration of justice was punishable, irrespective of its truth.424 But in Bridges v. California,425 in which contempt citations had been brought

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420 337 U.S. at 4-5.
424 Patterson v. Colorado, 205 U.S. 454 (1907); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
425 314 U.S. 252 (1941).
against a newspaper and a labor leader for statements made about pending judicial proceedings, Justice Black for a five-to-four Court majority began with application of clear and present danger, which he interpreted to require that “the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”

He noted that the “substantive evil here sought to be averted . . . appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice.” The likelihood that the court will suffer damage to its reputation or standing in the community was not, Justice Black continued, a “substantive evil” which would justify punishment of expression. The other evil, “disorderly and unfair administration of justice,” “is more plausibly associated with restricting publications which touch upon pending litigation.” But the “degree of likelihood” of the evil being accomplished was not “sufficient to justify summary punishment.” In dissent, Justice Frankfurter accepted the application of clear and present danger, but he interpreted it as meaning no more than a “reasonable tendency” test. “Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another.... A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed.”

A unanimous Court next struck down the contempt conviction arising out of newspaper criticism of judicial action already taken, although one case was pending after a second indictment. Specifically alluding to clear and present danger, while seeming to regard it as as stringent a test as Justice Black had in the prior case, Justice Reed wrote that the danger sought to be averted, a “threat to the impartial and orderly administration of justice,” “has not the clearness and immediacy necessary to close the door of permissible

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426 314 U.S. at 263.
427 314 U.S. at 270-71.
428 314 U.S. at 271-78.
429 314 U.S. at 291. Joining Justice Frankfurter in dissent were Chief Justice Stone and Justices Roberts and Byrnes.
public comment.” To Justice Frankfurter, the decisive consideration was whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect. Id. at 369.

Craig v. Harney, 331 U.S. 367, 376 (1947). Dissenting with Chief Justice Vinson, Justice Frankfurter said: “We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another.” Id. at 390. Justice Jackson also dissented. Id. at 394. A unanimous Court recently seems to have applied the standard to set aside a contempt conviction of a defendant who, arguing his own case, alleged before the jury that the trial judge by his bias had prejudiced his trial and that he was a political prisoner. Though the defendant’s remarks may have been disrespectful of the court, the Supreme Court noted that “[t]here is no indication … that petitioner’s statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding” and quoted its previous language about the imminence of the threat necessary to constitute contempt.

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430 Pennekamp v. Florida, 328 U.S. 331, 336, 350 (1946). To Justice Frankfurter, the decisive consideration was whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect. Id. at 369.

431 Craig v. Harney, 331 U.S. 367, 376 (1947). Dissenting with Chief Justice Vinson, Justice Frankfurter said: “We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another.” Id. at 390. Justice Jackson also dissented. Id. at 394. See also Landmark Communications v. Virginia, 435 U.S. 829, 844 (1978); Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 562–63 (1976).


433 370 U.S. at 383–85, 386–90. Dissenting, Justices Harlan and Clark thought that the charges made by the defendant could well have influenced the grand jurors in their deliberations and that the fact that laymen rather than judicial officers were subject to influence should call forth a less stringent test than when the latter were the object of comment. Id. at 395.

434 In re Little, 404 U.S. 553, 555 (1972). The language from Craig v. Harney, 331 U.S. 367, 376 (1947), is quoted in the previous paragraph of text, supra.
Clear and Present Danger Revised: Dennis.—In *Dennis v. United States*, supra, the Court sustained the constitutionality of the Smith Act, supra, which proscribed advocacy of the overthrow by force and violence of the government of the United States, and upheld convictions under it. *Dennis*’ importance here is in the rewriting of the clear and present danger test. For a plurality of four, Chief Justice Vinson acknowledged that the Court had in recent years relied on the Holmes-Brandeis formulation of clear and present danger without actually overruling the older cases that had rejected the test; but while clear and present danger was the proper constitutional test, that “shorthand phrase should [not] be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case.” It was a relative concept. Many of the cases in which it had been used to reverse convictions had turned “on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech.” supra. Here, by contrast, “[o]verthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech.” supra. And in combating that threat, the Government need not wait to act until the putsch is about to be executed and the plans are set for action. “If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.” supra. Therefore, what does the phrase “clear and present danger” import for judgment? “Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: ‘In each case [courts] must ask whether the gravity of the “evil,” discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.’” supra at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot

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438 341 U.S. at 509.
439 341 U.S. at 508, 509.
expect from words." The "gravity of the evil, discounted by its improbability" was found to justify the convictions.

**Balancing.**—Clear and present danger as a test, it seems clear, was a pallid restriction on governmental power after *Dennis*, and it virtually disappeared from the Court's language over the next twenty years. Its replacement for part of this period was the much disputed "balancing" test, which made its appearance in the year prior to *Dennis* in *American Communications Ass'n v. Douds*. There the Court sustained a law barring from access to the NLRB any labor union if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government. Chief Justice Vinson, for the Court, rejected reliance on the clear and present danger test. "Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial

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440 341 U.S. at 510. Justice Frankfurter, concurring, adopted a balancing test, id. at 517, discussed in the next topic. Justice Jackson appeared to proceed on a conspiracy approach rather than one depending on advocacy. Id. at 561. Justices Black and Douglas dissented, reasserting clear and present danger as the standard. Id. at 579, 581. Note the recurrence to the Learned Hand formulation in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976), although the Court appeared in fact to apply balancing.

441 In *Yates v. United States*, 354 U.S. 298 (1957), the Court substantially limited both the Smith Act and the *Dennis* case by interpreting the Act to require advocacy of unlawful action, to require the urging of doing something now or in the future, rather than merely advocacy of forcible overthrow as an abstract doctrine, and by finding the evidence lacking to prove the former. Of *Dennis*, Justice Harlan wrote: "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' id. at 511–12, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." Id. at 321.


443 339 U.S. 382 (1950). See also Osman v. Douds, 339 U.S. 846 (1950). Balancing language was used by Justice Black in his opinion for the Court in *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), but it seems not to have influenced the decision. Similarly, in *Schneider v. Irvington*, 308 U.S. 147, 161–62 (1939), Justice Roberts used balancing language that he apparently did not apply.

444 The law, § 9(h) of the Taft-Hartley Act, 61 Stat. 146 (1947), was repealed, 73 Stat. 525 (1959), and replaced by a section making it a criminal offense for any person "who is or has been a member of the Communist Party" during the preceding five years to serve as an officer or employee of any union. § 504, 73 Stat. 536 (1959); 29 U.S.C. § 504. It was held unconstitutional in *United States v. Brown*, 381 U.S. 437 (1965).
evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. The Board does not contend that political strikes . . . are the present or impending products of advocacy of the doctrines of Communism or the expression of belief in overthrow of the Government by force. On the contrary, it points out that such strikes are called by persons who, so Congress has found, have the will and power to do so without advocacy."

The test, rather, must be one of balancing of interests. “When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.” Inasmuch as the interest in the restriction, the government’s right to prevent political strikes and the disruption of commerce, is much more substantial than the limited interest on the other side in view of the relative handful of persons affected in only a partial manner, the Court perceived no difficulty upholding the statute.

Justice Frankfurter in Dennis rejected the applicability of clear and present danger and adopted a balancing test. “The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interest, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.” But the “careful weighing of conflicting interests” not only placed in the scale the disparately-weighed interest of government in self-preservation and the interest of defendants in advocating illegal action, which alone would have determined the balance, it also involved the Justice’s philosophy of the “confines of the judicial process” within which the role of courts, in First Amendment litigation as in other, is severely limited. Thus, “[f]ull responsibility” may not be placed in the courts “to balance the relevant factors and ascertain which interest in the circumstances [is] to prevail.” “Courts are not representative bodies. They are not designed to be a good reflex of a democratic soci-

446 339 U.S. at 399.
447 339 U.S. at 400-06.
448 Dennis v. United States, 341 U.S. 494, 517 (1951) (concurring opinion).
449 341 U.S. at 524-25.
450 341 U.S. at 542.
ety.” Rather, “[p]rimary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.”\footnote{341 U.S. at 525.} Therefore, after considering at some length the factors to be balanced, Justice Frankfurter concluded: “It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends.”\footnote{341 U.S. at 550-51.} Only if the balance struck by the legislature is “outside the pale of fair judgment”\footnote{341 U.S. at 540.} could the Court hold that Congress was deprived by the Constitution of the power it had exercised.\footnote{341 U.S. at 551.}

Thereafter, during the 1950s and the early 1960s, the Court used the balancing test in a series of decisions in which the issues were not, as they were not in \textit{Douds} and \textit{Dennis}, matters of expression or advocacy as a threat but rather were governmental inquiries into associations and beliefs of persons or governmental regulation of associations of persons, based on the idea that beliefs and associations provided adequate standards for predicting future or intended conduct that was within the power of government to regulate or to prohibit. Thus, in the leading case on balancing, \textit{Konigsberg v. State Bar of California},\footnote{366 U.S. 36 (1961).} the Court upheld the refusal of the State to certify an applicant for admission to the bar. Required to satisfy the Committee of Bar Examiners that he was of “good moral character,” Konigsberg testified that he did not believe in the violent overthrow of the government and that he had never knowingly been a member of any organization which advocated such action, but he declined to answer any question pertaining to membership in the Communist Party.

For the Court, Justice Harlan began by asserting that freedom of speech and association were not absolutes but were subject to various limitations. Among the limitations, “general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitu-
tionality which has necessarily involved a weighing of the governmental interest involved.” The governmental interest involved was the assurance that those admitted to the practice of law were committed to lawful change in society and it was proper for the State to believe that one possessed of “a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form” of government did not meet the standard of fitness. On the other hand, the First Amendment interest was limited because there was “minimal effect upon free association occasioned by compulsory disclosure” under the circumstances. “There is here no likelihood that deterrence of association may result from foreseeable private action … for bar committee interrogations such as this are conducted in private…. Nor is there the possibility that the State may be afforded the opportunity for imposing undetectable arbitrary consequences upon protected association … for a bar applicant’s exclusion by reason of Communist Party membership is subject to judicial review, including ultimate review by this Court, should it appear that such exclusion has rested on substantive or procedural factors that do not comport with the Federal Constitution.”

Balancing was used to sustain congressional and state inquiries into the associations and activities of individuals in connection with allegations of subversion and to sustain proceedings against the Communist Party and its members. In certain other cases, involving state attempts to compel the production of membership lists of the National Association for the Advancement of Colored People and to investigate that organization, use of the balancing test resulted in a finding that speech and associational rights outweighed the governmental interest claimed. The Court used a balancing test in the late 1960s to protect the speech rights of a public employee who had criticized his employers. Balancing, however, was not used when the Court struck down restric-

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456 366 U.S. at 50-51.
457 366 U.S. at 51-52.
458 366 U.S. at 52-53. See also In re Anastaplo, 366 U.S. 82 (1961). The status of these two cases is in doubt after Baird v. State Bar, 401 U.S. 1 (1971), and In re Stolar, 401 U.S. 23 (1971), in which neither the plurality nor the concurring Justice making up the majority used a balancing test.
tions on receipt of materials mailed from Communist countries, and it was not used in cases involving picketing, pamphleteering, and demonstrating in public places. But the only case in which it was specifically rejected involved a statutory regulation like those that had given rise to the test in the first place. United States v. Robel held invalid under the First Amendment a statute which made it unlawful for any member of an organization which the Subversive Activities Control Board had ordered to register to work in a defense establishment. Although Chief Justice Warren for the Court asserted that the vice of the law was that its proscription operated per se “without any need to establish that an individual’s association poses the threat feared by the Government in proscribing it,” the rationale of the decision was not clear and present danger but the existence of less restrictive means by which the governmental interest could be accomplished. In a concluding footnote, the Court said: “It has been suggested that this case should be decided by ‘balancing’ the governmental interests ... against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way ‘balanced’ those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.”

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463 Lamont v. Postmaster General, 381 U.S. 301 (1965).
468 389 U.S. at 265-68.
469 389 U.S. at 268 n.20.
The "Absolutist" View of the First Amendment, With a Note on "Preferred Position".—During much of this period, the opposition to the balancing test was led by Justices Black and Douglas, who espoused what may be called an "absolutist" position, denying the government any power to abridge speech. But the beginnings of such a philosophy may be gleaned in much earlier cases in which a rule of decision based on a preference for First Amendment liberties was prescribed. Thus, Chief Justice Stone in his famous Carolene Products "footnote 4" suggested that the ordinary presumption of constitutionality that prevailed when economic regulation was in issue might very well be reversed when legislation that restricted "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" is called into question.\footnote{United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).} Then in Murdock v. Pennsylvania,\footnote{319 U.S. 105, 115 (1943). See also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).} in striking down a license tax on religious colporteurs, the Court remarked that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Two years later the Court indicated that its decision with regard to the constitutionality of legislation regulating individuals is "delicate ... [especially] where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.... That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."\footnote{Thomas v. Collins, 323 U.S. 516, 529–30 (1945).} The "preferred-position" language was sharply attacked by Justice Frankfurter in Kovacs v. Cooper,\footnote{336 U.S. 77, 89 (1949) (collecting cases with critical analysis).} and it dropped from the opinions, although its philosophy did not.

doctrine that permits constitutionally protected rights to be ‘balanced’ away whenever a majority of this Court thinks that a State might have an interest sufficient to justify abridgment of those freedoms . . . I believe that the First Amendment’s unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”  As he elsewhere wrote: “First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government.” But the “First and Fourteenth Amendments . . . take away from government, state and federal, all power to restrict freedom of speech, press and assembly where people have a right to be for such purpose. This does not mean however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling whether on publicly owned streets or on privately owned property.” Thus, in his last years on the Court, the Justice, while maintaining an “absolutist” position, increasingly drew a line between “speech” and “conduct which involved communication.”

Of Other Tests and Standards: Vagueness, Overbreadth, Least Restrictive Means, and Others.—In addition to the foregoing tests, the Court has developed certain standards that are exclusively or primarily applicable in First Amendment litigation. Some of these, such as the doctrines prevalent in the libel and obscenity areas, are very specialized, but others are not. Vagueness is a due process vice which can be brought into play with regard to any criminal and many civil statutes, but as applied in areas respecting expression it also encompasses concern that protected conduct will be deterred out of fear that the statute is capable of application to it. Vagueness has been the basis for voiding numerous such laws, especially in the fields of loyalty oaths, obscenity, and loyalty oaths.  

479 The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. See, e.g., Connally v. General Construction Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Colautti v. Franklin, 439 U.S. 379 (1979); Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982).  
ity, and restrictions on public demonstrations. It is usually combined with the overbreadth doctrine, which focuses on the need for precision in drafting a statute that may affect First Amendment rights; an overbroad statute that sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid, although in a non-First Amendment situation the Court would simply void its application to protected conduct. Similarly, and closely related at least to the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to the given end, it must choose the measure that least interferes with rights of expression. Also, the Court has insisted that regulatory measures that bear on expression must relate to the achievement of the purpose asserted as


their justification. The prevalence of these standards and tests in this area appear to indicate that, while "preferred position" may have disappeared from the Court's language, it has not disappeared from its philosophy.

*Is There a Present Test?*—Complexities inherent in the myriad varieties of expression encompassed by the First Amendment guarantees of speech, press, and assembly probably preclude any single standard. For certain forms of expression for which protection is claimed, the Court engages in "definitional balancing" to determine that those forms are outside the range of protection. Balancing is in evidence to enable the Court to determine whether certain covered speech is entitled to protection in the particular context in which the question arises. Use of vagueness, overbreadth, and less intrusive means may very well operate to reduce the occasions when questions of protection must be answered squarely on the merits. What is observable, however, is the reemergence, at least in a tentative fashion, of something like the clear and present danger standard in advocacy cases, which is the context in which it was first developed. Thus, in *Brandenburg v. Ohio*, a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terrorist means to achieve political change was reversed. The prevailing doctrine developed in the Communist Party cases was that "mere" advocacy was protected but that a call for concrete, forcible action even far in the future was not protected speech and knowing membership in an organization calling for such action was not protected associa-

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487 Thus, obscenity, by definition, is outside the coverage of the First Amendment, Roth v. United States, 354 U.S. 476 (1957); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), as are malicious defamation, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court must, of course, decide in each instance whether the questioned expression, as a matter of definition, falls within one of these or another category. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

488 E.g., the multifaceted test for determining when commercial speech is protected, Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566 (1980); the standard for determining when expressive conduct is protected, United States v. O'Brien, 391 U.S. 367, 377 (1968); the elements going into decision with respect to access at trials, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–10 (1982); and the test for reviewing press "gag orders" in criminal trials, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–67 (1976), are but a few examples.

tion, regardless of the probability of success. In Brandenburg, however, the Court reformulated these and other rulings to mean "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The Court has not revisited these issues since Brandenburg, so the long-term significance of the decision is yet to be determined.

**Freedom of Belief**

The First Amendment does not expressly speak in terms of liberty to hold such beliefs as one chooses, but in both the religion and the expression clauses, it is clear, liberty of belief is the foundation of the liberty to practice what religion one chooses and to express oneself as one chooses. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Speaking in the context of religious freedom, the Court at one point said that, while the freedom to act on one's beliefs could be limited, the freedom to believe what one will "is absolute." But matters are not so simple.

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492 In Stewart v. McCoy, 123 S. Ct. 468 (2002), Justice Stevens, in a statement accompanying a denial of certiorari, wrote that, while Brandenburg's "requirement that the consequence be 'imminent' is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function... Long range planning of criminal enterprises – which may include oral advice, training exercises, and perhaps the preparation of written materials – involve speech that should not be glibly characterized as mere 'advocacy' and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech."


**Flag Salute Cases.**—That government generally may not compel a person to affirm a belief is the principle of the second *Flag Salute Case*. In *Minersville School District v. Gobitis*, the Court upheld the power of the State to expel from its schools certain children, Jehovah’s Witnesses, who refused upon religious grounds to join in a flag salute ceremony and recitation of the pledge of allegiance. “Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.” But three years later, a six-to-three majority of the Court reversed itself. Justice Jackson for the Court chose to ignore the religious argument and to ground the decision upon freedom of speech. The state policy, he said, constituted “a compulsion of students to declare a belief.... It requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks.” But the power of a State to follow a policy that “requires affirmation of a belief and an attitude of mind” is limited by the First Amendment, which, under the standard then prevailing, required the State to prove that the act of the students in remaining passive during the ritual “creates a clear and present danger that would justify an effort even to muffle expression.”

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497 310 U.S. 586 (1940).
498 310 U.S. at 594. Justice Stone alone dissented, arguing that the First Amendment religion and speech clauses forbade coercion of “these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions.” Id. at 601.
499 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Justices Roberts and Reed simply noted their continued adherence to *Gobitis*. Id. at 642. Justice Frankfurter dissented at some length, denying that the First Amendment authorized the Court “to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.” Id. at 646, 647.
500 319 U.S. at 631, 633. *Barnette* was the focus of the Court’s decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), voiding the state’s requirement that motorists display auto license plates bearing the motto “Live Free or Die.” Acting on the complaint of a Jehovah’s Witness, the Court held that one may not be compelled to display on his private property a message making an ideological statement. Compare *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85–88 (1980), and id. at 96 (Justice Powell concurring), in which the Court upheld a state requirement that privately owned shopping centers permit others to engage in speech or petitioning on their property. The First Amendment does not preclude a public university from charging its students an activity fee that is used to support student organizations that engage in extracurricular speech, provided the money is allocated to those groups by use of viewpoint-neutral criteria. *Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) (upholding fee except to the extent a student referendum substituted majority determinations for viewpoint neutrality in allocating funds). Nor does the First Amendment preclude the Government from “compell[ing] financial contributions that are used to fund advertising,” pro-
However, the principle of Barnette does not extend so far as to bar government from requiring of its employees or of persons seeking professional licensing or other benefits an oath generally but not precisely based on the oath required of federal officers, which is set out in the Constitution, that the taker of the oath will uphold and defend the Constitution. \(^{502}\) It is not at all clear, however, to what degree the government is limited in probing the sincerity of the person taking the oath. \(^{503}\)

**Imposition of Consequences for Holding Certain Beliefs.**—Despite the Cantwell dictum that freedom of belief is absolute, \(^{504}\) government has been permitted to inquire into the holding of certain beliefs and to impose consequences on the believers, primarily with regard to its own employees and to licensing certain professions. \(^{505}\) It is not clear what precise limitations the Court has placed on these practices.

In its disposition of one of the first cases concerning the federal loyalty-security program, the Court of Appeals for the District of Columbia asserted broadly that “so far as the Constitution is concerned there is no prohibition against dismissal of Government employees because of their political beliefs, activities or affiliations.” United States v. United Foods, Inc., 533 U.S. 405, 411, 412 (2001) (striking down Secretary of Agriculture’s mandatory assessments, used for advertising, upon handlers of fresh mushrooms).


505 The issue has also arisen in the context of criminal sentencing. Evidence that racial hatred was a motivation for a crime may be taken into account, Barclay v. Florida, 463 U.S. 939, 949 (1983); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (criminal sentence may be enhanced because the defendant intentionally selected his victim on account of the victim’s race), but evidence of the defendant’s membership in a racist group is inadmissible where race was not a factor and no connection had been established between the defendant’s crime and the group’s objectives. Dawson v. Delaware, 503 U.S. 159 (1992). See also United States v. Abel, 469 U.S. 45 (1984) (defense witness could be impeached by evidence that both witness and defendant belonged to group whose members were sworn to lie on each other’s behalf).
On appeal, this decision was affirmed by an equally divided Court, it being impossible to determine whether this issue was one treated by the Justices. Thereafter, the Court dealt with the loyalty-security program in several narrow decisions not confronting the issue of denial or termination of employment because of beliefs or “beliefs plus.” But the same issue was also before the Court in related fields. In *American Communications Ass'n v. Douds*, the Court was again evenly divided over a requirement that, in order for a union to have access to the NLRB, each of its officers must file an affidavit that he neither believed in, nor belonged to an organization that believed in, the overthrow of government by force or by illegal means. Chief Justice Vinson thought the requirement reasonable because it did not prevent anyone from believing what he chose but only prevented certain people from being officers of unions, and because Congress could reasonably conclude that a person with such beliefs was likely to engage in political strikes and other conduct that Congress could prevent. Dissenting, Justice Frankfurter thought the provision too vague. Justice Jackson thought that Congress could impose no disqualification upon anyone for an opinion or belief that had not manifested itself in any overt act, and Justice Black thought that government had no power to penalize beliefs in any way. Finally, in *Konigsberg v. State Bar of California*, a majority of the Court supported dictum in Justice Harlan’s opinion in which he justified some inquiry into beliefs, saying that “[i]t would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the

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506 Bailey v. Richardson, 182 F.2d 46, 59 (D.C. Cir. 1950). The premise of the decision was that government employment is a privilege rather than a right and that access thereto may be conditioned as the Government pleases. But this basis, as the Court has said, “has been thoroughly undermined in the ensuing years,” Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). For the vitiation of the right-privilege distinction, see discussion under “Government as Employer: Free Speech Generally,” infra.

507 Bailey v. Richardson, 341 U.S. 918 (1951). See also Washington v. McGrath, 341 U.S. 923 (1951), affg by an equally divided Court, 182 F. 2d 375 (D.C. Cir. 1950). While no opinions were written in these cases, several Justices expressed themselves on the issues in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), decided the same day.

508 339 U.S. 382 (1950). In a later case raising the same point, the Court was again equally divided. Osman v. Douds, 339 U.S. 846 (1950).

509 339 U.S. at 408-09, 412.

510 339 U.S. at 415.

511 339 U.S. at 422.

512 339 U.S. at 445.

513 336 U.S. 36, 51–52 (1961). See also In re Anastaplo, 336 U.S. 82, 89 (1961). Justice Black, joined by Justice Douglas and Chief Justice Warren, dissented on the ground that the refusal to admit the two to the state bars was impermissibly based upon their beliefs. Id. at 56, 97.
State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country’s legal and political institutions.”

When the same issue returned to the Court years later, three five-to-four decisions left the principles involved unclear. Four Justices endorsed the view that beliefs could not be inquired into as a basis for determining qualifications for admission to the bar; four Justices endorsed the view that while mere beliefs might not be sufficient grounds to debar one from admission, the States were not precluded from inquiring into them for purposes of determining whether one was prepared to advocate violent overthrow of the government and to act on his beliefs. The decisive vote in each case was cast by a single Justice who would not permit denial of admission based on beliefs alone but would permit inquiry into those beliefs to an unspecified extent for purposes of determining that the required oath to uphold and defend the Constitution could be taken in good faith. Changes in Court personnel following this decision would seem to leave the questions presented open to further litigation.

Right of Association

“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” It would appear from the Court’s opinions that the right of association is derivative from the First Amendment guarantees of speech, assembly,
and petition, although it has at times seemingly been referred to as a separate, independent freedom protected by the First Amendment. The doctrine is a fairly recent construction, the problems associated with it having previously arisen primarily in the context of loyalty-security investigations of Communist Party membership, and these cases having been resolved without giving rise to any separate theory of association.

Freedom of association as a concept thus grew out of a series of cases in the 1950s and 1960s in which certain States were attempting to curb the activities of the National Association for the Advancement of Colored People. In the first case, the Court unanimously set aside a contempt citation imposed after the organization refused to comply with a court order to produce a list of its members within the State. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." [T]hese indispensable liberties, whether of speech, press, or association, may be abridged by governmental action either directly or indirectly, wrote Justice Harlan, and the State had failed to demonstrate a need for the lists which would outweigh the harm to associational rights which disclosure would produce.

Applying the concept in subsequent cases, the Court again held in Bates v. City of Little Rock, that the disclosure of membership lists, because of the harm to be caused to "the right of association," could only be compelled upon a showing of a subordinating interest; ruled in Shelton v. Tucker, that while a State had a broad interest to inquire into the fitness of its school teachers, that interest did not justify a regulation requiring all teachers to list all organizations to which they had belonged within the previous five years; again struck down an effort to compel membership lists from the NAACP; and overturned a state court order barring the NAACP from doing any business within the State because of alleged impro-

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523 357 U.S. at 461.
525 364 U.S. 479 (1960).
prieties.  

527 Certain of the activities condemned in the latter case, the Court said, were protected by the First Amendment and, while other actions might not have been, the State could not so infringe on the "right of association" by ousting the organization altogether.  

528 A state order prohibiting the NAACP from urging persons to seek legal redress for alleged wrongs and from assisting and representing such persons in litigation opened up new avenues when the Court struck the order down as violating the First Amendment.  

529 "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion…. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression…."

"We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity."  

530 This decision was followed in three cases in which the Court held that labor unions enjoyed First Amendment protection in assisting their members in pursuing their legal remedies to recover for injuries and other actions. In the first case, the union advised members to seek legal advice before settling injury claims and recommended particular at-
torneys;\(^{531}\) in the second the union retained attorneys on a salaried basis to represent members;\(^{532}\) in the third, the union recommended certain attorneys whose fee would not exceed a specified percentage of the recovery.\(^{533}\) Wrote Justice Black: "[T]he First Amendment guarantees of free speech, petition, and assembly give railroad workers the rights to cooperate in helping and advising one another in asserting their rights..."\(^{534}\)

Thus, a right to associate together to further political and social views is protected against unreasonable burdening,\(^{535}\) but the evolution of this right in recent years has passed far beyond the relatively narrow contexts in which it was given birth.

Social contacts that fall short of organization or association to "engage in speech" may be unprotected, however. In holding that a state may restrict admission to certain licensed dance halls to persons between the ages of 14 and 18, the Court declared that there is no "generalized right of 'social association' that includes chance encounters in dance halls."\(^{536}\)

In a series of three decisions, the Court explored the extent to which associational rights may be burdened by nondiscrimination requirements. First, \textit{Roberts v. United States Jaycees}\(^{537}\) upheld application of the Minnesota Human Rights Act to prohibit the United States Jaycees from excluding women from full membership. Three years later in \textit{Board of Directors of Rotary Int'l v. Rotary Club of Duarte},\(^{538}\) the Court applied \textit{Roberts} in upholding application of a similar California law to prevent Rotary International from excluding women from membership. Then, in \textit{New York State
Club Ass’n v. New York City,\textsuperscript{539} the Court upheld against facial challenge New York City’s Human Rights Law, which prohibits race, creed, sex, and other discrimination in places “of public accommodation, resort, or amusement,” and applies to clubs of more than 400 members providing regular meal service and supported by nonmembers for trade or business purposes. In Roberts, both the Jaycees’ nearly indiscriminate membership requirements and the State’s compelling interest in prohibiting discrimination against women were important to the Court’s analysis. On the one hand, the Court found, “the local chapters of the Jaycees are large and basically unselective groups,” age and sex being the only established membership criteria in organizations otherwise entirely open to public participation. The Jaycees, therefore, “lack the distinctive characteristics [e.g., small size, identifiable purpose, selectivity in membership, perhaps seclusion from the public eye] that might afford constitutional protection to the decision of its members to exclude women.”\textsuperscript{540} Similarly, the Court determined in Rotary International that Rotary Clubs, designed as community service organizations representing a cross section of business and professional occupations, also do not represent “the kind of intimate or private relation that warrants constitutional protection.”\textsuperscript{541} And in the New York City case, the fact that the ordinance certainly could be constitutionally applied at least to some of the large clubs, under [the] decisions in Rotary and Roberts, the applicability criteria “pinpointing organizations which are ‘commercial’ in nature,” helped to defeat the facial challenge.\textsuperscript{542}

Some amount of First Amendment protection is still due such organizations; the Jaycees and its members had taken public positions on a number of issues, and had engaged in “a variety of civic, charitable, lobbying, fundraising and other activities worthy of constitutional protection.” However, the Roberts Court could find “no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.”\textsuperscript{543} Moreover, the State had a “compelling interest to prevent . . . acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages.”\textsuperscript{544}

Because of the near-public nature of the Jaycees and Rotary Clubs—the Court in Roberts likening the situation to a large busi-

\begin{itemize}
  \item \textsuperscript{539} 487 U.S. 1 (1988).
  \item \textsuperscript{540} 468 U.S. at 621.
  \item \textsuperscript{541} 481 U.S. at 546.
  \item \textsuperscript{542} 487 U.S. at 12.
  \item \textsuperscript{543} 468 U.S. at 626-27.
  \item \textsuperscript{544} 468 U.S. at 628.
\end{itemize}
ness attempting to discriminate in hiring or in selection of customers—the cases may be limited in application, and should not be read as governing membership discrimination by private social clubs. 545 In New York City, the Court noted that “opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth . . . will be curable through case-by-case analysis of specific facts.” 546

When application of a public accommodations law was viewed as impinging on an organization’s ability to present its message, the Court found a First Amendment violation. Massachusetts could not require the private organizers of Boston’s St. Patrick’s Day parade to allow a group of gays and lesbians to march as a unit proclaiming its members’ gay and lesbian identity, the Court held in Hurley v. Irish-American Gay Group. 547 To do so would require parade organizers to promote a message they did not wish to promote. The Roberts and New York City cases were distinguished as not involving “a trespass on the organization’s message itself.” 548 Those cases stood for the proposition that the state could require equal access for individuals to what was considered the public benefit of organization membership. But even if individual access to the parade might similarly be mandated, the Court reasoned, the gay group “could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club’s existing members.” 549

In Boy Scouts of America v. Dale, 550 the Court held that application of New Jersey’s public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as an adult member violated the organization’s “First Amendment right of expressive association.” 551 Citing Hurley, the Court held that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.” 552 The Boy Scouts, the Court found,

545 The Court in Rotary rejected an assertion that Roberts had recognized that Kiwanis Clubs are constitutionally distinguishable, and suggested that a case-by-case approach is necessary to determine whether “the ‘zone of privacy’ extends to a particular club or entity.” 481 U.S. at 547 n.6.

546 487 U.S. at 15.
548 515 U.S. at 580.
549 515 U.S. at 580-81.
551 530 U.S. at 644.
552 530 U.S. at 648.
engages in expressive activity in seeking to transmit a system of values, which include being "morally straight" and "clean." The Court "accept[ed] the Boy Scouts' assertion" that the organization teaches that homosexual conduct is not morally straight. The Court also gave "deference to [the] association's view of what would impair its expression." Allowing a gay rights activist to serve in the Scouts would "force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." 

**Political Association.**—The major expansion of the right of association has occurred in the area of political rights. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." Usually in combination with an equal protection analysis, the Court since *Williams v. Rhodes* has passed on numerous state restrictions that have an impact upon the ability of individuals or groups to join one or the other of the major parties or to form and join an independent political party to further political, social and economic goals. Of course, the right is not absolute. The Court has recognized that there must be substantial state regulation of the election process which necessarily will work a diminution of the individual's right to vote and to join with others for political purposes. The validity of governmental regulation must be determined by assessing the degree of infringement of the right of association against the legitimacy, strength, and necessity of the governmental interests and the means of implementing those inter-

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553 530 U.S. at 650.
554 530 U.S. at 651.
555 530 U.S. at 653.
556 530 U.S. at 653. One commentator argues that this decision subverts all civil rights laws by implying that any entity can claim "that the very act of discrimination shows an expressive purpose." Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1822 (2002).
558 393 U.S. 23 (1968).

A significant extension of First Amendment association rights in the political context occurred when the Court curtailed the already limited political patronage system. At first holding that a nonpolicy-making, nonconfidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs or affiliations,\footnote{Thus, in Storer v. Brown, 415 U.S. 724, 736 (1974), the Court found “compelling” the state interest in achieving stability through promotion of the two-party system, and upheld a bar on any independent candidate who had been affiliated with any other party within one year. Compare Williams v. Rhodes, 393 U.S. 23, 31–32 (1968) (casting doubt on state interest in promoting Republican and Democratic voters). The state interest in protecting the integrity of political parties was held to justify requiring enrollment of a person in the party up to eleven months before a primary election, Rosario v. Rockefeller, 410 U.S. 752 (1973), but not to justify requiring one to forgo one election before changing parties. Kusper v. Pontikes, 414 U.S. 51 (1973). See also Civil Service Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973) (efficient operation of government justifies limits on employee political activity); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (permitting political party to designate replacement in office vacated by elected incumbent of that party serves valid governmental interests). Storer v. Brown was distinguished in Anderson v. Celebrezze, 460 U.S. 780 (1983), holding invalid a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot; state interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters. See also Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) (state interests are insubstantial in imposing “closed primary” under which a political party is prohibited from allowing independents to vote in its primaries).} the Court subsequently held that “the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”\footnote{Elrod v. Burns, 427 U.S. 347 (1976). The limited concurrence of Justices Stewart and Blackmun provided the qualification for an otherwise expansive plurality opinion. Id. at 374.} The concept of policymaking, confidential positions was abandoned, the Court noting that some such positions would nonetheless be protected whereas some people filling positions not reached by the

\footnote{Branti v. Finkel, 445 U.S. 507, 518 (1980). On the same page, the Court refers to a position in which “party membership was essential to a discharge of the employee’s governmental responsibilities,” (emphasis supplied). A great gulf separates “appropriate” from “essential,” so that much depends on whether the Court was using the two words interchangeably or whether the stronger word was meant to characterize the position noted and not to particularize the standard.}
description would not be.\textsuperscript{564} The opinion of the Court makes difficult an evaluation of the ramifications of the decision, but it seems clear that a majority of the Justices adhere to a doctrine of broad associational political freedom that will have substantial implications for governmental employment. Refusing to confine \textit{Elrod} and \textit{Branti} to their facts, the court in \textit{Rutan v. Republican Party of Illinois}\textsuperscript{565} held that restrictions on patronage apply not only to dismissal or its substantial equivalent, but also to promotion, transfer, recall after layoffs, and hiring of low-level public employees. In 1996 the Court extended \textit{Elrod} and \textit{Branti} to protect independent government contractors.\textsuperscript{566}

The protected right of association extends as well to coverage of party principles, enabling a political party to assert against some state regulation an overriding interest sufficient to overcome the legitimate interests of the governing body. Thus, a Wisconsin law that mandated an open primary election, with party delegates bound to support at the national convention the wishes of the voters expressed in that primary election, while legitimate and valid in and of itself, had to yield to a national party rule providing for the acceptance of delegates chosen only in an election limited to those voters who affiliated with the party.\textsuperscript{567}

Provisions of the Federal Election Campaign Act requiring the reporting and disclosure of contributions and expenditures to and by political organizations, including the maintenance by such organizations of records of everyone contributing more than $10 and the reporting by individuals and groups that are not candidates or political committees who contribute or expend more than $100 a year for the purpose of advocating the election or defeat of an identified candidate, were sustained.\textsuperscript{568}

\begin{footnotesize}
\textsuperscript{564} Justice Powell's dissents in both cases contain lengthy treatments of and defenses of the patronage system as a glue strengthening necessary political parties. 445 U.S. at 520.

\textsuperscript{565} 497 U.S. 62 (1990). \textit{Rutan} was a 5–4 decision, with Justice Brennan writing the Court's opinion. The four dissenters indicated, in an opinion by Justice Scalia, that they would not only rule differently in \textit{Rutan}, but that they would also overrule \textit{Elrod} and \textit{Branti}.

\textsuperscript{566} O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (allegation that city removed petitioner's company from list of those offered towing business on a rotating basis, in retaliation for petitioner's refusal to contribute to mayor's campaign, and for his support of mayor's opponent, states a cause of action under the First Amendment). \textit{See also} Board of County Comm'r's v. Umbehr, 518 U.S. 668 (1996) (termination or non-renewal of a public contract in retaliation for the contractor's speech on a matter of public concern can violate the First Amendment).

\textsuperscript{567} Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981). \textit{See also} Cousins v. Wigoda, 419 U.S. 477 (1975) (party rules, not state law, governed which delegation from State would be seated at national convention; national party had protected associational right to sit delegates it chose).

\textsuperscript{568} Buckley v. Valeo, 424 U.S. 1, 60–84 (1976).
\end{footnotesize}
itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.... We long have recognized the significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.... We have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed.”

The governmental interests effectuated by these requirements – providing the electorate with information, deterring corruption and the appearance of corruption, and gathering data necessary to detect violations—were found to be of sufficient magnitude to be validated even though they might incidentally deter some persons from contributing. A claim that contributions to minor parties and independents should have a blanket exemption from disclosure was rejected inasmuch as an injury was highly speculative; but any such party making a showing of a reasonable probability that compelled disclosure of contributors’ names would subject them to threats or reprisals could obtain an exemption from the courts. The Buckley Court also narrowly construed the requirement of reporting independent contributions and expenditures in order to avoid constitutional problems.

**Conflict Between Organization and Members.**—It is to be expected that disputes will arise between an organization and some of its members, and that First Amendment principles may be implicated. Of course, unless there is some governmental connection, there will be no federal constitutional application to any such controversy. But at least in some instances, when government compels membership in an organization or in some manner lends its authority to such compulsion, there may well be constitutional limitations. Disputes implicating such limitations can arise in connection with union shop labor agreements permissible under the National Labor Relations Act and the Railway Labor Act.

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569 424 U.S. at 64 (footnote citations omitted).
570 424 U.S. at 66-68.
571 424 U.S. at 68-74. Such a showing, based on past governmental and private hostility and harassment, was made in Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).
572 424 U.S. at 74-84.
573 The Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U.S.C. §§ 411–413, enacted a bill of rights for union members, designed to protect, inter alia, freedom of speech and assembly and the right to participate in union meetings on political and economic subjects.
Initially, the Court avoided constitutional issues in resolving a challenge by union shop employees to use of their dues money for political causes. Acknowledging “the utmost gravity” of the constitutional issues, the Court determined that Congress had intended that dues money obtained through union shop agreements should be used only to support collective bargaining and not in support of other causes.\footnote{575} Justices Black and Douglas, in separate opinions, would have held that Congress could not constitutionally provide for compulsory membership in an organization which could exact from members money which the organization would then spend on causes which the members opposed; Justices Frankfurter and Harlan, also reaching the constitutional issue, would have held that the First Amendment was not violated when government did not compel membership but merely permitted private parties to enter into such agreements and that in any event so long as members were free to espouse their own political views the use by a union of dues money to support political causes which some members opposed did not violate the First Amendment.\footnote{576}

In \textit{Abood v. Detroit Bd. of Education},\footnote{577} the Court applied \textit{Hanson} and \textit{Street} to the public employment context. Recognizing that employee associational rights were clearly restricted by any system of compelled support, because the employees had a right not to associate, not to support, the Court nonetheless found the governmental interests served by the agency shop provision—the promotion of labor peace and stability of employer-employee relations—to be of overriding importance and to justify the impact.


\footnotetext[576]{367 U.S. at 775 (Justice Douglas concurring), 780 (Justice Black dissenting), 797 (Justices Frankfurter and Harlan dissenting). On the same day, a majority of the Court declined, in \textit{Lathrop v. Donohue}, 367 U.S. 820 (1961), to reach the constitutional issues presented by roughly the same fact situation in a suit by lawyers compelled to join an “integrated bar.” These issues were faced squarely in Keller v. State Bar of California, 496 U.S. 1 (1990). An integrated state bar may not, against a members’ wishes, devote compulsory dues to ideological or other political activities not “necessarily or reasonably related to the purpose of regulating the legal profession or improving the quality of legal service available to the people of the State.” \textit{Id.} at 14.}

\footnotetext[577]{431 U.S. 209 (1977). That a public entity was the employer and the employees consequently were public employees was deemed constitutionally immaterial for the application of the principles of \textit{Hanson} and \textit{Street}, \textit{Id.} at 226–32, but Justice Powell found the distinction between public and private employment crucial. \textit{Id.} at 244.}
upon employee freedom. But a different balance was drawn when the Court considered whether employees compelled to support the union were constitutionally entitled to object to the use of those exacted funds to support political candidates or to advance ideological causes not germane to the union’s duties as collective-bargaining representative. To compel one to expend funds in such a way is to violate his freedom of belief and the right to act on those beliefs just as much as if government prohibited him from acting to further his own beliefs. However, the remedy was not to restrain the union from making non-collective bargaining related expenditures but to require that those funds come only from employees who do not object. Therefore, the lower courts were directed to oversee development of a system whereby employees could object generally to such use of union funds and could obtain either a proportionate refund or reduction of future exactions. Later, the Court further tightened the requirements. A proportionate refund is inadequate because “even then the union obtains an involuntary loan for purposes to which the employee objects;” an advance reduction of dues corrects the problem only if accompanied by sufficient information by which employees may gauge the propriety of the union’s fee. Therefore, the union procedure must also “provide for a reasonably prompt decision by an impartial decision-maker.”

On a related matter, the Court held that a labor relations body could not prevent a union member or employee represented exclusively by a union from speaking out at a public meeting on an issue of public concern, simply because the issue was a subject of collective bargaining between the union and the employer.

578 431 U.S. at 217-23. The compelled support was through the agency shop device. Id. at 211, 217 n.10. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, would have held that compelled support by public employees of unions violated their First Amendment rights. Id. at 244. For an argument over the issue of corporate political contributions and shareholder rights, see First National Bank v. Bellotti, 435 U.S. 765, 792–95 (1978), and id. at 802, 812–21 (Justice White dissenting).

579 431 U.S. at 232-37.

580 431 U.S. at 237-42. On the other hand, nonmembers may be charged for such general union expenses as contributions to state and national affiliates, expenses of sending delegates to state and national union conventions, and costs of a union newsletter. Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507 (1991).


583 475 U.S. at 309.

Maintenance of National Security and the First Amendment

Preservation of the security of the Nation from its enemies, foreign and domestic, is the obligation of government and one of the foremost reasons for government to exist. Pursuit of this goal may lead government officials at times to trespass in areas protected by the guarantees of speech and press and may require the balancing away of rights which might be preserved inviolate at other times. The drawing of the line is committed, not exclusively but finally, to the Supreme Court. In this section, we consider a number of areas in which the necessity to draw lines has arisen.

**Punishment of Advocacy.**—Criminal punishment for the advocacy of illegal or of merely unpopular goals and of ideas did not originate in the United States in the post-World War II concern with Communism. Enactment of and prosecutions under the Seditious Act of 1798 and prosecutions under the federal espionage laws and state sedition and criminal syndicalism laws in the 1920s and early 1930s have been alluded to earlier. But it was in the 1950s and the 1960s that the Supreme Court confronted First Amendment concepts fully in determining the degree to which government could proceed against persons and organizations which it believed were plotting and conspiring both to advocate the overthrow of government and to accomplish that goal.

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585 Ch. 74, 1 Stat. 596 (1798).
586 The cases included Schenck v. United States, 249 U.S. 47 (1919) (affirming conviction for attempting to disrupt conscription by circulation of leaflets bitterly condemning the draft); Debs v. United States, 249 U.S. 211 (1919) (affirming conviction for attempting to create insubordination in armed forces based on one speech advocating socialism and opposition to war, and praising resistance to the draft); Abrams v. United States, 250 U.S. 616 (1919) (affirming convictions based on two leaflets, one of which attacked President Wilson as a coward and hypocrite for sending troops into Russia and the other of which urged workers not to produce materials to be used against their brothers).
587 The cases included Gitlow v. New York, 268 U.S. 652 (1925) (affirming conviction based on publication of "manifesto" calling for the furthering of the "class struggle" through mass strikes and other mass action); Whitney v. California, 274 U.S. 357 (1927) (affirming conviction based upon adherence to party which had platform rejecting parliamentary methods and urging a "revolutionary class struggle," the adoption of which defendant had opposed).
588 See discussion under "Adoption and the Common Law Background," and "Clear and Present Danger," supra. See also Taylor v. Mississippi, 319 U.S. 583 (1943), setting aside convictions of three Jehovah's Witnesses under a statute that prohibited teaching or advocacy intended to encourage violence, sabotage, or disloyalty to the government after the defendants had said that it was wrong for the President "to send our boys across in uniform to fight our enemies" and that boys were being killed "for no purpose at all." The Court found no evil or sinister purpose, no advocacy of or incitement to subversive action, and no threat of clear and present danger to government.
The Smith Act of 1940 made it a criminal offense for anyone to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the Government of the United States or of any State by force or violence, or for anyone to organize any association which teaches, advises, or encourages such an overthrow, or for anyone to become a member of or to affiliate with any such association. No case involving prosecution under this law was reviewed by the Supreme Court until in *Dennis v. United States* it considered the convictions of eleven Communist Party leaders on charges of conspiracy to violate the advocacy and organizing sections of the statute. Chief Justice Vinson’s plurality opinion for the Court applied a revised clear and present danger test and concluded that the evil sought to be prevented was serious enough to justify suppression of speech. “If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase ‘clear and present danger’ of the utterances bringing about the evil within the power of Congress to punish. Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.”

Justice Frankfurter in concurrence developed a balancing test, which, however, he deferred to the congressional judgment in applying, concluding that “there is ample justification for a legislative
judgment that the conspiracy now before us is a substantial threat to national order and security.” 594 Justice Jackson’s concurrence was based on his reading of the case as involving “a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy.” Here the Government was dealing with “permanently organized, well-financed, semi-secret, and highly disciplined organizations” plotting to overthrow the Government; under the First Amendment “it is not forbidden to put down force and violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose.” 595 Justices Black and Douglas dissented separately, the former viewing the Smith Act as an invalid prior restraint and calling for reversal of the convictions for lack of a clear and present danger, the latter applying the Holmes-Brandeis formula of clear and present danger to conclude that “[t]o believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible.” 596

In Yates v. United States, 597 the convictions of several second-string Communist Party leaders were set aside, a number ordered acquitted, and others remanded for retrial. The decision was based upon construction of the statute and appraisal of the evidence rather than on First Amendment claims, although each prong of the ruling seems to have been informed with First Amendment considerations. Thus, Justice Harlan for the Court wrote that the trial judge had given faulty instructions to the jury in advising that all advocacy and teaching of forcible overthrow was punishable, whether it was language of incitement or not, so long as it was done with an intent to accomplish that purpose. But the statute, the Justice continued, prohibited “advocacy of action,” not merely “advocacy in the realm of ideas.” “The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.” 598 Second, the Court found the evidence insufficient to establish that the Communist Party had engaged in the required advocacy of action, requiring the Government to prove such advocacy in each instance rather than presenting evidence generally about the Party. Additionally, the Court found the evidence insuffi-

594 341 U.S. at 517, 542.
595 341 U.S. at 561, 572, 575.
596 341 U.S. at 579 (Justice Black dissenting), 581, 589 (Justice Douglas dissenting).
Compelled Registration of Communist Party.—The Internal Security Act of 1950 provided for a comprehensive regulatory scheme by which “Communist-action organizations” and “Communist-front organizations” could be curbed. Organizations found to fall within one or the other of these designations were required to register and to provide for public inspection membership lists, accountings of all money received and expended, and listings of all printing presses and duplicating machines; members of organizations which failed to register were required to register and members were subject to comprehensive restrictions and criminal sanctions. After a lengthy series of proceedings, a challenge to the registration provisions reached the Supreme Court, which sustained the constitutionality of the section under the First Amendment, only Justice Black dissenting on this ground. Employing the balancing test, Justice Frankfurter for himself and four other Justices concluded that the threat to national security posed by the Communist conspiracy outweighed considerations of individual liberty, the impact of the registration provision in this area in any event being limited to whatever “public opprobrium and obloquy” might attach. Three Justices based their conclusion on the premise that the Communist Party was an anti-democratic, secret organization, subservient to a foreign power, and utilizing speech plus in attempting to achieve its ends and was therefore subject to extensive governmental regulation.

Punishment for Membership in an Organization That Engages in Proscribed Advocacy.—The Smith Act provision making it a crime to organize or become a member of an organization that teaches, advocates, or encourages the overthrow of gov-

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599 354 U.S. at 330-31, 332. Justices Black and Douglas would have held the
Smith Act unconstitutional. Id. at 339. Justice Harlan’s formulation of the standard
by which certain advocacy could be punished was noticeably stiffened in Branden-

600 Ch. 1024, 64 Stat. 987. Sections of the Act requiring registration of Com-
munist-action and Communist-front organizations and their members were repealed

601 Communist Party v. SACB, 367 U.S. 1 (1961). The Court reserved decision
on the self-incrimination claims raised by the Party. The registration provisions ulti-
mately floundered on this claim. Albertson v. SACB, 382 U.S. 70 (1965).

602 367 U.S. at 88-105. The quoted phrase appears at 102.

603 367 U.S. at 170-75 (Justice Douglas dissenting on other grounds). Justice Black's
dissent on First Amendment grounds argued that “Congress has [no] power to out-
law an association, group or party either on the ground that it advocates a policy
of violent overthrow of the existing Government at some time in the distant future
or on the ground that it is ideologically subservient to some foreign country.” Id.
at 147.
ernment by force or violence was used by the Government against Communist Party members. In *Scales v. United States*, the Court affirmed a conviction under this section and held it constitutional against First Amendment attack. Advocacy such as the Communist Party engaged in, Justice Harlan wrote for the Court, was unprotected under *Dennis*, and he could see no reason why membership that constituted a purposeful form of complicity in a group engaging in such advocacy should be a protected form of association. Of course, “[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but . . . [t]he clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy.” Only an “active” member of the Party—one who with knowledge of the proscribed advocacy intends to accomplish the aims of the organization—was to be punished, the Court said, not a “nominal, passive, inactive or purely technical” member.

**Disabilities Attaching to Membership in Proscribed Organizations.**—The consequences of being or becoming a member of a proscribed organization can be severe. Aliens are subject to deportation for such membership. Congress made it unlawful for any member of an organization required to register as a “Communist-action” or a “Communist-front” organization to apply for a passport or to use a passport. A now-repealed statute required

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604 367 U.S. 203 (1961). Justices Black and Douglas dissented on First Amendment grounds, id. at 259, 262, while Justice Brennan and Chief Justice Warren dissented on statutory grounds. Id. at 278

605 367 U.S. at 228-30. In *Noto v. United States*, 367 U.S. 290 (1961), the Court reversed a conviction under the membership clause because the evidence was insufficient to prove that the Party had engaged in unlawful advocacy. “The mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.” Id. at 297–98.


607 Subversive Activities Control Act of 1950, § 6, 64 Stat. 993, 50 U.S.C. § 785. The section was declared unconstitutional in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), as an infringement of the right to travel, a liberty protected by the due process clause of the Fifth Amendment. But the Court considered the case as
as a condition of access to NLRB processes by any union that each of its officers must file affidavits that he was not a member of the Communist Party or affiliated with it.\footnote{608} The Court has sustained state bar associations in their efforts to probe into applicants’ membership in the Communist Party in order to determine whether there was knowing membership on the part of one sharing a specific intent to further the illegal goals of the organization.\footnote{609} A section of the Communist Control Act of 1954 was designed to keep the Communist Party off the ballot in all elections.\footnote{610} The most recent interpretation of this type of disability is \textit{United States v. Robel},\footnote{611} in which the Court held unconstitutional under the First Amendment a section of the Internal Security Act that made it unlawful for any member of an organization compelled to register as a “Communist-action” or “Communist-front” organization to work thereafter in any defense facility. For the Court, Chief Justice Warren wrote that a statute that so infringed upon freedom of association must be much more narrowly drawn to take precise account of the evils at which it permissibly could be aimed. One could be disqualified from holding sensitive positions on the basis of active, knowing membership with a specific intent to further the unlawful goals of an organization, but that membership that was passive or inactive, or by a person unaware of the organization’s unlawful aims, or by one who disagreed with those aims, could not be grounds for disqualification, certainly not for a non-sensitive position.\footnote{612}

A somewhat different matter is disqualifying a person for public benefits of some sort because of membership in a proscribed or-

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\item Well in terms of its restrictions on “freedom of association,” emphasizing that the statute reached membership whether it was with knowledge of the organization’s illegal aims or not, whether it was active or not, and whether the member intended to further the organization’s illegal aims. Id. at 507–14. \textit{But see Zemel v. Rusk}, 381 U.S. 1, 16–17 (1965), in which the Court denied that State Department area restrictions in its passport policies violated the First Amendment, because the policy inhibited action rather than expression, a distinction the Court continued in \textit{Haig v. Agee}, 453 U.S. 280, 304–10 (1981).

\item This part of the oath was sustained in \textit{American Communications Ass’n v. Douds}, 339 U.S. 382 (1950), and \textit{Osman v. Douds}, 339 U.S. 846 (1950).


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ganization or because of some other basis ascribable to doubts about his loyalty. The First Amendment was raised only in dissent when in *Flemming v. Nestor* the Court sustained a statute that required the termination of Social Security old-age benefits to an alien who was deported on grounds of membership in the Communist Party. Proceeding on the basis that no one was "entitled" to Social Security benefits, Justice Harlan for the Court concluded that a rational justification for the law might be the deportee's inability to aid the domestic economy by spending the benefits locally, although a passage in the opinion could be read to suggest that termination was permissible because alien Communists are undeserving of benefits. Of considerable significance in First Amendment jurisprudence is *Speiser v. Randall*, in which the Court struck down a state scheme for denying veterans' property tax exemptions to "disloyal" persons. The system, as interpreted by the state courts, denied the exemption only to persons who engaged in speech that could be criminally punished consistently with the First Amendment, but the Court found the vice of the provision to be that after each claimant had executed an oath disclaiming his engagement in unlawful speech, the tax assessor could disbelieve the oath taker and deny the exemption, thus placing on the claimant the burden of proving that he was loyal. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens .... In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free."
Employment Restrictions and Loyalty Oaths.—An area in which significant First Amendment issues are often raised is the establishment of loyalty-security standards for government employees. Such programs generally take one of two forms or may combine the two. First, government may establish a system investigating employees or prospective employees under standards relating to presumed loyalty. Second, government may require its employees or prospective employees to subscribe to a loyalty oath disclaiming belief in or advocacy of, or membership in an organization that stands for or advocates, unlawful or disloyal action. The Federal Government’s security investigation program has been tested numerous times and First Amendment issues raised, but the Supreme Court has never squarely confronted the substantive constitutional issues, and it has not dealt with the loyalty oath features of the federal program.\textsuperscript{617} The Court has, however, had a long running encounter with state loyalty oath programs.\textsuperscript{618}

First encountered\textsuperscript{619} was a loyalty oath for candidates for public office rather than one for public employees. Accepting the state court construction that the law required each candidate to “make oath that he is not a person who is engaged ‘in one way or another in the attempt to overthrow the government by force or violence,’ and that he is not knowingly a member of an organization engaged in such an attempt,” the Court unanimously sustained the provision in a one-paragraph \textit{per curiam} opinion.\textsuperscript{620} Less than two


\footnotesize{\textsuperscript{619}Test oaths had first reached the Court in the period following the Civil War, at which time they were voided as ex post facto laws and bills of attainder. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867).

\footnotesize{\textsuperscript{620}Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (emphasis original). In Indiana Communist Party v. Whitcomb, 414 U.S. 411 (1974), a requirement that parties and candidates seeking ballot space subscribe to a similar oath was voided because the oath’s language did not comport with the advocacy stand-
months later, the Court upheld a requirement that employees take an oath that they had not within a prescribed period advised, advocated, or taught the overthrow of government by unlawful means, nor been a member of an organization with similar objectives; every employee was also required to swear that he was not and had not been a member of the Communist Party. For the Court, Justice Clark perceived no problem with the inquiry into Communist Party membership but cautioned that no issue had been raised whether an employee who was or had been a member could be discharged merely for that reason. With regard to the oath, the Court did not discuss First Amendment considerations but stressed that it believed the appropriate authorities would not construe the oath adversely against persons who were innocent of an organization’s purpose during their affiliation, or persons who had severed their associations upon knowledge of an organization’s purposes, or persons who had been members of an organization at a time when it was not unlawfully engaged. Otherwise, the oath requirement was valid as “a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty” and as being “reasonably designed to protect the integrity and competency of the service.”

In the following Term, the Court sustained a state statute disqualifying for government employment persons who advocated the overthrow of government by force or violence or persons who were members of organizations that so advocated; the statute had been supplemented by a provision applicable to teachers calling for the drawing up of a list of organizations that advocated violent overthrow and making membership in any listed organization prima facie evidence of disqualification. Justice Minton observed that everyone had a right to assemble, speak, think, and believe as he pleased, but had no right to work for the State in its public school
system except upon compliance with the State’s reasonable terms. “If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.”626 A State could deny employment based on a person’s advocacy of overthrow of the government by force or violence or based on unexplained membership in an organization so advocating with knowledge of the advocacy.627 With regard to the required list, the Justice observed that the state courts had interpreted the law to provide that a person could rebut the presumption attached to his mere membership.628

Invalidated the same year was an oath requirement, addressed to membership in the Communist Party and other proscribed organizations, which the state courts had interpreted to disqualify from employment “solely on the basis of organizational membership.” Stressing that membership might be innocent, that one might be unaware of an organization’s aims, or that he might have severed a relationship upon learning of its aims, the Court struck the law down; one must be or have been a member with knowledge of illegal aims.629 But subsequent cases firmly reiterated the power of governmental agencies to inquire into the associational relationships of their employees for purposes of determining fitness and upheld dismissals for refusal to answer relevant questions.630 In Shelton v. Tucker,631 however, a five-to-four majority held that, while a State could inquire into the fitness and competence of its teachers, a requirement that every teacher annually list every organization to which he belonged or had belonged in the previous five years was invalid because it was too broad, bore no rational relationship to the State’s interests, and had a considerable potential for abuse.

Vagueness was then employed by the Court when loyalty oaths aimed at “subversives” next came before it. Cramp v. Board of Pub-

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626 342 U.S. at 492.
627 342 U.S. at 492.
628 342 U.S. at 494-96.
631 364 U.S. 479 (1960). “It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.” Id. at 485–86. Justices Frankfurter, Clark, Harlan, and Whittaker dissented. Id. at 490, 496.
lic Instruction $^{632}$ unanimously held too vague an oath that required one to swear, *inter alia*, that “I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party.” Similarly, in *Baggett v. Bullitt*, $^{633}$ the Court struck down two oaths, one requiring teachers to swear that they “will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government,” and the other requiring all state employees to swear, *inter alia*, that they would not “aid in the commission of any act intended to overthrow, destroy, or alter or assist in the overthrow, destruction, or alteration” of government. Although couched in vagueness terms, the Court’s opinion stressed that the vagueness was compounded by its effect on First Amendment rights and seemed to emphasize that the State could not deny employment to one simply because he unintentionally lent indirect aid to the cause of violent overthrow by engaging in lawful activities that he knew might add to the power of persons supporting illegal overthrow. $^{634}$

More precisely drawn oaths survived vagueness attacks but fell before First Amendment objections in the next three cases. *Elfbrandt v. Russell* $^{635}$ involved an oath that as supplemented would have been violated by one who “knowingly and willfully becomes or remains a member of the communist party … or any other organization having for its purposes the overthrow by force or violence of the government” with “knowledge of said unlawful purpose of said organization.” The law’s blanketing in of “knowing but guiltless” membership was invalid, wrote Justice Douglas for the Court, because one could be a knowing member but not subscribe to the illegal goals of the organization; moreover, it appeared that one must also have participated in the unlawful activities of the organization before public employment could be denied. $^{636}$

Next, in *Keyishian v. Board of Regents*, $^{637}$ the oath provisions sustained in *Adler* $^{638}$ were declared unconstitutional. A number of pro-

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$^{633}$377 U.S. 360 (1964). Justices Clark and Harlan dissented. Id. at 380

$^{634}$377 U.S. at 369-70.


$^{636}$384 U.S. at 16, 17, 19. “Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities pose no threat, either as citizens or public employees.” Id. at 17.

$^{637}$385 U.S. 589 (1967). Justices Clark, Harlan, Stewart, and White dissented. Id. at 620.

visions were voided as vague, but the Court held invalid a new provision making Communist Party membership prima facie evidence of disqualification for employment because the opportunity to rebut the presumption was too limited. It could be rebutted only by denying membership, denying knowledge of advocacy of illegal overthrow, or denying that the organization advocates illegal overthrow. But “legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations.” Similarly, in Whitehill v. Elkins, an oath was voided because the Court thought it might include within its prescription innocent membership in an organization that advocated illegal overthrow of government.

More recent cases do not illuminate whether membership changes in the Court presage a change in view with regard to the loyalty-oath question. In Connell v. Higginbotham an oath provision reading “that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence” was invalidated because the statute provided for summary dismissal of an employee refusing to take the oath, with no opportunity to explain that refusal. Cole v. Richardson upheld a clause in an oath “that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method” upon the construction that this clause was mere “repetition, whether for emphasis or cadence,” of the first part of the oath, which was a valid “uphold and defend” positive oath.

**Legislative Investigations and the First Amendment.**—

The power of inquiry by congressional and state legislative committees in order to develop information as a basis for legislation is subject to some uncertain limitation when the power as exercised results in deterrence or penalization of protected beliefs, associations, and conduct. While the Court initially indicated that it would scrutinize closely such inquiries in order to curb First Amendment infringement, later cases balanced the interests of the legislative

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640 385 U.S. at 608. Note that the statement here makes specific intent or active membership alternatives in addition to knowledge while Elfbrandt v. Russell, 384 U.S. 11, 19 (1966), requires both in addition to knowledge.
641 389 U.S. 54 (1967). Justices Harlan, Stewart, and White dissented. Id. at 62.
642 403 U.S. 207 (1971).
644 See subtopics under “Investigations in Aid of Legislation,” supra.
bodies in inquiring about both protected and unprotected associations and conduct against what were perceived to be limited restraints upon the speech and association rights of witnesses, and upheld wide-ranging committee investigations. More recently, the Court has placed the balance somewhat differently and required that the investigating agency show “a subordinating interest which is compelling” to justify the restraint on First Amendment rights that the Court found would result from the inquiry. The issues in this field, thus, remain unsettled.

**Interference With War Effort.**—Unlike the dissent to United States participation in World War I, which provoked several prosecutions, the dissent to United States action in Vietnam was subjected to little legal attack. Possibly the most celebrated governmental action, the prosecution of Dr. Spock and four others for conspiring to counsel, aid, and abet persons to evade or to refuse obligations under the Selective Service System, failed to reach the Supreme Court. Aside from a comparatively minor case, the Court’s sole encounter with a Vietnam War protest allegedly involving protected “symbolic conduct” was United States v. O’Brien. That case affirmed a conviction and upheld a congressional prohibition against destruction of draft registration certificates; O’Brien had publicly burned his card. “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O’Brien’s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when ‘speech’ and ‘nonspeech’ elements are combined in the same course

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(1957). Concurring in the last case, Justices Frankfurter and Harlan would have ruled that the inquiry there was precluded by the First Amendment. Id. at 255.


648 United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

649 In Schacht v. United States, 398 U.S. 58 (1970), the Court reversed a conviction under 18 U.S.C. § 702 for wearing a military uniform without authority. The defendant had worn the uniform in a skit in an on-the-street anti-war demonstration, and 10 U.S.C. § 772(f) authorized the wearing of a military uniform in a “theatrical production” so long as the performance did not “tend to discredit” the military. This last clause the Court held unconstitutional as an invalid limitation of freedom of speech.

of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”  

Finding that the Government's interest in having registrants retain their cards at all times was an important one and that the prohibition of destruction of the cards worked no restriction of First Amendment freedoms broader than that needed to serve the interest, the Court upheld the statute. More recently, the Court upheld a “passive enforcement” policy singling out for prosecution for failure to register for the draft those young men who notified authorities of an intention not to register for the draft and those reported by others.  

**Suppression of Communist Propaganda in the Mails.**—A 1962 statute authorizing the Post Office Department to retain all mail from abroad which was determined to be “communist political propaganda” and to forward it to an addressee only upon his request was held unconstitutional in *Lamont v. Postmaster General*. The Court held that to require anyone to request receipt of mail determined to be undesirable by the Government was certain to deter and inhibit the exercise of First Amendment rights to receive information. Distinguishing *Lamont*, the Court in 1987 upheld statutory classification as “political propaganda” of communications or expressions by or on behalf of foreign governments, foreign “principals,” or their agents, and reasonably adapted or intended to influence United States foreign policy. “The physical detention of materials, not their mere designation as ‘communist political propaganda,’ was the offending element of the statutory scheme [in *Lamont*].”  

**Exclusion of Certain Aliens as a First Amendment Problem.**—While a nonresident alien might be able to present no claim, based on the First Amendment or on any other constitutional pro-

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652 470 U.S. 598 (1985). The incidental restriction on First Amendment rights to speak out against the draft was no greater than necessary to further the government's interests in "prosecutorial efficiency," obtaining sufficient proof prior to prosecution, and promoting general deterrence (or not appearing to condone open defiance of the law). *See also United States v. Albertini*, 472 U.S. 675 (1985) (order banning a civilian from entering military base valid as applied to attendance at base open house by individual previously convicted of destroying military property).  
653 381 U.S. 301 (1965). The statute, 76 Stat. 840, was the first federal law ever struck down by the Court as an abridgment of the First Amendment speech and press clauses.  
654 381 U.S. at 307. Justices Brennan, Harlan, and Goldberg concurred, spelling out in some detail the rationale of the protected right to receive information as the basis for the decision.  
656 481 U.S. at 480.
vision, to overcome a governmental decision to exclude him from the country, it was arguable that United States citizens who could assert a First Amendment interest in hearing the alien and receiving information from him, such as the right recognized in *La mont*, could be able to contest such exclusion.\(^{657}\) But the Court declined to reach the First Amendment issue and to place it in balance when it found that a governmental refusal to waive a statutory exclusion\(^{658}\) was on facially legitimate and neutral grounds; the Court’s emphasis, however, upon the “plenary” power of Congress over admission or exclusion of aliens seemed to indicate where such a balance might be drawn.\(^{659}\)

**Particular Governmental Regulations That Restrict Expression**

Government adopts and enforces many measures that are designed to further a valid interest but that may restrict freedom of expression. As an employer, government is interested in attaining and maintaining full production from its employees in a harmonious environment. As enforcer of the democratic method of selecting public officials, it is interested in outlawing “corrupt practices” and promoting a fair and smoothly-functioning electoral process. As regulator of economic affairs, its interests are extensive. As educator, it desires to impart knowledge and training to the young with as little distraction as possible. All of these interests may be achieved with some restriction upon expression, but if the regulation goes too far expression may be abridged and the regulation will fail.\(^{660}\)

\(^{657}\) The right to receive information has been prominent in the rationale of several cases, *e.g.*, *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Thomas v. Collins*, 323 U.S. 516 (1945); *Stanley v. Georgia*, 394 U.S. 557 (1969).

\(^{658}\) By §§ 212(a)(28)(D) and (G) of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1182(a)(28)(D) and (G), aliens who advocate or write and publish “the economic, international, and governmental doctrines of world communism” are made ineligible to receive visas and are thus excluded from the United States. Upon the recommendation of the Secretary of State, however, the Attorney General is authorized to waive these provisions and to admit such an alien temporarily into the country. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A).


\(^{660}\) Highly relevant in this and subsequent sections dealing with governmental incidental restraints upon expression is the distinction the Court has drawn between content-based and content-neutral regulations, a distinction designed to ferret out those regulations that indeed serve other valid governmental interests from those that in fact are imposed because of the content of the expression reached. *Compare* Police Department v. Mosley, 408 U.S. 92 (1972); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *and Schacht v. United States*, 398 U.S. 58 (1970), *with Greer v. Spock*, 424 U.S. 828 (1976); *Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); and *United States v. O’Brien*, 391 U.S. 367 (1968). Content-based regulations are subjected to strict scrutiny, while content-neutral regulations are not.
Government as Employer: Political and Other Outside Activities.—Abolition of the “spoils system” in federal employment brought with it consequential restrictions upon political activities by federal employees. In 1876, federal employees were prohibited from requesting from, giving to, or receiving from any other federal employee money for political purposes, and the Civil Service Act of 1883 more broadly forbade civil service employees to use their official authority or influence to coerce political action of any person or to interfere with elections.661 By the Hatch Act, federal employees, and many state employees as well, are forbidden to “take any active part in political management or in political campaigns.”662 As applied through the regulations and rulings of the Office of Personnel Management, formerly the Civil Service Commission, the Act prevents employees from running for public office, distributing campaign literature, playing an active role at political meetings, circulating nomination petitions, attending a political convention except as a spectator, publishing a letter soliciting votes for a candidate, and all similar activity.663 The question is whether government, which may not prohibit citizens in general from engaging in these activities, may nonetheless so control the off-duty activities of its own employees.

In United Public Workers v. Mitchell,664 the Court answered in the affirmative. While the Court refused to consider the claims of persons who had not yet engaged in forbidden political activities, it ruled against a mechanical employee of the Mint who had done so. The Court’s opinion, by Justice Reed, recognized that the restrictions of political activities imposed by the Act did in some measure impair First Amendment and other constitutional rights,665 but it placed its decision upon the established principle that no right is absolute. The standard by which the Court judged the validity of the permissible impairment of First Amendment

662 53 Stat. 1147 § 9(a), (1939), as amended, 5 U.S.C. § 7324(a)(2). By 54 Stat. 767 (1940), as amended, 5 U.S.C. §§ 1501–08, the restrictions on political activity were extended to state and local governmental employees working in programs financed in whole or in part with federal funds. This provision was sustained against federalism challenges in Oklahoma v. Civil Service Comm’n, 330 U.S. 127 (1947). All the States have adopted laws patterned on the Hatch Act. See Broadrick v. Oklahoma, 413 U.S. 601, 604 (1973).
664 330 U.S. 75, 94–104 (1947). The decision was 4–to–3, with Justice Frankfurter joining the Court on the merits only after arguing that the Court lacked jurisdiction.
665 330 U.S. at 94-95.
Thus, changes in the standards of judging incidental restrictions on expression suggested the possibility of a reconsideration of Mitchell. But a divided Court, reaffirming Mitchell, sustained the Act’s limitations upon political activity against a range of First Amendment challenges. It emphasized that the interest of the Government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association; therefore, a statute that barred in plain language a long list of activities would clearly be valid. The issue in Letter Carriers, however, was whether the language that Congress had enacted, forbidding employees to take “an active part in political management or in political campaigns,” was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted, or because the statute swept in under its coverage conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. With respect to vagueness, plaintiffs contended and the lower court had held that the quoted proscription was inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was to enact that the forbidden activities were the same activities that the Commission had as of 1940, and reaching back to 1883, “determined are at the time of the passage of this act prohibited on the part of employees . . . by the provisions of the civil-service rules . . . .” This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings it had made that were not available to employees and that were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of

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666 330 U.S. at 101-02.
668 Civil Service Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973). In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the plaintiffs had engaged in conduct that the statute clearly could constitutionally proscribe.
669 The interests the Court recognized as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences. 413 U.S. at 557-67.
670 413 U.S. at 556.
671 413 U.S. at 554, 570 n.17.
672 413 U.S. at 570 n.17.
1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. That the Commission had done. It had regularly summarized in understandable terms the rules which it applied, and it was authorized as well to issue advisory opinions to employees uncertain of the propriety of contemplated conduct. “[T]here are limitations in the English language with respect to being both specific and manageably brief,” said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were “set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interests.”673 There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did under some circumstances so partake of partisan activities as to be properly proscribable. But the Court would not invalidate the entire statute for this degree of overbreadth.674 More recently, in Bush v. Lucas675 the Court held that the civil service laws and regulations are sufficiently “elaborate [and] comprehensive” to afford federal employees an adequate remedy for deprivation of First Amendment rights as a result of disciplinary actions by supervisors, and that therefore there is no need to create an additional judicial remedy for the constitutional violation.

The Hatch Act cases were distinguished in United States v. National Treasury Employees Union,676 in which the Court struck down an honoraria ban as applied to lower-level employees of the Federal Government. The honoraria ban suppressed employees’ right to free expression while the Hatch Act sought to protect that right, and also there was no evidence of improprieties in acceptance of honoraria by members of the plaintiff class of federal employees.677 The Court emphasized further difficulties with the “crudely crafted” honoraria ban: it was limited to expressive activities and had no application to other sources of outside income, it applied when neither the subjects of speeches and articles nor the persons or groups paying for them bore any connection to the employee’s job responsibilities, and it exempted a “series” of speeches or arti-

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673 413 U.S. at 578-79.
674 413 U.S. at 580-81.
677 The plaintiff class consisted of all Executive Branch employees below grade GS–16. Also covered by the ban were senior executives, Members of Congress, and other federal officials, but the possibility of improprieties by these groups did not justify application of the ban to “the vast rank and file of federal employees below grade GS–16.”
icles without also exempting individual articles and speeches. These “anomalies” led the Court to conclude that the “speculative benefits” of the ban were insufficient to justify the burdens it imposed on expressive activities.\(^{678}\)

**Government as Employer: Free Expression Generally.**—Change has occurred in many contexts, in the main with regard to state and local employees and with regard to varying restrictions placed upon such employees. Foremost among the changes has been the general disregarding of the “right-privilege” distinction. Application of that distinction to the public employment context was epitomized in the famous sentence of Justice Holmes: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”\(^{679}\) The Supreme Court embraced this application in the early 1950s, first affirming a lower court decision by equally divided vote,\(^{680}\) and soon after applying the distinction itself. Upholding a prohibition on employment as teachers of persons who advocated the desirability of overthrowing the government, the Court declared that “[i]t is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system under reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.”\(^{681}\)

The same year, however, saw the express rejection of the right-privilege doctrine in another loyalty case. Voiding a loyalty oath re-

\(^{678}\) 513 U.S. at 477.


\(^{680}\) Bailey v. Richardson, 182 F. 2d 46, 59 (D.C. Cir. 1950), aff’d by an equally divided Court, 341 U.S. 918 (1951). The appeals court majority, upholding the dismissal of a government employee against due process and First Amendment claims, asserted that “the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. . . . The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ.” Although the Supreme Court issued no opinion in Bailey, several Justices touched on the issues in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). Justices Douglas and Jackson in separate opinions rejected the privilege doctrine as applied by the lower court in Bailey. Id. at 180, 185. Justice Black had previously rejected the doctrine in United Public Workers v. Mitchell, 330 U.S. 75, 105 (1947) (dissenting opinion).

requirement conditioned on mere membership in suspect organizations, the Court reasoned that the interest of public employees in being free of such an imposition was substantial. “There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy…. [W]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.”

The premise here—that, if removal or rejection injures one in some fashion, he is therefore entitled to raise constitutional claims against the dismissal or rejection—has faded in subsequent cases; the rationale now is that, while government may deny employment, or any benefit for that matter, for any number of reasons, it may not deny employment or other benefits on a basis that infringes that person's constitutionally protected interests. “For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’ … Such interference with constitutional rights is impermissible.”

However, the fact that government does not have carte blanche in dealing with the constitutional rights of its employees does not mean it has no power at all. “[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”

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683 Perry v. Sindermann, 408 U.S. 593, 597 (1972). In a companion case, the Court noted that the privilege basis for the appeals court’s due process holding in Bailey “has been thoroughly undermined in the ensuing years.” Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). The test now in due process and other such cases is whether government has conferred a property right in employment which it must respect, but the inquiry when it is alleged that an employee has been penalized for the assertion of a constitutional right is that stated in the text. A finding, however, that protected expression or conduct played a substantial part in the decision to dismiss or punish does not conclude the case; the employer may show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected expression or conduct. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 416 (1979). See discussion infra under “The Interests Protected: Entitlements and Positivist Recognition.”

ering concerned the dismissal of a high school teacher who had written a critical letter to a local newspaper reflecting on the administration of the school system. The letter also contained several factual errors. “The problem in any case,” Justice Marshall wrote for the Court, “is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” 685 The Court laid down no general standard, but undertook a suggestive analysis. Dismissal of a public employee for criticism of his superiors was improper, the Court indicated, where the relationship of employee to superior was not so close, such as day-to-day personal contact, that problems of discipline or of harmony among co-workers, or problems of personal loyalty and confidence, would arise. 686 The school board had not shown that any harm had resulted from the false statements in the letter, and it could not proceed on the assumption that the false statements were per se harmful, inasmuch as the statements primarily reflected a difference of opinion between the teacher and the board about the allocation of funds. Moreover, the allocation of funds is a matter of important public concern about which teachers have informed and definite opinions that the community should be aware of. “In these circumstances we conclude that the interest of the school administration in limiting teachers’ opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.” 687

Combining a balancing test of governmental interest and employee rights with a purportedly limiting statutory construction, the Court, in Arnett v. Kennedy, 688 sustained the constitutionality of a provision of federal law authorizing removal or suspension without pay of an employee “for such cause as will promote the efficiency of the service” when the “cause” cited concerned speech by

685 391 U.S. at 568.
686 391 U.S. at 568-70. Contrast Connick v. Myers, 461 U.S. 138 (1983), where Pickering was distinguished on the basis that the employee, an assistant district attorney, worked in an environment where a close personal relationship involving loyalty and harmony was important. “When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.” Id. at 151–52.
687 391 U.S. at 570-73. Pickering was extended to private communications of an employee’s views to the employer in Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979), although the Court recognized that different considerations might arise in context. That is, with respect to public speech, content may be determinative in weighing impairment of the government’s interests, whereas with private speech, manner, time, and place of delivery may be as or more important. Id. at 415 n.4.
the employee. He had charged that his superiors had made an offer of a bribe to a private person. The quoted statutory phrase, the Court held, “is without doubt intended to authorize dismissal for speech as well as other conduct.” But, recurring to its Letter Carriers analysis, it noted that the authority conferred was not impermissibly vague, inasmuch as it is not possible to encompass within a statutory enactment all the myriad situations that arise in the course of employment, and inasmuch as the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law. Neither was the language overbroad, continued the Court, because it “proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer…. We hold that the language ‘such cause as will promote the efficiency of the service’ in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad.”

Pickering was distinguished in Connick v. Myers, involving what the Court characterized in the main as an employee grievance rather than an effort to inform the public on a matter of public concern. The employee, an assistant district attorney involved in a dispute with her supervisor over transfer to a different section, was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale. This firing the Court found permissible. “When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” Whether an employee’s speech addresses a matter

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691 416 U.S. at 162. In dissent, Justice Marshall argued: “The Court’s answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious.” Id. at 229.
693 416 U.S. at 146. Connick was a 5–4 decision, with Justice White’s opinion of the Court being joined by Chief Justice Burger and Justices Powell, Rehnquist, and O’Connor. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that information concerning morale at an important government office is a matter of public concern, and that the Court extended too much deference to the employer’s judgment as to disruptive effect. Id. at 163–65.
of public concern, the Court indicated, must be determined not only by its content, but also by its form and context. 461 U.S. at 147-48. Justice Brennan objected to this introduction of context, admittedly of interest in balancing interests, into the threshold issue of public concern.

461 U.S. at 151-52. The Court explained that “a stronger showing [of interference with governmental interests] may be necessary if the employee’s speech more substantially involve[s] matters of public concern.” Id. at 152. This conclusion was implicit in Givhan, 439 U.S. 410 (1979), characterized by the Court in Connick as involving “an employee speak[ing] out as a citizen on a matter of general concern, not tied to a personal employment dispute, but [speaking] privately.” 461 U.S. at 148, n.8.

483 U.S. 378 (1987). This was a 5–4 decision, with Justice Marshall’s opinion of the Court being joined by Justices Brennan, Blackmun, Powell, and Stevens, and with Justice Scalia’s dissent being joined by Chief Justice Rehnquist, and by Justices White and O’Connor. Justice Powell added a separate concurring opinion.

The protections applicable to government employees have been extended to independent government contractors, the Court announcing that “the Pickering balancing test, adjusted to weigh the government’s interests as contractor rather than as employer, determines the extent of their protection.”

Thus, although the public employer cannot muzzle its employees or penalize them for their expressions and associations to the same extent that a private employer can (the First Amendment, inapplicable to the private employer, is applicable to the public employer), the public employer nonetheless has broad leeway in restricting employee speech. If the employee speech does not relate to a matter of "public concern," then Connick applies and the employer is largely free of constitutional restraint. If the speech does relate to a matter of public concern, then Pickering's balancing test (as modified by Connick) is employed, the governmental interests in efficiency, workplace harmony, and the satisfactory performance of the employee's duties being balanced against the employee's First Amendment rights. While the general approach is relatively easy to describe, it has proven difficult to apply. The First Amendment, however, does not stand alone in protecting the speech of public employees; statutory protections for "whistleblowers" add to the mix.

**Government as Educator.**—While the Court had previously made clear that students in public schools are entitled to some con-

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701 See, e.g., Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980) (political patronage systems impermissibly infringe protected belief and associational rights of employees); Madison School Dist. v. WERC, 429 U.S. 167 (1977) (school teacher may not be prevented from speaking at a public meeting in opposition to position advanced by union with exclusive representation rights). The public employer may, as may private employers, permit collective bargaining and confer on representatives of its employees the right of exclusive representation, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223–32 (1977), but the fact that its employees may speak does not compel government to listen to them. See Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1979) (employees have right to associate to present their positions to their employer but employer not constitutionally required to engage in collective bargaining). See also Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) (public employees not members of union have no First Amendment right to meet separately with public employers compelled by state law to "meet and confer" with exclusive bargaining representative). Government may also inquire into the fitness of its employees and potential employees, but it must do so in a manner that does not needlessly endanger the expression and associational rights of those persons. See, e.g., Shelton v. Tucker, 364 U.S. 479 (1969).

702 In some contexts, the governmental interest is more far-reaching. See Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (interest in protecting secrecy of foreign intelligence sources).

703 For analysis of the efforts of lower courts to apply Pickering and Connick, see Massaro, Significant Silences: Freedom of Speech in the Public Sector Workplace, 61 S. Cal. L. Rev. 1 (1987); and Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 Ind. L.J. 43 (1988). In Waters v. Churchill, 511 U.S. 661 (1994), the Court grappled with what procedural protections may be required by the First Amendment when public employees are dismissed on speech-related grounds, but reached no consensus.

stitutional protection, and that minors generally are not outside the range of constitutional protection, its first attempt to establish standards of First Amendment expression guarantees against curtailment by school authorities came in Tinker v. Des Moines Independent Community School District. There, high school principals had banned the wearing of black armbands by students in school as a symbol of protest against United States actions in Vietnam. Reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban, the Court set out the balance to be drawn. “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate.... On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” Restriction on expression by school authorities is only permissible to prevent disruption of educational discipline. “In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”


706 In re Gault, 387 U.S. 1 (1967). Of course, children are in a number of respects subject to restrictions which would be impermissible were adults involved. E.g., Ginsberg v. New York, 390 U.S. 629 (1968); Rowan v. Post Office Dep’t, 397 U.S. 728 (1970) (access to objectionable and perhaps obscene materials).


708 393 U.S. at 506, 507.

709 393 U.S. at 509. The internal quotation is from Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). See also Papish v. Board of Curators, 410 U.S. 667 (1973) (state university could not expel a student for using “indecent speech” in campus newspaper). However, offensive “indecent” speech in the context of a high school assembly is punishable by school authorities. See Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding 2-day suspension, and withdrawal of privilege of speaking at graduation, for student who used sophomoric sexual metaphor in speech given to school assembly).
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Tinker was reaffirmed by the Court in Healy v. James, in which it held that the withholding of recognition by a public college administration from a student organization violated the students’ right of association, which is a construct of First Amendment liberties. Denial of recognition, the Court held, was impermissible if it had been based on the local organization’s affiliation with the national SDS, or on disagreement with the organization’s philosophy, or on a fear of disruption with no evidentiary support. “First Amendment rights must always be applied ‘in light of the special characteristics of the … environment’ in the particular case…. And, where state-operated educational institutions are involved, this Court has long recognized ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’ … Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ … The college classroom with its surrounding environs is peculiarly the ‘market place of ideas’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.” But a college may impose reasonable regulations to maintain order and preserve an atmosphere in which learning may take place, and it may impose as a condition of recognition that each organization affirm in advance its willingness to adhere to reasonable campus law.

While a public college may not be required to open its facilities generally for use by student groups, once it has done so it must justify any discriminations and exclusions under applicable constitutional norms, such as those developed under the public forum doctrine. Thus, it was constitutionally impermissible for a college to

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710 408 U.S. 169 (1972).
712 Healy v. James, 408 U.S. at 193. Because a First Amendment right was in issue, the burden was on the college to justify its rejection of a request for recognition rather than upon the requesters to justify affirmatively their right to be recognized. Id. at 184. Justice Rehnquist concurred in the result, because in his view a school administration could impose upon students reasonable regulations that would be impermissible if imposed by the government upon all citizens; consequently, cases cited by the Court which had arisen in the latter situation he did not think controlling. Id. at 201. See also Grayned v. City of Rockford, 408 U.S. 104 (1972), in which the Court upheld an anti-noise ordinance that forbade persons on grounds adjacent to a school to willfully make noise or to create any other diversion during school hours that “disturbs or tends to disturb” normal school activities.
close off its facilities, otherwise open, to students wishing to engage in religious speech. To be sure, a decision to permit access by religious groups had to be evaluated under First Amendment religion standards, but equal access did not violate the religion clauses. Compliance with stricter state constitutional provisions on church-state was a substantial interest, but it could not justify a content-based discrimination in violation of the First Amendment speech clause. By enactment of the Equal Access Act in 1984, Congress applied the same “limited open [public] forum” principles to public high schools, and the Court upheld the Act against First Amendment challenge.

When faced with another conflict between a school system’s obligation to inculcate community values in students and the expression rights of those students, the Court splintered badly, remanding for full trial a case challenging the authority of a school board to remove certain books from high school and junior high school libraries. In dispute were the school board’s reasons for removing the books—whether, as the board alleged, because of vulgarity and other content-neutral reasons, or whether also because of political disagreement with contents. The plurality conceded that school boards must be permitted “to establish and apply their curriculum in such a way as to transmit community values,” and that “there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.” At the same time, the plurality thought that students retained substantial free expression protections and that among these was the right to receive information and ideas. Carefully limiting its discussion to the removal of books from a school library, thereby excluding acquisition of books as well as questions of school curricula, the plurality would hold a school board constitutionally disabled from removing library books in order to deny ac-

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714 454 U.S. at 270-76. Whether the holding extends beyond the college level to students in high school or below who are more “impressionable” and perhaps less able to appreciate that equal access does not compromise the school’s neutrality toward religion, id. at 274 n.14, is unclear. See Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).
716 Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990). There was no opinion of the Court on the Establishment Clause holding. A plurality opinion, id. at 247–53, rejected Justice Marshall’s contention, id. at 263, that compulsory attendance and other structured aspects of the particular high school setting in Mergens differed so significantly from the relatively robust, open college setting in Widmar as to suggest state endorsement of religion.
cess to ideas with which it disagrees for political reasons. The four dissenters basically rejected the contention that school children have a protected right to receive information and ideas and thought that the proper role of education was to inculcate the community's values, a function into which the federal courts could rarely intrude. The decision provides little guidance to school officials and to the lower courts and assures a revisiting of the controversy by the Supreme Court.

_Tinker_ was distinguished in Hazelwood School Dist. v. Kuhlmeier, the Court relying on public forum analysis to hold that editorial control and censorship of a student newspaper sponsored by a public high school need only be “reasonably related to legitimate pedagogical concerns.” “The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in _Tinker_—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.” The student newspaper had been created by school officials as a part of the school curriculum, and served “as a supervised learning experience for journalism students.” Because no public forum had been created, school officials could maintain editorial control subject only to a reasonableness standard. Thus, a principal’s decisions to excise from the publication an article describing student pregnancy in a manner believed inappropriate for younger students, and another article on divorce critical of a named parent, were upheld.

The category of school-sponsored speech subject to _Kuhlmeier_ analysis appears to be far broader than the category of student expression still governed by _Tinker_. School-sponsored activities, the Court indicated, can include “publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or

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718 457 U.S. at 862, 864–69, 870–72. Only Justices Marshall and Stevens joined fully Justice Brennan's opinion. Justice Blackmun joined it for the most part with differing emphases. Id. at 875. Justice White refrained from joining any of the opinions but concurred in the result solely because he thought there were unresolved issues of fact that required a trial. Id. at 883.

719 The principal dissent was by Justice Rehnquist. 457 U.S. at 904. See also id. at 885 (Chief Justice Burger), 893 (Justice Powell), 921 (Justice O'Connor).


721 484 U.S. at 273.

722 484 U.S. at 270-71.
skilled to student participants and audiences."723 Because most primary, intermediate, and secondary school environments are tightly structured, with few opportunities for unsupervised student expression,724 Tinker apparently has limited applicability. It may be, for example, that students are protected for off-premises production of "underground" newspapers (but not necessarily for attempted distribution on school grounds) as well as for non-disruptive symbolic speech. For most student speech at public schools, however, Tinker's tilt in favor of student expression, requiring school administrators to premise censorship on likely disruptive effects, has been replaced by Kuhlmeier's tilt in favor of school administrators' pedagogical discretion.725

Governmental regulation of school and college administration can also implicate the First Amendment. But the Court dismissed as too attenuated a claim to a First Amendment-based academic freedom privilege to withhold peer review materials from EEOC subpoena in an investigation of a charge of sex discrimination in a faculty tenure decision.726

Government as Regulator of the Electoral Process: Elections.—Government has increasingly regulated the electoral system by which candidates are nominated and elected, requiring disclosure of contributions and expenditures, limiting contributions and expenditures, and imposing other regulations.727 These regulations restrict freedom of expression, which comprehends the rights to join together for political purposes, to promote candidates and

723 484 U.S. at 271. Selection of materials for school libraries may fall within this broad category, depending upon what is meant by "designed to impart particular knowledge or skills." See generally Stewart, The First Amendment, the Public Schools, and the Inculcation of Community Values, 18 J. LAW & EDUC. 23 (1989).

724 The Court in Kuhlmeier declined to decide "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." 484 U.S. at 274, n.7.

725 One exception may exist for student religious groups covered by the Equal Access Act; in this context the Court seemed to step back from Kuhlmeier's broad concept of curriculum-relatedness, seeing no constitutionally significant danger of perceived school sponsorship of religion arising from application of the Act's requirement that high schools provide meeting space for student religious groups on the same basis that they provide such space for student clubs. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).


issues, and to participate in the political process. The Court is divided with respect to many of these federal and state restrictions, but has not permitted the government to bar or penalize political speech directly. Thus, it held that the Minnesota Supreme Court could not prohibit candidates for judicial election from announcing their views on disputed legal and political issues. And, when Kentucky attempted to void an election on the ground that the winner’s campaign promise to serve at a lower salary than that affixed to the office violated a law prohibiting candidates from offering material benefits to voters in consideration for their votes, the Court ruled unanimously that the state’s action violated the First Amendment. Similarly, California could not prohibit official governing bodies of political parties from endorsing or opposing candidates in primary elections. Minnesota, however, could prohibit a candidate from appearing on the ballot as the candidate of more than one party. The Court wrote that election “[r]egulations imposing severe burdens on plaintiffs’ [associational] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions.” Minnesota’s ban on “fusion” candidates was not severe, as it left a party that could not place another party’s candidate on the ballot free to communicate its preference for that candidate by other means, and the ban was justified by “valid state interests in ballot integrity and political stability.”

In 1971 and 1974, Congress imposed new and stringent regulation of and limitations on contributions to and expenditures by po-
litical campaigns, as well as disclosure of most contributions and expenditures, setting the stage for the landmark *Buckley v. Valeo* decision probing the scope of protection afforded political activities by the First Amendment.\(^7\) In basic unanimity, but with several Justices feeling that the sustained provisions trenched on protected expression, the Court sustained the contribution and disclosure sections of the statute but voided the limitations on expenditures.\(^8\)

“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.... A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”\(^9\) The expenditure of money in political campaigns may involve speech alone, conduct alone, or mixed speech-conduct, the Court noted, but all forms of it involve communication, and when governmental regulation is aimed directly at suppressing communication it matters not how that communication is defined. As such, the regulation must be subjected to close scrutiny and justified by compelling governmental interests. When this process was engaged in, the contribution limitations, with some construed exceptions, survived, but the expenditure limitation did not.

The contribution limitation was sustained as imposing only a marginal restriction upon the contributor’s ability to engage in free communication, inasmuch as the contribution is a generalized expression of support for a candidate but it is not a communication of reasons for the support; “the size of the contribution provides a very rough index of the intensity of the contributors’ support for the candidate.”\(^8\) The political expression really occurs when the funds are spent by a candidate; only if the restrictions were set so low as to impede this communication would there arise a constitutional infringement. This incidental restraint upon expression may therefore be justified by Congress’ purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions.\(^9\)

\(^7\) 424 U.S. 1 (1976).
\(^8\) The Court’s lengthy opinion was denominated *per curiam*, but five Justices filed separate opinions.
\(^9\) 424 U.S. at 14, 19.
\(^8\) 424 U.S. at 21.
\(^9\) 424 U.S. at 14-38. Chief Justice Burger and Justice Blackmun would have struck down the contribution limitations. Id. at 235, 241-46, 290. See also California Medical Ass’n v. FEC, 453 U.S. 182 (1981), sustaining a provision barring individ-
Of considerable importance to the analysis of the validity of the limitations on contributions was the Court’s conclusion voiding a section restricting to $1,000 a year the aggregate expenditure anyone could make to advocate the election or defeat of a “clearly identified candidate.” Though the Court treated the restricted spending as purely an expenditure it seems to partake equally of the nature of a contribution on behalf of a candidate that is not given to the candidate but that is spent on his behalf. “Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.” 740 The Court found that none of the justifications offered in support of a restriction on such expression was adequate; independent expenditures did not appear to pose the dangers of corruption that contributions did and it was an impermissible purpose to attempt to equalize the ability of some individuals and groups to express themselves by restricting the speech of other individuals and groups. 741

Similarly, limitations upon the amount of funds a candidate could spend out of his own resources or those of his immediate family were voided. A candidate, no less than any other person, has a

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740 424 U.S. at 48.

741 424 U.S. at 39-51. Justice White dissented. Id. at 257. In an oblique return to the right-privilege distinction, the Court agreed that Congress could condition receipt of public financing funds upon acceptance of expenditure limitations. Id. at 108–09. In Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), aff’d by an equally divided Court, 455 U.S. 129 (1982), a provision was invalidated which limited independent political committees to expenditures of no more than $1,000 to further the election of any presidential candidate who received public funding. An equally divided affirmation is of limited precedential value. When the validity of this provision, 26 U.S.C. § 9012(f), was again before the Court in 1985, the Court invalidated it. FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985). In an opinion by Justice Rehnquist, the Court determined that the governmental interest in preventing corruption or the appearance of corruption was insufficient justification for restricting the First Amendment rights of committees interested in making independent expenditures on behalf of a candidate, since “the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” Id. at 498. See also Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996) (the First Amendment bars application of the Party Expenditure Provision of the Federal Election Campaign Act, 2 U.S.C. § 441a(d)(3), to expenditures that the political party makes independently, without coordination with the candidate).
First Amendment right to advocate.\textsuperscript{742} The limitations upon total expenditures by candidates seeking nomination or election to federal office could not be justified: the evil associated with dependence on large contributions was met by limitations on contributions, the purpose of equalizing candidate financial resources was impermissible, and the First Amendment did not permit government to determine that expenditures for advocacy were excessive or wasteful.\textsuperscript{743}

Although the Court in Buckley upheld the Act’s reporting and disclosure requirements, it indicated that under some circumstances the First Amendment might require exemption for minor parties able to show “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”\textsuperscript{744} This standard was applied both to disclosure of contributors’ names and to disclosure of recipients of campaign expenditures in \textit{Brown v. Socialist Workers ’74 Campaign Committee},\textsuperscript{745} in which the Court held that the minor party had established the requisite showing of likely reprisals through proof of past governmental and private hostility and harassment. Disclosure of recipients of campaign expenditures, the Court reasoned, could not only dissuade supporters and workers who might receive reimbursement for expenses, but could also dissuade various entities from performing routine commercial services for the party and thereby “cripple a minor party’s ability to operate effectively.”\textsuperscript{746}

In \textit{Nixon v. Shrink Missouri Government PAC},\textsuperscript{747} the Court held that Buckley v. Valeo “is authority for state limits on contributions to state political candidates,” but state limits “need not be pegged to Buckley’s dollars.”\textsuperscript{748} The Court in Nixon justified the limits on contributions on the same grounds that it had in Buckley: “preventing corruption and the appearance of it that flows from munificent campaign contributions.”\textsuperscript{749} Further, Nixon did “not present a close call requiring further definition of whatever the State’s evidentiary obligation may be” to justify the contribution limits, as “there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and

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  \item \textsuperscript{742}424 U.S. at 51-54. Justices Marshall and White disagreed with this part of the decision. Id. at 286.
  \item \textsuperscript{743}424 U.S. at 54-59. The reporting and disclosure requirements were sustained. Id. at 60–84.
  \item \textsuperscript{744}424 U.S. at 74.
  \item \textsuperscript{745}459 U.S. 87 (1982).
  \item \textsuperscript{746}459 U.S. at 97–98.
  \item \textsuperscript{747}528 U.S. 377 (2000).
  \item \textsuperscript{748}528 U.S. at 381-82.
  \item \textsuperscript{749}528 U.S. at 390.
\end{itemize}
no reason to question the existence of a corresponding suspicion among voters.”750 As for the amount of the contribution limits, Missouri’s fluctuated in accordance with the consumer price index, and, when suit was filed, ranged from $275 to $1,075, depending on the state office or size of constituency. The Court upheld these limits, writing that, in Buckley, it had “rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate.”751 The relevant inquiry, rather, was “whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”752

Outside the context of contributions to candidates, however, the Court has not been convinced of the justifications for limiting such uses of money for political purposes. Thus, a municipal ordinance regulating the maximum amount that could be contributed to or accepted by an association formed to take part in a city referendum was invalidated.753 While Buckley had sustained limits on contributions as a prophylactic measure to prevent corruption or its appearance, no risk of corruption was found in giving or receiving funds in connection with a referendum. Similarly, the Court invalidated a criminal prohibition on payment of persons to circulate petitions for a ballot initiative.754

Venturing into the area of the constitutional validity of governmental limits upon political spending or contributions by corporations, a closely divided Court struck down a state law that prohibited corporations from expending funds in order to influence referendum votes on any measure save proposals that materially af-

750 528 U.S. at 393, 395.
751 528 U.S. at 397.
752 528 U.S. at 397.
753 Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1980). It is not clear from the opinion whether the Court was applying a contribution or an expenditure analysis to the ordinance, see id. at 301 (Justice Marshall concurring), or whether in this context it makes any difference.
754 Meyer v. Grant, 486 U.S. 414 (1988). The Court subsequently struck down a Colorado statute that required ballot-initiative proponents, if they pay circulators, to file reports disclosing circulators’ names and addresses and the total amount paid to each circulator. Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999). Although the Court upheld a requirement that proponents’ names and the total amount they have spent to collect signatures be disclosed, as this served “as a control or check on domination of the initiative process by affluent special interest groups” (id. at 202), it found that “[t]he added benefit of revealing the names of paid circulators and the amounts paid to each circulator . . . is hardly apparent and has not been demonstrated.” Id. at 203. The Court also struck down a requirement that circulators be registered voters, as the state’s interest in ensuring that circulators would be amenable to subpoenas was served by the requirement that they be residents a requirement on which the Court had no occasion to rule.
fected corporate business, property, or assets. The free discussion of governmental affairs “is the type of speech indispensable to decisionmaking in a democracy,” the Court said, “and this is no less true because the speech comes from a corporation rather than an individual.” It is the nature of the speech, not the status of the speaker, that is relevant for First Amendment analysis, thus allowing the Court to pass by the question of the rights a corporate person may have. The “materially affecting” requirement was found to be an impermissible proscription of speech based on content and identity of interests. The “exact scrutiny” that restrictions on speech must pass was not satisfied by any of the justifications offered and the Court in any event found some of them impermissible.

Bellotti called into some question the constitutionality of the federal law that makes it unlawful for any corporation or labor union “to make a contribution or expenditure in connection with any election” for federal office or “in connection with any primary election or political convention or caucus held to select candidates” for such office. Three times the opportunity has arisen for the Court to assess the validity of the statute and each time it has passed it by. One of the dissents in Bellotti suggested its application to the federal law, but the Court saw several distinctions.

Other aspects of the federal provision have been interpreted by the Court. First, in FEC v. National Right to Work Committee the Court unanimously upheld section 441b’s prohibition on corporate solicitation of money from corporate nonmembers for use in

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755 First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). Justice Powell wrote the opinion of the Court. Dissenting, Justices White, Brennan, and Marshall argued that while corporations were entitled to First Amendment protection, they were subject to more regulation than were individuals, and substantial state interests supported the restrictions. Id. at 802. Justice Rehnquist went further in dissent, finding no corporate constitutional protection. Id. at 822.


757 All three cases involved labor unions and were decided on the basis of statutory interpretation, apparently informed with some constitutional doubts. United States v. CIO, 335 U.S. 106 (1948); United States v. United Automobile Workers, 352 U.S. 567 (1957); Pipefitters v. United States, 407 U.S. 385 (1972).

758 First National Bank of Boston v. Bellotti, 435 U.S. 765, 811–12 (1978) (Justice White dissenting). The Court emphasized that Bellotti was a referendum case, not a case involving corporate expenditures in the context of partisan candidate elections, in which the problem of corruption of elected representatives was a weighty problem. “Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.” Id. at 787–88 & n.26.

federal elections. Relying on *Bellotti* for the proposition that government may act to prevent “both actual corruption and the appearance of corruption of elected representatives,” the Court concluded that “there is no reason why ... unions, corporations, and similar organizations [may not be] treated differently from individuals.”

However, an exception to this general principle was recognized by a divided Court in *FEC v. Massachusetts Citizens for Life, Inc.*, holding the section’s independent expenditure limitations (not limiting expenditures but requiring only that such expenditures be financed by voluntary contributions to a separate segregated fund) unconstitutional as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a “business corporation” or union. One of the rationales for the special rules on corporate participation in elections—elimination of “the potential for unfair deployment of [corporate] wealth for political purposes”—has no applicability to such a corporation “formed to disseminate political ideas, not to amass capital.”

The other principal rationale—protection of corporate shareholders and other contributors from having their money used to support political candidates to whom they may be opposed—was also deemed inapplicable. The Court distinguished *National Right to Work Committee* because “restrictions on contributions require less compelling justification than restrictions on independent spending,” and also explained that, “given a contributor’s awareness of the political activity of [MCFL], as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b’s restriction on ... independent spending.”

What the Court did not address directly was whether the same analysis could have led to a different result in *National Right to Work Committee*.

Clarification of *Massachusetts Citizens for Life* was afforded by *Austin v. Michigan State Chamber of Commerce*, in which the Court upheld application to a nonprofit corporation of Michigan’s restrictions on independent expenditures by corporations. The Michigan law, like federal law, prohibited such expenditures from

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459 U.S. at 210-11.
479 U.S. 238 (1986). Justice Brennan’s opinion for the Court was joined by Justices Marshall, Powell, O’Connor, and Scalia; Chief Justice Rehnquist, author of the Court’s opinion in *National Right to Work Comm.*, dissented from the constitutional ruling, and was joined by Justices White, Blackmun, and Stevens.
479 U.S. at 259.
479 U.S. at 259-60, 262.
The Court did not spell out whether there was any significant distinction between the two organizations, NRWC and MCFL; Chief Justice Rehnquist’s dissent suggested that there was not. See 479 U.S. at 266.
corporate treasury funds, but allowed them to be made from separate “segregated” funds. This arrangement, the Court decided, serves the state’s compelling interest in assuring that corporate wealth, accumulated with the help of special advantages conferred by state law, does not unfairly influence elections. The law was sufficiently “narrowly tailored” because it permits corporations to make independent political expenditures through segregated funds that “accurately reflect contributors’ support for the corporation’s political views.”

Also, the Court concluded that the Chamber of Commerce was unlike the MCFL in each of the three distinguishing features that had justified an exemption from operation of the federal law. Unlike MCFL, the Chamber was not organized solely to promote political ideas; although it had no stockholders, the Chamber’s members had similar disincentives to forego benefits of membership in order to protest the Chamber’s political expression; and, by accepting corporate contributions, the Chamber could serve as a conduit for corporations to circumvent prohibitions on direct corporate contributions and expenditures.

Government as Regulator of the Electoral Process: Lobbying.—Legislators may be greatly dependent upon representations made to them and information supplied to them by interested parties, and therefore may desire to know what the real interests of those parties are, what groups or persons they represent, and other such information. But everyone is constitutionally entitled to write his congressman or his state legislator, to cause others to write or otherwise contact legislators, and to make speeches and publish articles designed to influence legislators. Conflict is inherent. In the Federal Regulation of Lobbying Act, Congress by broadly phrased and ambiguous language seemed to require detailed reporting and registration by all persons who solicited, received, or expended funds for purposes of lobbying, that is to influence congressional action directly or indirectly. In United States v. Harriss, the Court, stating that it was construing the Act to avoid constitutional doubts, interpreted covered lobbying as meaning only direct attempts to influence legislation through direct communication with members of Congress. So construed, the Act was constitutional; Congress had “merely provided for a modicum of information from those who for hire attempt to influence legisla-

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766 494 U.S. at 660-61.
767 494 U.S. at 661-65.
770 347 U.S. at 612.
771 347 U.S. at 617-24.
tion or who collect or spend funds for that purpose,” and this was simply a measure of “self-protection.”

Other statutes and governmental programs affect lobbying and lobbying activities. It is not impermissible for the Federal Government to deny a business expense tax deduction for money spent to defeat legislation which would adversely affect one’s business. But the antitrust laws may not be applied to a concert of business enterprises that have joined to lobby the legislative branch to pass and the executive branch to enforce laws which would have a detrimental effect upon competitors, even if the lobbying was conducted unethically. On the other hand, allegations that competitors combined to harass and deter others from having free and unlimited access to agencies and courts by resisting before those bodies all petitions of competitors for purposes of injury to competition are sufficient to implicate antitrust principles.

Government as Regulator of Labor Relations.—Numerous problems may arise in this area, but the issue here considered is the balance to be drawn between the free speech rights of an employer and the statutory rights of his employees to engage or not engage in concerted activities free of employer coercion, which may well include threats or promises or other oral or written communications. The Court has upheld prohibitions against employer interference with union activity through speech so long as the speech is coercive, and that holding has been reduced to statutory form. Nonetheless, there is a First Amendment tension in this area, with its myriad variations of speech forms that may be de-

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772 347 U.S. at 625. Justices Douglas, Black, and Jackson dissented. Id. at 628, 633. They thought the Court’s interpretation too narrow and would have struck the statute down as being too broad and too vague, but would not have denied Congress the power to enact narrow legislation to get at the substantial evils of the situation. See also United States v. Rumely, 345 U.S. 41 (1953).


775 California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Justices Stewart and Brennan thought that joining to induce administrative and judicial action was as protected as the concert in Noerr but concurred in the result because the complaint could be read as alleging that defendants sought to forestall access to agencies and courts by plaintiffs. Id. at 516.


nominated “predictions,” especially since determination whether particular utterances have an impermissible impact on workers is vested with an agency with no particular expertise in the protection of freedom of expression. 779

Government as Investigator: Reporter’s Privilege.—News organizations have claimed that the First Amendment status of the press compels a recognition by government of an exception to the ancient rule that every citizen owes to his government a duty to give what testimony he is capable of giving. 780 The argument for a limited exemption to permit reporters to conceal their sources and to keep confidential certain information they obtain and choose at least for the moment not to publish was rejected in Branzburg v. Hayes 781 by a closely divided Court. “Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.” 782 Not only was it uncertain to what degree confidential informants would be deterred from providing information, said Justice White for the Court, but the conditional nature of the privilege claimed might not mitigate the deterrent effect, leading to claims for an absolute privilege. Confidentiality could be protected by the secrecy of grand jury proceedings and by the experience of law enforcement officials in themselves dealing with informers. Difficulties would arise as well in identifying who should have the privilege and who should not. But the principal basis of the holding was that the investigation and exposure of criminal conduct was a governmental function of such importance that it overrode the interest of reporters in avoiding the

781 408 U.S. 665 (1972). “The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.” Id. at 682.
782 408 U.S. at 690-91.
incidental burden on their newsgathering activities occasioned by such governmental inquiries.\(^{783}\)

The Court observed that Congress and the States were free to develop by statute privileges for reporters as narrowly or as broadly as they chose; while efforts in Congress failed, many States have enacted such laws.\(^{784}\) The assertion of a privilege in civil cases has met with mixed success in the lower courts, the Supreme Court having not yet confronted the issue.\(^{785}\)

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigation.\(^{786}\) The press had argued that to permit searches of newsrooms would threaten the abil-

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\(^{783}\) Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court’s opinion. Justice Powell also submitted a concurring opinion in which he suggested that reporters might be able to assert a privilege of confidentiality if in each individual case they demonstrated that responding to the governmental inquiry at hand would result in a deterrence of First Amendment rights and privilege and that the governmental interest asserted was entitled to less weight than their interest. 408 U.S. at 709. Justice Stewart dissented, joined by Justices Brennan and Marshall, and argued that the First Amendment required a privilege that could only be overcome by a governmental showing that the information sought is clearly relevant to a precisely defined subject of inquiry, that it is reasonable to think that the witness has that information, and that there is not any means of obtaining the information less destructive of First Amendment liberties. Id. at 725. Justice Douglas also dissented. Id. at 711.

The courts have construed \textit{Branzburg} as recognizing a limited privilege that must be balanced against other interests. \textit{See In re Pennington, 224 Kan. 573, 581 P.2d 812 (1978), cert. denied, 440 U.S. 929 (1979); Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980); cf. United States v. Criden, 633 F.2d 346 (3d Cir. 1980).}


\(^{786}\) \textit{Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978).} Justice Powell thought it appropriate that “a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment” when he assesses the reasonableness of a warrant in light of all the circumstances. Id. at 568 (concurring). Justice Stewart and Marshall would have imposed special restrictions upon searches when the press was the object, id. at 570 (dissenting), and Justice Stevens dissented on Fourth Amendment grounds. Id. at 577.
ity to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, but it seemed to doubt that the consequences alleged would occur, and it observed that the built-in protections of the warrant clause would adequately protect those interests and noted that magistrates could guard against abuses when warrants were sought to search newsrooms by requiring particularizations of the type, scope, and intrusiveness that would be permitted in the searches. 787

**Government and the Conduct of Trials.**—Conflict between constitutionally protected rights is not uncommon. One of the most difficult to resolve is the conflict between a criminal defendant’s Fifth and Sixth Amendment rights to a fair trial and the First Amendment’s protection of the rights to obtain and publish information about defendants and trials. Convictions obtained in the context of prejudicial pre-trial publicity 788 and during trials that were media “spectaculars” 789 have been reversed, but the prevention of such occurrences is of paramount importance to the governmental and public interest in the finality of criminal trials and the successful prosecution of criminals. However, the imposition of “gag orders” on press publication of information directly confronts the First Amendment’s bar on prior restraints, 790 although the courts have a good deal more discretion in preventing the information from becoming public in the first place. 791 Perhaps the most profound debate that has arisen in recent years concerns the right of access of the public and the press to trial and pre-trial proceedings, and in those cases the Court has enunciated several important theorems of First Amendment interpretation.

When the Court held that the Sixth Amendment right to a public trial did not guarantee access of the public and the press to...
pre-trial suppression hearings, a major debate flowered concerning the extent to which, if at all, the speech and press clauses protected the public and the press in seeking to attend trials. The right of access to criminal trials against the wishes of the defendant was held protected in Richmond Newspapers v. Virginia, but the Justices could not agree upon a majority rationale that would permit principled application of the holding to other areas in which access is sought.

Chief Justice Burger pronounced the judgment of the Court, but his opinion was joined by only two other Justices (and one of them in a separate concurrence drew conclusions probably going beyond the Chief Justice's opinion). Basic to the Chief Justice's view was an historical treatment that demonstrated that trials were traditionally open. This openness, moreover, was no "quirk of history" but "an indispensable attribute of an Anglo-American trial." This characteristic flowed from the public interest in seeing fairness and proper conduct in the administration of criminal trials; the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt at the commission of many crimes, convincingly demonstrated why the tradition had developed and been maintained. Thus, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." The presumption has more than custom to command it. "[I]n the context of trials ... the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."

Justice Brennan, joined by Justice Marshall, followed a significantly different route to the same conclusion. In his view, "the First Amendment ... has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but the ante-
ecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself but also for the indispensable conditions of meaningful communication.” 797

The trial court in Richmond Newspapers had made no findings of necessity for closure, and neither Chief Justice Burger nor Justice Brennan found the need to articulate a standard for determining when the government’s or the defendant’s interests could outweigh the public right of access. That standard was developed two years later. Globe Newspaper Co. v. Superior Court 798 involved a statute, unique to one State, that mandated the exclusion of the public and the press from trials during the testimony of a sex-crime victim under the age of 18. For the Court, Justice Brennan wrote that the First Amendment guarantees press and public access to criminal trials, both because of the tradition of openness 799 and because public scrutiny of a criminal trial serves the valuable functions of enhancing the quality and safeguards of the integrity of the factfinding process, of fostering the appearance of fairness, and of permitting public participation in the judicial process. The right is not absolute, but in order to close all or part of a trial government must show that “the denial is necessitated by a compelling governmental interest, and [that it] is narrowly tailored to serve that interest.” 800 The Court was explicit that the right of access was to criminal trials, 801 so that the question of the openness of civil trials remains.

The Court next applied and extended the right of access in several other areas, striking down state efforts to exclude the public

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797 448 U.S. at 587-88 (emphasis in original, citations omitted).
798 457 U.S. 596 (1982). Joining Justice Brennan’s opinion of the Court were Justices White, Marshall, Blackmun, and Powell. Justice O’Connor concurred in the judgment. Chief Justice Burger, with Justice Rehnquist, dissented, arguing that the tradition of openness that underlay Richmond Newspapers, was absent with respect to sex crimes and youthful victims and that Richmond Newspapers was unjustifiably extended. Id. at 612. Justice Stevens dissented on mootness grounds. Id. at 620.
799 That there was no tradition of openness with respect to the testimony of minor victims of sex crimes was irrelevant, the Court argued. As a general matter, all criminal trials have been open. The presumption of openness thus attaches to all criminal trials and to close any particular kind or part of one because of a particular reason requires justification on the basis of the governmental interest asserted. 457 U.S. at 605 n.13.
800 457 U.S. at 606-07. Protecting the well-being of minor victims was a compelling interest, the Court held, and might justify exclusion in specific cases, but it did not justify a mandatory closure rule. The other asserted interest, encouraging minors to come forward and report sex crimes, was not well served by the statute.
801 The Court throughout the opinion identifies the right as access to criminal trials, even italicizing the words at one point. 457 U.S. at 605.
from *voir dire* proceedings, from a suppression hearing, and from a preliminary hearing. The Court determined in *Press-Enterprise I* that historically *voir dire* had been open to the public, and that “[t]he presumption of openness may be overcome only by an over-riding interest based on findings that closure is essential to pre-serve higher values and is narrowly tailored to serve that inter-est.” No such findings had been made by the state court, which had ordered closed, in the interest of protecting the privacy interests of some prospective jurors, 41 of the 44 days of *voir dire* in a rape-murder case. The trial court also had not considered the possi-bility of less restrictive alternatives, e.g., *in camera* consideration of jurors’ requests for protection from publicity. In *Waller v. Georgia*, the Court held that “under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press Enterprise*,” and noted that the need for openness at suppression hearings “may be particularly strong” because the conduct of police and prosecutor is often at issue. And in *Press Enterprise II*, the Court held that there is a similar First Amendment right of the public to access to most criminal proceedings (here a preliminary hearing) even when the accused requests that the proceedings be closed. Thus, an accused’s Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be “specific findings … demonstrating that first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would pre-vent, and second, reasonable alternatives to closure cannot ade-quately protect the defendant’s fair trial rights.” Openness of preliminary hearings was deemed important because, under California law, the hearings can be “the final and most important step in the criminal proceeding” and therefore may be “the sole occasion for public observation of the criminal justice system,” and also because the safeguard of a jury is unavailable at preliminary hear-ings.

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803 464 U.S. at 510.
804 *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), did not involve assertion by the accused of his 6th Amendment right to a public trial; instead, the accused in that case had requested closure. “[T]he constitutional guarantee of a public trial is for the benefit of the defendant.” Id. at 381.
806 467 U.S. at 47.
808 478 U.S. at 14.
809 478 U.S. at 12.
**Government as Administrator of Prisons.**—A prison inmate retains only those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. The identifiable governmental interests at stake in administration of prisons are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners. In applying these general standards, the Court at first arrived at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between newsmen and prisoners. The Court’s more recent deferential approach to regulation of prisoners’ mail has lessened the differences.

First, in *Procunier v. Martinez*, the Court invalidated mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they thought that the letters “unduly complain,” “express inflammatory ... views or beliefs,” or were “defamatory” or “otherwise inappropriate.” The Court based this ruling not on the rights of the prisoner, but instead on the outsider’s right to communicate with the prisoner either by sending or by receiving mail. Under this framework, the Court held, regulation of mail must further an important interest unrelated to the suppression of expression; regulation must be shown to further the substantial interest of security, order, and rehabilitation, and it must not be used simply to censor opinions or other expressions. Further, a restriction must be no greater than is necessary or essential to the protection of the particular government interest involved.

However, in *Turner v. Safley*, the Court made clear that a more deferential standard is applicable when only the communicative rights of inmates are at stake. In upholding a Missouri rule barring inmate-to-inmate correspondence, while striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child, the Court announced the appropriate standard. “[W]hen a regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legiti-
mate penological interests.” Several considerations are appropriate in determining reasonableness of a regulation. First, there must be a rational relation to a legitimate, content-neutral objective. Prison security, broadly defined, is one such objective. Availability of other avenues for exercise of the inmate right suggests reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation “that fully accommodated the prisoner’s rights at de minimis cost to valid penological interests” suggests unreasonableness. Two years after Safley, the Court directly limited Martinez, restricting it to regulation of outgoing correspondence. In the Court’s current view the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from non-prisoners, or outside publications.

Neither prisoners nor reporters have any affirmative First Amendment right to face-to-face interviews, when general public access to prisons is restricted and when there are alternatives by which the news media can obtain information respecting prison policies and conditions. Prison restrictions on such interviews do indeed implicate the First Amendment rights of prisoners, the Court held, but the justification for the restraint lay in the implementation of security arrangements, affected by the entry of persons into prisons, and the carrying out of rehabilitation objectives, affected by the phenomenon of the “big wheel,” the exploitation of access to the news media by certain prisoners; alternatives to face-to-face interviews existed, such as mail and visitation with family, attorneys, clergy, and friends. The existence of alternatives and the presence of justifications for the restraint served to weigh the balance against the asserted First Amendment right, the Court held.

While agreeing with a previous affirmation that “news gathering is not without some First Amendment protec-

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814 482 U.S. at 89.
815 All that is required is that the underlying governmental objective be content neutral; the regulation itself may discriminate on the basis of content. See Thornburgh v. Abbott, 490 U.S. 401 (1989) (upholding Federal Bureau of Prisons regulation allowing prison authorities to reject incoming publications found to be detrimental to prison security).
816 482 U.S. at 91.
819 417 U.S. at 829-35.
tion,” the Court denied that the First Amendment accorded the press any affirmative obligation on the part of government. “The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.” Government has an obligation not to impair the freedom of journalists to seek out newsworthy information, and not to restrain the publication of news. But it cannot be argued, the Court continued, “that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally.”

_Pell_ and _Saxbe_ did not delineate whether the “equal access” rule applied only in cases in which there was public access, so that a different rule for the press might follow when general access was denied, nor did they purport to begin defining what the rules of equal access are. No greater specificity emerged from _Houchins v. KQED_, in which the broadcaster had sued for access to a prison from which public and press alike were barred and as to which there was considerable controversy over conditions of incarceration. Following initiation of the suit, the administrator of the prison authorized limited public tours. The tours were open to the press, but cameras and recording devices were not permitted, there was no opportunity to talk to inmates, and the tours did not include the maximum security area about which much of the controversy centered. The Supreme Court overturned the injunction obtained in the lower courts, the plurality reiterating that “[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control…. [U]ntil the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than

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821 417 U.S. at 834.
822 417 U.S. at 834. The holding was applied to federal prisons in _Saxbe v. Washington Post_, 417 U.S. 843 (1974). Dissenting, Justices Powell, Brennan, and Marshall argued that an important societal function of the First Amendment is to preserve free public discussion of governmental affairs, that the press’ role was to make this discussion informed through providing the requisite information, and that the ban on face-to-face interviews unconstitutionally fettered this role of the press. Id. at 850.
823 438 U.S. 1 (1978). The decision’s imprecision of meaning is partly attributable to the fact that there was no opinion of the Court. A plurality opinion represented the views of only three Justices; two Justices did not participate, three Justices dissented, and one Justice concurred with views that departed somewhat from the plurality.
that accorded the public generally." 824 Justice Stewart, whose vote was necessary to the disposition of the case, agreed with the equal access holding but would have approved an injunction more narrowly drawn to protect the press' right to use cameras and recorders so as to enlarge public access to the information. 825 Thus, any question of special press access appears settled by the decision; yet there still remain the questions raised above. May everyone be barred from access and, once access is accorded, does the Constitution necessitate any limitation on the discretion of prison administrators? 826

_Government and Power of the Purse._—In exercise of the spending power, Congress may refuse to subsidize the exercise of First Amendment rights, but may not deny benefits solely on the basis of the exercise of such rights. The distinction between these two closely related principles seemed, initially at least, to hinge on the severity and pervasiveness of the restriction placed on exercise of First Amendment rights. What has emerged is the principle that Congress may condition the receipt of federal funds on acceptance of speech limitations on persons working for the project receiving the federal funding—even if the project also receives non-federal funds—provided that the speech limitations do not extend to the use of non-federal funds outside of the federally funded project. In _Regan v. Taxation With Representation_, 827 the Court held that Congress could constitutionally limit tax-exempt status under § 501(c)(3) of the Internal Revenue Code to charitable organizations that do not engage in lobbying. "Congress has merely refused to pay for the lobbying out of public moneys," the Court concluded. 828 The effect of the ruling on the organization's lobbying activities was

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824 438 U.S. at 15-16.
825 438 U.S. at 16.
826 The dissenters, Justices Stevens, Brennan, and Powell, believed that the Constitution protects the public's right to be informed about conditions within the prison and that total denial of access, such as existed prior to institution of the suit, was unconstitutional. They would have sustained the more narrowly drawn injunctive relief to the press on the basis that no member of the public had yet sought access. 438 U.S. at 19. It is clear that Justice Stewart did not believe the Constitution affords any relief. Id. at 16. While the plurality opinion of the Chief Justice Burger and Justices White and Rehnquist may be read as not deciding whether any public right of access exists, overall it appears to proceed on the unspoken basis that there is none. The second question, when Justice Stewart's concurring opinion and the dissenting opinion are combined, appears to be answerable qualitatively in the direction of constitutional constraints upon the nature of access limitation once access is granted.
828 461 U.S. at 545. See also _Cammarano v. United States_, 358 U.S. 498, 512–13 (1959) (exclusion of lobbying expenses from income tax deduction for ordinary and necessary business expenses is not a regulation aimed at the suppression of dangerous ideas, and does not violate the First Amendment).
minimal, however, since it could continue to receive tax-deductible contributions by creating a separate affiliate to conduct the lobbying. In FCC v. League of Women Voters, 829 by contrast, the Court held that the First Amendment rights of public broadcasting stations were abridged by a prohibition on all editorializing by any recipient of public funds. There was no alternative means, as there had been in Taxation With Representation, by which the stations could continue to receive public funding and create an affiliate to engage in the prohibited speech. The Court rejected dissenting Justice Rehnquist’s argument that the general principles of Taxation With Representation and Oklahoma v. Civil Service Comm’n 830 should be controlling.831 In Rust v. Sullivan, however, Chief Justice Rehnquist asserted for the Court that restrictions on abortion counseling and referral imposed on recipients of family planning funding under the Public Health Service Act did not constitute discrimination on the basis of viewpoint, but instead represented government’s decision “to fund one activity to the exclusion of the other.”832 In addition, the Court noted, the “regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X grantee and a Title X project…. The regulations govern the scope of the Title X project’s activities, and leave the grantee unfettered in its other activities.”833 It remains to be seen what application this decision will have outside the contentious area of abortion regulation.834

831 468 U.S. at 399–401, & n.27.
832 500 U.S. 173, 193 (1991). Dissenting Justice Blackmun contended that Taxation With Representation was easily distinguishable because its restriction was on all lobbying activity regardless of content or viewpoint. Id. at 208-09.
833 500 U.S. at 196 (emphasis in original). Dissenting Justice Blackmun wrote: “Under the majority’s reasoning, the First Amendment could be read to tolerate any governmental restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past.” Id. at 213 (emphasis in original).
834 The Court attempted to minimize the potential sweep of its ruling in Rust. “This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipient to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression.” 500 U.S. at 199. The Court noted several possible exceptions to the general principle: government ownership of a public forum does not justify restrictions on speech; the university setting requires heightened protections through application of vagueness and overbreadth principles; and the doctor-patient relationship may also be subject to special First Amendment protection. (The Court denied, however, that the doctor-patient relationship was significantly impaired by the regulatory restrictions at issue.) Lower courts were quick to pick up on these suggestions. See, e.g., Stanford Univ. v Sullivan, 773 F. Supp. 472, 477–78 (D.D.C.
In *National Endowment for the Arts v. Finley*, the Supreme Court upheld the constitutionality of a federal statute requiring the NEA, in awarding grants, to “take[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” 835 The Court acknowledged that, if the statute were “applied in a manner that raises concern about the suppression of disfavored viewpoints,” 836 then such application might be unconstitutional. The statute on its face, however, is constitutional because it “imposes no categorical requirement,” being merely “advisory.” 837 “Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.... The ‘very assumption’ of the NEA is that grants will be awarded according to the ‘artistic worth of competing applications,’ and absolute neutrality is simply ‘inconceivable.’” 838 The Court also found that the terms of the statute, “if they appeared in a criminal statute or regulatory scheme, ... could raise substantial vagueness concerns.... But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.” 839

In *Legal Services Corporation v. Velazquez*, the Court struck down a provision of the Legal Services Corporation Act that prohibited recipients of Legal Services Corporation (LSC) funds (i.e., legal-aid organizations that provide lawyers to the poor in civil matters) from representing a client who seeks “to amend or otherwise challenge existing [welfare] law.” This meant that, even with non-federal funds, a recipient of federal funds could not argue that a state welfare statute violated a federal statute or that a state or federal welfare law violated the Constitution. If a case was underway when such a challenge became apparent, the attorney had to withdraw. The Court distinguished this situation from that in *Rust v. Sullivan* on the ground “that the counseling activities of the doctors under Title X amounted to governmental speech,” whereas “an

1991) (confidentiality clause in federal grant research contract is invalid because, inter alia, of application of vagueness principles in a university setting); Gay Men’s Health Crisis v. Sullivan, 792 F. Supp. 278 (S.D.N.Y. 1992) (“offensiveness” guidelines restricting Center for Disease Control grants for preparation of AIDS-related educational materials are unconstitutionally vague).  
836 524 U.S. at 587.  
837 524 U.S. at 581. Justice Scalia, in a concurring opinion joined by Justice Thomas, claimed that this interpretation of the statute “gutted it.” Id. at 590. He believed that the statute “establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.” Id.  
838 524 U.S. at 585.  
839 524 U.S. at 588–89.  
LSC-funded attorney speaks on behalf of the client in a claim against the government for welfare benefits." 841 Furthermore, the restriction in this case “distorts the legal system” by prohibiting “speech and expression upon which courts must depend for the proper exercise of the judicial power,” and thereby is “inconsistent with accepted separation-of-powers principles.” 842

Governmental Regulation of Communications Industries

As in the previous section, the governmental regulations here considered may have only the most indirect relation to freedom of expression, or may clearly implicate that freedom even though the purpose of the particular regulation is not to reach the content of the message. First, however, the judicially formulated doctrine distinguishing commercial expression from other forms is briefly considered.

Commercial Speech.—In recent years, the Court’s treatment of “commercial speech” has undergone a transformation, from total nonprotection under the First Amendment to qualified protection. The conclusion that expression proposing a commercial transaction is a different order of speech was arrived at almost casually in Valentine v. Chrestensen, 843 in which the Court upheld a city ordinance prohibiting distribution on the street of “commercial and business advertising matter,” as applied to an exhibitor of a submarine who distributed leaflets describing his submarine on one side and on the other side protesting the city’s refusal of certain docking facilities. The doctrine was in any event limited to promotion of commercial activities; the fact that expression was disseminated for profit or through commercial channels did not expose it to any greater regulation than if it were offered for free. 844 The doctrine lasted in this form for more than twenty years.

“Commercial speech,” the Court has held, is protected “from unwarranted governmental regulation,” although its nature makes

841 531 U.S. at 541, 542.
842 531 U.S. at 544, 546.
844 Books that are sold for profit, Smith v. California, 361 U.S. 147, 150 (1959); Ginzburg v. United States, 383 U.S. 463, 474–75 (1966), advertisements dealing with political and social matters which newspapers carry for a fee, New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964), and motion pictures that are exhibited for an admission fee, United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952), were all during this period held entitled to full First Amendment protection regardless of the commercial element involved.
such communication subject to greater limitations than may be imposed on expression not solely related to the economic interests of the speaker and its audience. Overturning of this exception in free expression doctrine was accomplished within a brief span of time in which the Justices haltingly but then decisively moved to a new position. Reasserting the doctrine at first in a narrow five-to-four decision, the Court sustained the application of a city’s ban on employment discrimination to bar sex-designated employment advertising in a newspaper. Granting that speech does not lose its constitutional protection simply because it appears in a commercial context, Justice Powell, for the Court, found the placing of want-ads in newspapers to be “classic examples of commercial speech,” devoid of expressions of opinions with respect to issues of social policy; the ad “did no more than propose a commercial transaction.” But the Justice also noted that employment discrimination, which was facilitated by the advertisements, was itself illegal.

Next, the Court overturned a conviction under a state statute making it illegal, by sale or circulation of any publication, to encourage or prompt the obtaining of an abortion, as applied to an editor of a weekly newspaper who published an advertisement announcing the availability of legal and safe abortions in another State and detailing the assistance that would be provided state residents in going to and obtaining abortions in the other State. The Court discerned that the advertisements conveyed information of other than a purely commercial nature, that they related to services that were legal in the other jurisdiction, and that the State could not prevent its residents from obtaining abortions in the other State or punish them for doing so.

Then, all these distinctions were swept away as the Court voided a statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. Accepting a suit brought by consumers to protect their right to receive information, the Court held that speech that does no more than propose a commercial transaction is nonetheless of such social value as to be entitled to protection. Consumers’ interests in receiving factual information about prices may even be of greater value than polit-
Turning from the interests of consumers to receive information to the asserted right of advertisers to communicate, the Court voided several restrictions. The Court voided a municipal ordinance that barred the display of “For sale” and “Sold” signs on residential lawns, purportedly so as to limit “white flight” resulting from a “fear psychology” that developed among white residents following sale of homes to nonwhites. The right of owners to communicate their intention to sell a commodity and the right of potential buyers to receive the message was protected, the Court determined; the community interest could have been achieved by less restrictive means and in any event may not be achieved by restricting the free flow of truthful information. Similarly, deciding a question it had reserved in the Virginia Pharmacy case, the Court held that a State could not forbid lawyers from advertising the prices they charged for the performance of routine legal services. None of the proffered state justifications for the ban was deemed sufficient to overcome the private and societal interest in the free exchange of this form of speech. Nor may a state categorically prohibit attorney advertising through mailings that target persons known to face particular legal problems, or prohibit an attorney from holding himself out as a certified civil trial specialist, or prohibit a

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850 425 U.S. at 763-64 (consumers' interests), 764–65 (social interest), 766–70 (justifications for the ban).
853 433 U.S. at 368-79. See also In re R.M.J., 455 U.S. 191 (1982) (invalidating sanctions imposed on attorney for deviating in some respects from rigid prescriptions of advertising style and for engaging in some proscribed advertising practices, because the State could show neither that his advertising was misleading nor that any substantial governmental interest was served by the restraints).
854 Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). Shapero was distinguished in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), a 5–4 decision upholding a prohibition on targeted direct-mail solicitations to victims and their relatives for a 30-day period following an accident or disaster. “Shapero dealt with a broad ban on all direct mail solicitations” (id. at 629), the Court explained, and was not supported, as Florida’s more limited ban was, by findings describing the harms to be prevented by the ban. Dissenting Justice Kennedy disagreed that there was a valid distinction, pointing out that in Shapero the Court had said that “the mode of communication [mailings versus potentially more abusive in-person solicitation] makes all the difference,” and that mailings were at issue in both Shapero and Florida Bar. 515 U.S. at 637 (quoting Shapero, 486 U.S. at 475).
certified public accountant from holding herself out as a certified financial planner.\textsuperscript{856} However, a State has been held to have a much greater countervailing interest in regulating person-to-person solicitation of clients by attorneys; therefore, especially since in-person solicitation is “a business transaction in which speech is an essential but subordinate component,” the state interest need only be important rather than compelling.\textsuperscript{857} The Court later refused, however, to extend this principle to in-person solicitation by certified public accountants, explaining that CPAs, unlike attorneys, are not professionally “trained in the art of persuasion,” and that the typical business executive client of a CPA is “far less susceptible to manipulation” than was the accident victim in \textit{Ohralik}.\textsuperscript{858}

Moreover, a statute prohibiting the practice of optometry under a trade name was sustained because there was “a significant possibility” that the public might be misled through deceptive utilization of the same or similar trade names.\textsuperscript{860} But a state regulatory commission prohibition of utility advertisements “intended to stimulate the purchase of utility services” was held unjustified by the asserted interests in energy consumption and avoidance of subsidization of additional energy costs by all consumers.\textsuperscript{861}

While commercial speech is entitled to First Amendment protection, the Court has clearly held that it is different from other forms of expression; it has remarked on the commonsense differences between speech that does no more than propose a commercial transaction and other varieties.\textsuperscript{862} The Court has developed

\textsuperscript{856}Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994) (also ruling that Accountancy Board could not reprimand the CPA, who was also a licensed attorney, for truthfully listing her CPA credentials in advertising for her law practice).

\textsuperscript{857}Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978). \textit{But compare} In re Primus, 426 U.S. 412 (1978). The distinction between in-person and other attorney advertising was continued in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (“print advertising . . . in most cases . . . will lack the coercive force of the personal presence of the trained advocate”).

\textsuperscript{858} \textit{Edenfield v. Fane}, 507 U.S. 761, 775 (1993).

\textsuperscript{859}507 U.S. at 777.

\textsuperscript{860}Friedman v. Rogers, 440 U.S. 1 (1979).


\textsuperscript{862}Commercial speech is viewed by the Court as usually harder than other speech; because advertising is the \textit{sine qua non} of commercial profits, it is less likely
the four-pronged *Central Hudson* test to measure the validity of restraints upon commercial expression.  

Under the first prong of the test, certain commercial speech is not entitled to protection; the informational function of advertising is the First Amendment concern and if an advertisement does not accurately inform the public about lawful activity, it can be suppressed.  

Second, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. The State must assert a substantial interest to be achieved by restrictions on commercial speech.  

To be chilled by regulation. Thus, the difference inheres in both the nature of the speech and the nature of the governmental interest. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). It is, of course, important to develop distinctions between commercial speech and other speech for purposes of determining when broader regulation is permissible. The Court’s definitional statements have been general, referring to commercial speech as that “proposing a commercial transaction,” Ohralik v. Ohio State Bar Ass’n, supra, or as “expression related solely to the economic interests of the speaker and its audience.” *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 561 (1980). It has simply viewed as noncommercial the advertising of views on public policy that would inhere to the economic benefit of the speaker. Consolidated Edison Co. v. Public Service Comm’n, 447 U.S. 530 (1980). So too, the Court has refused to treat as commercial speech charitable solicitation undertaken by professional fundraisers, characterizing the commercial component as “inextricably intertwined with otherwise fully protected speech.” *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 796 (1988). By contrast, a mixing of home economics information with a sales pitch at a “Tupperware” party did not remove the transaction from commercial speech. Board of Trustees v. Fox, 492 U.S. 469 (1989).  

*Central Hudson Gas & Electric Co. v. Public Service Comm’n*, 447 U.S. 557 (1980). In one case, the Court referred to the test as having three prongs, referring to its second, third, and fourth prongs, as, respectively, its first, second, and third. The Court in that case did, however, apply *Central Hudson’s* first prong as well. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995).  

Within this category fall the cases involving the possibility of deception through such devices as use of trade names, Friedman v. Rogers, 440 U.S. 1 (1979), and solicitation of business by lawyers, Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978), as well as the proposal of an unlawful transaction, *Pittsburgh Press Co. v. Commission on Human Relations*, 413 U.S. 376 (1973).  

*Central Hudson Gas & Electric Co. v. Public Service Comm’n*, 447 U.S. 557, 564, 568–69 (1980). The Court deemed the State’s interests to be clear and substantial. The pattern here is similar to much due process and equal protection litigation as well as expression and religion cases in which the Court accepts the proffered interests as legitimate and worthy. See also *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (governmental interest in protecting USOC’s exclusive use of word “Olympic” is substantial); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (government’s interest in curbing strength wars among brewers is substantial, but interest in facilitating state regulation of alcohol is not substantial). *Contrast United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), finding a substantial federal interest in facilitating state restrictions on lotteries. “Unlike the situation in *Edge Broadcasting*,” the Coors Court explained, “the policies of some states do not prevent neighboring states from pursuing their own
Third, the restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose.\footnote{1181} Instead, the regulation must “directly advance” the governmental interest. The Court resolves this issue with reference to aggregate effects, and does not limit its consideration to effects on the challenging litigant.\footnote{1187}

Fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.\footnote{1188} The Court has rejected the idea that a “least restrictive means” test is required. Instead, what is now required is a “reasonable fit” between means and ends, with the means “narrowly tailored to achieve the desired objective.”\footnote{1189} The alcohol-related policies within their respective borders.” 514 U.S. at 486. However, in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the Court deemed insubstantial a governmental interest in protecting postal patrons from offensive but not obscene materials. For deferential treatment of the governmental interest, see Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (Puerto Rico’s “substantial” interest in discouraging casino gambling by residents justifies ban on ads aimed at residents even though residents may legally engage in casino gambling, and even though ads aimed at tourists are permitted). The ban here was found to directly advance one of the proffered interests. Contrast this holding with Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels does not directly and materially advance government’s interest in curbing strength wars among brewers, given the inconsistencies and “overall irrationality” of the regulatory scheme); and Edenfield v. Fane, 507 U.S. 761 (1993) (Florida’s ban on in-person solicitation by certified public accountants does not directly advance its legitimate interests in protecting consumers from fraud, protecting consumer privacy, and maintaining professional independence from clients), where the restraints were deemed indirect or ineffectual.

\footnote{1186} United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993) (“this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity”). 447 U.S. at 569. The ban here was found to directly advance one of the proffered interests. Contrast this holding with Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels does not directly and materially advance government’s interest in curbing strength wars among brewers, given the inconsistencies and “overall irrationality” of the regulatory scheme); and Edenfield v. Fane, 507 U.S. 761 (1993) (Florida’s ban on in-person solicitation by certified public accountants does not directly advance its legitimate interests in protecting consumers from fraud, protecting consumer privacy, and maintaining professional independence from clients), where the restraints were deemed indirect or ineffectual.

\footnote{1187} Central Hudson Gas & Electric Co. v. Public Service Comm’n, 447 U.S. 557, 565, 569–71 (1980). This test is, of course, the “least restrictive means” standard. Shelton v. Tucker, 364 U.S. 479, 488 (1960). In Central Hudson, the Court found the ban more extensive than was necessary to effectuate the governmental purpose. And see Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), where the Court held that the governmental interest in not interfering with parental efforts at controlling children’s access to birth control information could not justify a ban on commercial mailings about birth control products; “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.” Id. at 74. See also Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (there are less intrusive alternatives— e.g., direct limitations on alcohol content of beer—to prohibition on display of alcohol content on beer label). Note, however, that in San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987), the Court applied the test in a manner deferential to Congress: “the restrictions at issue are not broader than Congress reasonably could have determined to be necessary to further these interests.”

\footnote{1188} Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). In a 1993 opinion the Court elaborated on the difference between “reasonable fit” and least restrictive alternative. “A regulation need not be ‘absolutely the least severe that will achieve
Court, however, does “not equate this test with the less rigorous obstacles of rational basis review; . . . the existence of ‘numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.’”  

The “reasonable fit” standard has some teeth, the Court made clear in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), striking down a city’s prohibition on distribution of “commercial handbills” through freestanding newsracks located on city property. The city’s aesthetic interest in reducing visual clutter was furthered by reducing the total number of newsracks, but the distinction between prohibited “commercial” publications and permitted “newspapers” bore “no relationship whatsoever” to this legitimate interest. The city could not, the Court ruled, single out commercial speech to bear the full onus when “all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault.” 870 By contrast, the Court upheld a federal law that prohibited broadcast of lottery advertisements by a broadcaster in a state that prohibits lotteries, while allowing broadcast of such ads by stations in states that sponsor lotteries. There was a “reasonable fit” between the restriction and the asserted federal interest in supporting state anti-gambling policies without unduly interfering with policies of neighboring states that promote lotteries. 874 The prohibition “directly served” the congressional interest, and could be applied to a broadcaster whose principal audience was in an adjoining lottery state, and who sought to run ads for that state’s lottery. 875

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871 507 U.S. 410 (1993). See also Edenfield v. Fane, 507 U.S. 761 (1993), decided the same Term, relying on the “directly advance” third prong of Central Hudson to strike down a ban on in-person solicitation by certified public accountants.
872 507 U.S. at 424.
873 507 U.S. at 426. The Court also noted the “minute” effect of removing 62 “commercial” newsracks while 1,500 to 2,000 other newsracks remained in place. Id. at 418.
875 507 U.S. at 428.
In 1999 the Court struck down a provision of the same statute as applied to advertisements for private casino gambling that are broadcast by radio and television stations located in a state where such gambling is legal. 876 The Court emphasized the interrelatedness of the four parts of the Central Hudson test; e.g., though the government has a substantial interest in reducing the social costs of gambling, the fact that the Congress has simultaneously encouraged gambling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable “fit.” In this case, “[t]he operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.” 877 . . . [T]he regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all. 878

In a 1986 decision the Court had asserted that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.” 879 Subsequently, however, the Court has eschewed reliance on Posadas, 880 and it seems doubtful that the Court would again embrace the broad principle that government may ban all advertising of an activity that it permits but has power to prohibit. Indeed, the Court’s very holding in 44 Liquormart, Inc. v. Rhode Island, 881 striking down the State’s ban on advertisements that provide truthful information about liquor prices, is inconsistent with the general proposition. A Court plurality in 44 Liquormart squarely rejected Posadas, calling it “erroneous,” declining to give force to its “highly deferential approach,” and proclaiming that a state “does not have the broad discretion to suppress truthful, nonmisleading information

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877 527 U.S. at 190
878 527 U.S. at 195
880 In Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (invalidating a federal ban on revealing alcohol content on malt beverage labels), the Court rejected reliance on Posadas, pointing out that the statement in Posadas had been made only after a determination that the advertising could be upheld under Central Hudson. The Court found it unnecessary to consider the greater-includes-lesser argument in United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993), upholding through application of Central Hudson principles a ban on broadcast of lottery ads.
for paternalistic purposes that the Posadas majority was willing to tolerate.\footnote{517 U. S. at 510 (opinion of Stevens, joined by Justices Kennedy, Thomas, and Ginsburg). The Stevens opinion also dismissed the Posadas “greater-includes-the-lesser argument” as “inconsistent with both logic and well-settled doctrine,” pointing out that the First Amendment “presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct.” Id. at 511–512.} Four other Justices concluded that Posadas was inconsistent with the “closer look” that the Court has since required in applying the principles of Central Hudson.\footnote{517 U. S. at 531-32 (concurring opinion of O’Connor, joined by Chief Justice Rehnquist and by Justices Souter and Breyer).}

The “different degree of protection” accorded commercial speech has a number of consequences. Somewhat broader times, places, and manner regulations are to be tolerated.\footnote{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977). But in Linmark Associates v. Township of Willingboro, 431 U.S. 85, 93–94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting “For Sale” signs on residential lawns. First, ample alternative channels of communication were not available, and second, the ban was seen rather as a content limitation.} The rule against prior restraints may be inapplicable,\footnote{517 U. S. at 531-32 (concurring opinion of O’Connor, joined by Chief Justice Rehnquist and by Justices Souter and Breyer).} and disseminators of commercial speech are not protected by the overbreadth doctrine.\footnote{Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Central Hudson Gas & Elec. Co. v. Public Serv. Comm’n, 447 U.S. 557, 571 n.13 (1980).}

Different degrees of protection may also be discerned among different categories of commercial speech. The first prong of the Central Hudson test means that false, deceptive, or misleading advertisements need not be permitted; government may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent deception.\footnote{Bates v. State Bar of Arizona, 433 U.S. 350, 379–81 (1977); Central Hudson Gas & Electric Co. v. Public Service Comm’n, 447 U.S. 557, 565 n.8 (1980).} But even truthful, non-misleading commercial speech may be regulated, and the validity of such regulation is tested by application of the remaining prongs of the Central Hudson test. The test itself does not make further distinctions based on the content of the commercial message or the nature of the governmental interest (that interest need only be “substan-
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tial”). Recent decisions suggest, however, that further distinctions may exist. Measures aimed at preserving “a fair bargaining process” between consumer and advertiser\(^888\) may be more likely to pass the test\(^889\) than regulations designed to implement general health, safety, or moral concerns.\(^890\) As the governmental interest becomes further removed from protecting a fair bargaining process, it may become more difficult to establish the absence of less burdensome regulatory alternatives and the presence of a “reasonable fit” between the commercial speech restriction and the governmental interest.\(^891\)


\(^889\) See, e.g., Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 465 (1978) (upholding ban on in-person solicitation by attorneys due in part to the “potential for overreaching” when a trained advocate “solicits an unsophisticated, injured, or distressed lay person”).


\(^891\) “Several Members of the Court have expressed doubts about the Central Hudson analysis and whether it should apply in particular cases.” Thompson v. Western States Medical Center, 122 S. Ct. 1497, 1504 (2002). Justice Stevens has criticized the Central Hudson test because it seemingly allows regulation of any speech propounded in a commercial context regardless of the content of that speech. “[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.” Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (concurring opinion). The Justice repeated these views in 1996: “when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.” 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (a portion of the opinion joined by Justices Kennedy and Ginsburg). Justice Thomas, similarly, wrote that, in cases “in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the Central Hudson test should not be applied because such an interest is per se illegitimate….“ Greater New Orleans Broadcasting Ass’n, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (internal quotation marks omitted). Other decisions in which the Court majority acknowledged that some Justices would grant commercial speech greater protection than it has under the Central Hudson test include United States v. United Foods, Inc., 533 U.S. 405, 409-410 (2001) (mandated assessments, used for advertising, on handlers of fresh mushrooms struck down as compelled speech, rather than under Central Hudson), and Lorillard Tobacco Co. v. Reilly, 535 U.S. 525, 554 (2001) (various state restrictions on tobacco advertising struck down under Central Hudson as overly burdensome).
Taxation.—Disclaiming any intimation “that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government,” the Court voided a state two-percent tax on the gross receipts of advertising in newspapers with a circulation exceeding 20,000 copies a week. In the Court’s view, the tax was analogous to the Eighteenth Century English practice of imposing advertising and stamp taxes on newspapers for the express purpose of pricing the opposition penny press beyond the means of the mass of the population. The tax at issue focused exclusively upon newspapers, it imposed a serious burden on the distribution of news to the public, and it appeared to be a discriminatorily selective tax aimed almost solely at the opposition to the state administration. Combined with the standard that government may not impose a tax directly upon the exercise of a constitutional right itself, these tests seem to permit general business taxes upon receipts of businesses engaged in communicating protected expression without raising any First Amendment issues.

Ordinarily, a tax singling out the press for differential treatment is highly suspect, and creates a heavy burden of justification on the state. This is so, the Court explained in 1983, because such “a powerful weapon” to single out a small group carries with it a lessened political constraint than do those measures affecting a broader based constituency, and because “differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression.” The state’s interest in raising revenue is not suffi-
cient justification for differential treatment of the press. Moreover, the Court refused to adopt a rule permitting analysis of the “effective burden” imposed by a differential tax; even if the current effective tax burden could be measured and upheld, the threat of increasing the burden on the press might have “censorial effects,” and “courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation.”

Also difficult to justify is taxation that targets specific subgroups within a segment of the press for differential treatment. An Arkansas sales tax exemption for newspapers and for “religious, professional, trade, and sports journals” published within the state was struck down as an invalid content-based regulation of the press. Entirely as a result of content, some magazines were treated less favorably than others. The general interest in raising revenue was again rejected as a “compelling” justification for such treatment, and the measure was viewed as not narrowly tailored to achieve other asserted state interests in encouraging “fledgling” publishers and in fostering communications.

The Court seemed to change course somewhat in 1991, upholding a state tax that discriminated among different components of the communications media, and proclaiming that “differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas.”

The general principle that government may not impose a financial burden based on the content of speech underlay the Court’s invalidation of New York’s “Son of Sam” law, which provided that a criminal’s income from publications describing his crime was to be placed in escrow and made available to victims of the crime. While the Court recognized a compelling state interest in ensuring that criminals do not profit from their crimes, and in compensating crime victims, the law was not narrowly tailored to those ends. It applied only to income derived from speech, not to income from other sources, and it was significantly overinclusive because it reached a wide range of literature (e.g., the Confessions of Saint Augustine and Thoreau’s Civil Disobedience) “that did not enable a criminal to profit from his crime while a victim remains uncompensated.”

898 460 U.S. at 588, 589.
900 Leathers v. Medlock, 499 U.S. 439, 453 (1991) (tax applied to all cable television systems within the state, but not to other segments of the communications media).
902 502 U.S. at 122.
Labor Relations.—Just as newspapers and other communications businesses are subject to nondiscriminatory taxation, they are entitled to no immunity from the application of general laws regulating their relations with their employees and prescribing wage and hour standards. In Associated Press v. NLRB, the application of the National Labor Relations Act to a newsgathering agency was found to raise no constitutional problem. “The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.... The regulation here in question has no relation whatever to the impartial distribution of news.” Similarly, the Court has found no problem with requiring newspapers to pay minimum wages and observe maximum hours.

Antitrust Laws.—Resort to the antitrust laws to break up restraints on competition in the newsgathering and publishing field was found not only to present no First Amendment problem but to comport with government’s obligation under that Amendment. Said Justice Black: “It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.”

Thus, both newspapers and broadcasters, as well as other such industries, may not engage in monopolistic and other anticompetitive activities free of possibility of antitrust law attack, even
though it may be contended that freedom of the press may thereby be preserved. 907

Radio and Television.—Because there are a limited number of broadcast frequencies for radio and non-cable television use, the Federal Government licenses access to these frequencies, permitting some applicants to utilize them and denying the greater number of applicants such permission. Even though this licensing system is in form a variety of prior restraint, the Court has held that it does not present a First Amendment issue because of the unique characteristic of scarcity. 908 Thus, the Federal Communications Commission has broad authority to determine the right of access to broadcasting, 909 although, of course, the regulation must be exercised in a manner that is neutral with regard to the content of the materials broadcast. 910

In certain respects, however, governmental regulation does implicate First Amendment values to a great degree; insistence that broadcasters afford persons attacked on the air an opportunity to reply and that they afford a right to reply from opposing points of view when they editorialize on the air was unanimously found to be constitutional. 911 In Red Lion, Justice White explained that differences in the characteristics of various media justify differences in First Amendment standards applied to them. 912 Thus, while
there is a protected right of everyone to speak, write, or publish as he will, subject to very few limitations, there is no comparable right of everyone to broadcast. The frequencies are limited and some few must be given the privilege over others. The particular licensee, however, has no First Amendment right to hold that license and his exclusive privilege may be qualified. Qualification by censorship of content is impermissible, but the First Amendment does not prevent a governmental insistence that a licensee "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." Further, said Justice White, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." The broadcasters had argued that if they were required to provide equal time at their expense to persons attacked and to points of view different from those expressed on the air, expression would be curbed through self-censorship, for fear of controversy and economic loss. Justice White thought this possibility "at best speculative," but if it should materialize "the Commission is not powerless to insist that they give adequate and fair attention to public issues." In Columbia Broadcasting System v. Democratic National Committee, the Court rejected claims of political groups that the broadcast networks were constitutionally required to sell them broadcasting time for the presentation of views on controversial issues. The ruling terminated a broad drive to obtain that result, but the fragmented nature of the Court's multiple opinions precluded a satisfactory evaluation of the constitutional implications of the case. However, in CBS v. FCC, the Court held that Congress had conferred on candidates seeking federal elective office an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations, to be administered through FCC control

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913 395 U.S. at 388-90.
914 395 U.S. at 392-93.
916 453 U.S. 367 (1981). The dissent argued that the FCC had assumed, and the Court had confirmed it in assuming, too much authority under the congressional enactment. In its view, Congress had not meant to do away with the traditional deference to the editorial judgments of the broadcasters. Id. at 397 (Justices White, Rehnquist, and Stevens).
over license revocations, and held such right of access to be within Congress' power to grant, the First Amendment notwithstanding. The constitutional analysis was brief and merely restated the spectrum scarcity rationale and the role of the broadcasters as fiduciaries for the public interest.

In *FCC v. League of Women Voters*, holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended. The decision was 5–4, with Justice Brennan's opinion for the Court being joined by Justices Marshall, Blackmun, Powell, and O'Connor, and with Justices White, Rehnquist (joined by Chief Justice Burger and by Justice White), and Stevens filing dissenting opinions.

In *FCC v. League of Women Voters*, the Court took the same general approach to governmental regulation of broadcasting, but struck down a total ban on editorializing by stations receiving public funding. In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts, but indicated that broadcasters are entitled to greater protection than may have been suggested by *Red Lion*. “[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public’s First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. . . . [T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest.” However, the earlier cases were distinguished.

“[I]n sharp contrast to the restrictions upheld in *Red Lion* or in *CBS v. FCC*, which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner.” The ban on all editorializing was deemed too severe and restrictive a means of accomplishing the governmental purposes—protecting public broadcasting stations from being coerced, through threat or fear of withdrawal of public funding, into becoming “vehicles for governmental propagandizing,” and also keeping the stations “from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints.” Expression of editorial opinion was described as a “form of speech . . . that lies at the heart of First Amendment protection,” and the ban was said

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917 468 U.S. 364 (1984), holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended. The decision was 5–4, with Justice Brennan's opinion for the Court being joined by Justices Marshall, Blackmun, Powell, and O'Connor, and with Justices White, Rehnquist (joined by Chief Justice Burger and by Justice White), and Stevens filing dissenting opinions.

918 468 U.S. at 380. The Court rejected the suggestion that only a “compelling” rather than “substantial” governmental interest can justify restrictions.

919 468 U.S. at 385.

920 468 U.S. at 384-85. Dissenting Justice Stevens thought that the ban on editorializing served an important purpose of “maintaining government neutrality in the free marketplace of ideas.” Id. at 409.

921 468 U.S. at 381.
to be “defined solely on the basis of ... content,” the assumption being that editorial speech is speech directed at “controversial issues of public importance.” Moreover, the ban on editorializing was both overinclusive, applying to commentary on local issues of no likely interest to Congress, and underinclusive, not applying at all to expression of controversial opinion in the context of regular programming. Therefore, the Court concluded, the restriction was not narrowly enough tailored to fulfill the government’s purposes.

Sustaining FCC discipline of a broadcaster who aired a record containing a series of repeated “barnyard” words, considered “indecent” but not obscene, the Court posited a new theory to explain why the broadcast industry is less entitled to full constitutional protection than are other communications entities. "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizens, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.... Second, broadcasting is uniquely accessible to children, even those too young to read.... The ease with which children may obtain access to broadcast material ... amply justifies special treatment of indecent broadcasting." The purport of the Court’s new theory is hard to divine; while its potential is broad, the Court emphasized the contextual “narrowness” of its holding, which “requires consideration of a host of variables.” Time of day of broadcast, the likely audience, the differences between radio, television, and perhaps closed-circuit transmissions were all relevant in the Court’s view. It may be, then, that the case will be limited in the future to its particular facts; yet, the pronunciation of a new theory sets in motion a tendency the application of which may not be so easily cabined.
**Governmentally Compelled Right of Reply to Newspapers.**—However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.\(^\text{927}\) Granting that the number of newspapers had declined over the years, that ownership had become concentrated, and that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, while desirable, “is not mandated by the Constitution,” while freedom is. The compulsion exerted by government on a newspaper to print that which it would not otherwise print, “a compulsion to publish that which ‘reason tells them should not be published,’” runs afoul of the free press clause.\(^\text{928}\)

**Regulation of Cable Television**

The Court has recognized that cable television “implicates First Amendment interests,” since a cable operator communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering.\(^\text{929}\) Moreover, “settled principles of . . . First Amendment jurisprudence” govern review of cable regulation; cable is not limited by “scarce” broadcast frequencies and does not require the same less rigorous standard of review that the Court applies to regulation of broadcasting.\(^\text{930}\) Cable does, however, have unique characteristics that justify regulations that single out cable for special

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\(^\text{928}\) 418 U.S. at 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion. The Court has also held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. While a plurality opinion adhered to by four Justices relied heavily on Tornillo, there was not a Court majority consensus as to rationale. Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986). See also Hurley v. Irish-American Gay Group, 514 U.S. 334 (1995) (state may not compel parade organizer to allow participation by a parade unit proclaiming message that organizer does not wish to endorse).

\(^\text{929}\) City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986) (leaving for future decision how the operator's interests are to be balanced against a community's interests in limiting franchises and preserving utility space); Turner Broadcasting System v. FCC, 512 U.S. 622, 636 (1994).

The Court in *Turner Broadcasting System v. FCC* upheld federal statutory requirements that cable systems carry local commercial and public television stations. Although these “must-carry” requirements “distinguish between speakers in the television programming market,” they do so based on the manner of transmission and not on the content the messages conveyed, and hence are content-neutral. The regulations could therefore be measured by the “intermediate level of scrutiny” set forth in *United States v. O’Brien*. Two years later, however, a splintered Court could not agree on what standard of review to apply to content-based restrictions of cable broadcasts. Striking down a requirement that cable operators must, in order to protect children, segregate and block programs with patently offensive sexual material, a Court majority in *Denver Area Educational Telecommunications Consortium v. FCC*, found it unnecessary to determine whether strict scrutiny or some lesser standard applies, since the restriction was deemed invalid under any of the alternative tests. There was no opinion of the Court on the other two holdings in the case, and a plurality rejected assertions that public forum analysis.

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931 512 U.S. at 661 (referring to the “bottleneck monopoly power” exercised by cable operators in determining which networks and stations to carry, and to the resulting dangers posed to the viability of broadcast television stations). See also *Leathers v. Medlock*, 499 U.S. 439 (1991) (application of state gross receipts tax to cable industry permissible even though other segments of the communications media were exempted).


933 512 U.S. at 645. “Deciding whether a particular regulation is content-based or content-neutral is not always a simple task,” the Court confessed. Id. at 642. Indeed, dissenting Justice O’Connor, joined by Justices Scalia, Ginsburg, and Thomas, viewed the rules as content-based. Id. at 674–82.

934 391 U.S. 367, 377 (1968). The Court remanded *Turner* for further factual findings relevant to the *O’Brien* test. On remand, the district court upheld the must-carry provisions, and the Supreme Court affirmed, concluding that it “cannot displace Congress’ judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination.” *Turner Broadcasting System v. FCC*, 520 U.S. 180, 224 (1997).


936 Upholding § 10(a) of the Act, which permits cable operators to prohibit indecent material on leased access channels; and striking down § 10(c), which permits a cable operator to prevent transmission of “sexually explicit” programming on public access channels. In upholding § 10(a), Justice Breyer’s plurality opinion cited *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and noted that cable television “is as ‘accessible to children’ as over-the-air broadcasting, if not more so.” 518 U.S. at 744.

937 This section of Justice Breyer’s opinion was joined by Justices Stevens, O’Connor, and Souter. 518 U.S. at 749.

938 Justice Kennedy, joined by Justice Ginsburg, advocated this approach. 518 U.S. at 791, and took the plurality to task for its “evasion of any clear legal standard.” 518 U.S. at 784.
or a rule giving cable operators’ editorial rights “general primacy” over the rights of programmers and viewers,\footnote{Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, advocated this approach.} should govern.

Subsequently, in \textit{United States v. Playboy Entertainment Group, Inc.},\footnote{529 U.S. 803, 813 (2000).} the Supreme Court made clear, as it had not in \textit{Denver Consortium}, that strict scrutiny applies to content-based speech restrictions on cable television. The Court struck down a federal statute designed to “shield children from hearing or seeing images resulting from signal bleed,” which refers to blurred images or sounds that come through to non-subscribers.\footnote{529 U.S. at 806.} The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to scramble fully or otherwise fully block such channels, or to not provide such programming when a significant number of children are likely to be viewing it, which, under an F.C.C. regulation meant to transmit the programming only from 10 p.m. to 6 a.m. The Court apparently assumed that the government had a compelling interest in protecting at least some children from sexually oriented signal bleed, but found that Congress had not used the least restrictive means to do so. Congress in fact had enacted another provision that was less restrictive and that served the government’s purpose. This other provision requires that, upon request by a cable subscriber, a cable operator, without charge, fully scramble or otherwise fully block any channel to which a subscriber does not subscribe.

\textbf{Government Restraint of Content of Expression}

The three previous sections considered primarily but not exclusively incidental restraints on expression as a result of governmental regulatory measures aimed at goals other than control of the content of expression; this section considers the permissibility of governmental measures that directly concern the content of expression.\footnote{The distinction was sharply drawn by Justice Harlan in \textit{Konigsberg v. State Bar of California}, 366 U.S. 36, 49–51 (1961): “Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the states to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.”} As a general matter, government may not regulate speech “because of its message, its ideas, its subject matter, or its
Invalid content regulation includes not only restrictions on particular viewpoints, but also prohibitions on public discussion of an entire topic.\textsuperscript{944}

Originally the Court took a "two-tier" approach to content-oriented regulation of expression. Under the "definitional balancing" of this approach, some forms of expression are protected by the First Amendment and certain categories of expression are not entitled to protection. This doctrine traces to \textit{Chaplinsky v. New Hampshire},\textsuperscript{945} in which the Court opined that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that government may prevent those utterances and punish those uttering them without raising any constitutional problems. If speech fell within the \textit{Chaplinsky} categories, it was unprotected, regardless of its effect; if it did not, it was covered by the First Amendment and it was protected unless the restraint was justified by some test relating to harm, such as clear and present danger or a balancing of presumptively protected expression against a compelling governmental interest.

For several decades, the decided cases reflected a fairly consistent and sustained march by the Court to the elimination of, or a severe narrowing of, the "two-tier" doctrine. The result was protection of much expression that hitherto would have been held absolutely unprotected (e.g., seditious speech and seditious libel, fighting words, defamation, and obscenity). More recently, the march has been deflected by a shift in position with respect to obscenity and by the creation of a new category of non-obscene child pornography. But in the course of this movement, differences surfaced among the Justices on the permissibility of regulation based on content and the interrelated issue of a hierarchy of speech values, according to which some forms of expression, while protected, may be more readily subject to official regulation and perhaps suppression than other protected expression. These differences were compounded in cases in which First Amendment expression values came into conflict with other values, either constitutionally protected values such as the right to fair trials in criminal cases, or


\textsuperscript{945} 315 U.S. 568, 571–72 (1942).
societally valued interests such as those in privacy, reputation, and the protection from disclosure of certain kinds of information.

Attempts to work out these differences are elaborated in the following pages, but the effort to formulate a doctrine of permissible content regulation within categories of protected expression necessitates a brief treatment. It remains standard doctrine that it is impermissible to posit regulation of protected expression upon its content. But in recent Terms, Justice Stevens has articulated a theory that would permit some governmental restraint based upon content. In Justice Stevens' view, there is a hierarchy of speech; where the category of speech at issue fits into that hierarchy determines the appropriate level of protection under the First Amendment. A category's place on the continuum is guided by Chaplinsky's formulation of whether it is "an essential part of any exposition of ideas" and what its "social value as a step to truth" is. Thus, offensive but nonobscene words and portrayals dealing with sex and excretion may be regulated when the expression plays no role or a minimal role in the exposition of ideas. "Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."

While a majority of the Court has not joined in approving Justice Stevens' theory, the Court has in some contexts of covered expression approved restrictions based on content, and in still

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950 In New York v. Ferber, 458 U.S. 747, 763 (1982), a majority of the Court joined an opinion quoting much of Justice Stevens' language in these cases, but the opinion rather clearly adopts the proposition that the disputed expression, child pornography, is not covered by the First Amendment, not that it is covered but subject to suppression because of its content. Id. at 764. And see id. at 781 (Justice Stevens concurring in judgment).
951 E.g., commercial speech, which is covered by the First Amendment but is less protected than other speech, is subject to content-based regulation. Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557, 568-69 (1980). See
other areas, such as privacy, it has implied that some content-based restraints on expression would be approved. \footnote{1198} Moreover, the Court in recent years has emphasized numerous times the role of the First Amendment in facilitating, indeed making possible, political dialogue and the operation of democratic institutions. \footnote{952} While this emphasis may be read as being premised on a hierarchical theory of the worthiness of political speech and the subordinate position of less worthy forms of speech, it is more likely to be merely a celebration of the most worthy role speech plays, and not a suggestion that other roles and other kinds of discourses are relevant in determining the measure of protection enjoyed under the First Amendment. \footnote{953}

That there can be a permissible content regulation within a category of protected expression was questioned in theory, and rejected in application, in Hustler Magazine, Inc. v. Falwell. \footnote{955} In Falwell the Court refused to recognize a distinction between permissible political satire and “outrageous” parodies “doubtless gross and repugnant in the eyes of most.” \footnote{956} “If it were possible by laying down a principled standard to separate the one from the other,” the Court suggested, “public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description ‘outrageous’ does not supply one.” \footnote{957} Falwell can also be read as consistent with the hierarchical theory of interpretation; the offensive advertisement parody was protected as within “the world of debate about public affairs,” and was not “governed by any exception to … general First Amendment principles.” \footnote{958}

So too, there can be impermissible content regulation within a category of otherwise unprotected expression. In R.A.V. v. City of
St. Paul, the Court struck down a hate crimes ordinance construed by the state courts to apply only to use of “fighting words.” The difficulty, the Court found, was that the ordinance made a further content discrimination, proscribing only those fighting words that would arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender. This amounted to “special prohibitions on those speakers who express views on disfavored subjects.” The fact that government may proscribe areas of speech such as obscenity, defamation, or fighting words does not mean that these areas “may be made the vehicles for content discrimination unrelated to their distinctly proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.”

Content regulation of protected expression is measured by a compelling interest test derived from equal protection analysis: government “must show that its regulation is necessary to serve a compelling [governmental] interest and is narrowly drawn to achieve that end.” Application of this test ordinarily results in invalidation of the regulation. Objecting to the balancing approach inherent in this test because it “might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so,” Justice Kennedy argues instead for a rule of per se invalidity. But compelling interest analysis can still be useful, the Justice suggests, in determining whether a regulation is actually content-based or instead is content-neutral; in those cases in which the government tenders “a plausible justification unrelated to the suppression of expression,” application of the compelling interest test may help to determine “whether the asserted justification is in fact an accurate description of the purpose and effect of the law.”

Seditious Speech and Seditious Libel.—Opposition to government through speech alone has been subject to punishment

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960 505 U.S. at 391.
961 505 U.S. at 383-84 (emphasis in original).
963 But see Burson v. Freeman, 504 U.S. 191 (1992) (state law prohibiting the solicitation of votes and the display or distribution of campaign literature within 100 feet of a polling place upheld as applied to the traditional public forum of streets and sidewalks). The Burson plurality phrased the test not in terms of whether the law was “narrowly tailored,” but instead in terms of whether the law was “necessary” to serve compelling state interests. Id. at 199, 206.
throughout much of history under laws proscribing “seditious” utterances. In this country, the Sedition Act of 1798 made criminal, inter alia, malicious writings which defamed, brought into contempt or disrepute, or excited the hatred of the people against the Government, the President, or the Congress, or which stirred people to sedition. In *New York Times Co. v. Sullivan*, the Court surveyed the controversy surrounding the enactment and enforcement of the Sedition Act and concluded that debate “first crystallized a national awareness of the central meaning of the First Amendment…. Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history … [That history] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.” The “central meaning” discerned by the Court, quoting Madison’s comment that in a republican government “the censorial power is in the people over the Government, and not in the Government over the people,” is that “[t]he right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of government.”

Little opportunity to apply this concept of the “central meaning” of the First Amendment in the context of sedition and criminal syndicalism laws has been presented to the Court. In *Dombrowski v. Pfister* the Court, after expanding on First Amendment considerations the discretion of federal courts to enjoin state court proceedings, struck down as vague and as lacking due process procedural protections certain features of a state “Subversive Activities and Communist Control Law.” In *Brandenburg v. Ohio*, a state...
criminal syndicalism statute was held unconstitutional because its condemnation of advocacy of crime, violence, or unlawful methods of terrorism swept within its terms both mere advocacy as well as incitement to imminent lawless action. A seizure of books, pamphlets, and other documents under a search warrant pursuant to a state subversives suppression law was struck down under the Fourth Amendment in an opinion heavy with First Amendment overtones.970

**Fighting Words and Other Threats to the Peace.**—In Chaplinsky v. New Hampshire,971 the Court unanimously sustained a conviction under a statute proscribing “any offensive, derisive, or annoying word” addressed to any person in a public place under the state court’s interpretation of the statute as being limited to “fighting words”—i.e., to “words … [that] have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” The statute was sustained as “narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.”972 The case is best known for Justice Murphy’s famous dictum. “[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”973

*Chaplinsky* still remains viable for the principle that “the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called ‘fighting words,’ those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently

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970 Stanford v. Texas, 379 U.S. 476 (1965). In United States v. United States District Court, 407 U.S. 297 (1972), a Government claim to be free to wiretap in national security cases was rejected on Fourth Amendment grounds in an opinion which called attention to the relevance of the First Amendment.

971 315 U.S. 568 (1942).

972 315 U.S. at 573.

973 315 U.S. at 571-72.
likely to provoke violent reaction." But, in actuality, the Court has closely scrutinized statutes on vagueness and overbreadth grounds and set aside convictions as not being within the doctrine. Chaplinsky thus remains formally alive but of little vitality. 

On the obverse side, the "hostile audience" situation, the Court once sustained a conviction for disorderly conduct of one who refused police demands to cease speaking after his speech seemingly stirred numbers of his listeners to mutterings and threatened disorders. But this case has been significantly limited by cases that hold protected the peaceful expression of views that stirs people to anger because of the content of the expression, or perhaps because of the manner in which it is conveyed, and that breach of the peace and disorderly conduct statutes may not be used to curb such expression.

The cases are not clear to what extent the police must go in protecting the speaker against hostile audience reaction or whether only actual disorder or a clear and present danger of disorder will entitle the authorities to terminate the speech or other expressive conduct. Neither, in the absence of incitement to illegal action,

\textbf{Threats of Violence Against Individuals}.—The Supreme Court has cited three “reasons why threats of violence are outside the First Amendment”: “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”\footnote{979}{In Watts v. United States, however, the Court held that only “true” threats are outside the First Amendment. The defendant in Watts, at a public rally at which he was expressing his opposition to the military draft, said, “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.” He was convicted of violating a federal statute that prohibited “any threat to take the life of or to inflict bodily harm upon the President of the United States.” The Supreme Court reversed. Interpreting the statute “with the commands of the First Amendment clearly in mind,” it found that the defendant had not made a “true threat,” but had indulged in mere “political hyperbole.”}  

In \textit{NAACP v. Claiborne Hardware Co.}, white merchants in Claiborne County, Mississippi, sued the NAACP to recover losses caused by a boycott by black citizens of their businesses, and to enjoin future boycott activity.\footnote{980}{During the course of the boycott, NAACP Field Secretary Charles Evers had told an audience of “black people that any ‘uncle toms’ who broke the boycott would ‘have their necks broken’ by their own people.” The Court acknowledged that this language “might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence . . . .” Yet, no violence had followed directly from Evers’ speeches, and the Court found that Evers’ “emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in\textit{Brandenburg} . . . . An advocate must be free to stimulate his audience with spontaneous and emotional ap-}
peals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." While holding that, under *Bradenburg*, Evers’ speech did not constitute unprotected incitement of lawless action, the Court also cited *Watts*, thereby implying that Evers’ speech also did not constitute a “true threat.”

In *Planned Parenthood v. American Coalition of Life Activists*, the *en banc* Ninth Circuit, by a 6-to-5 vote, upheld a damage award in favor of four physicians and two health clinics that provide medical services, including abortions, to women. The plaintiffs had sued under a federal statute that gives aggrieved persons a right of action against whoever by “threat of force . . . intentionally . . . intimidates any person because the person is or has been . . . providing reproductive health services.” The defendants had published “WANTED,” “unWANTED,” and “GUILTY” posters with the names, photographs, addresses, and other personal information about abortion doctors, three of whom were subsequently murdered by abortion opponents. The defendants also operated a “Nuremberg Files” website that listed approximately 200 people under the label “ABORTIONIST,” with the legend: “Black font (working); Greyed-out Name (wounded); Strikethrough (fatality).” The posters and the website contained no language that literally constituted a threat, but, the court found, “they connote something they do not literally say,” namely “You’re Wanted or You’re Guilty; You’ll be shot or killed,” and the defendants knew that the posters caused abortion doctors to “quit out of fear for their lives.”

The Ninth Circuit concluded that a “true threat” is “a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.” “It is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat.”

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988 458 U.S. at 928.
990 *Claiborne*, 458 U.S. at 928 n.71.
992 290 F.3d at 1065.
993 290 F.3d at 1075.
994 290 F.3d at 1075.
995 290 F.3d at 1077.
996 290 F.3d at 1075.
Judge Alex Kozinski, in one of three dissenting opinions, agreed with the majority’s definition of a true threat, but believed that the majority had failed to apply it, because the speech in this case had not been “communicated as a serious expression of intent to inflict bodily harm....” The difference between a true threat and protected expression, Judge Kozinski wrote, “is this: A true threat warns of violence or other harm that the speaker controls.... Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that they will cause the harm.... Given this lack of evidence, the posters can be viewed, at most, as a call to arms for other abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under Brandenburg, encouragement or even advocacy of violence is protected by the First Amendment....” Moreover, the Court held in Claiborne that “[t]he mere fact the statements could be understood ‘as intending to create a fear of violence’ was insufficient to make them ‘true threats’ under Watts.”

**Group Libel, Hate Speech.**—In Beauharnais v. Illinois, the Court upheld a state group libel law that made it unlawful to defame a race or class of people. The defendant had been convicted under this statute after he had distributed a leaflet, part of which was in the form of a petition to his city government, taking a hard-line white-supremacy position, and calling for action to keep African Americans out of white neighborhoods. Justice Frankfurter for the Court sustained the statute along the following reasoning. Libel of an individual, he established, was a common-law crime and was now made criminal by statute in every State in the Union. These laws raise no constitutional difficulty because libel is within that class of speech that is not protected by the First Amendment. If an utterance directed at an individual may be the object of criminal sanctions, then no good reason appears to deny a State the power to punish the same utterances when they are directed at a defined group, “unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State.” The Justice then reviewed the history of racial strife in Illinois to conclude that the legislature could reasonably fear substantial evils from unre-
strained racial utterances. Neither did the Constitution require the State to accept a defense of truth, inasmuch as historically a defendant had to show not only truth but publication with good motives and for justifiable ends. "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary ... to consider the issues behind the phrase 'clear and present danger.'"

_Beauharnais_ has little continuing vitality as precedent. Its holding, premised in part on the categorical exclusion of defamatory statements from First Amendment protection, has been substantially undercut by subsequent developments, not the least of which are the Court's subjection of defamation law to First Amendment challenge and its ringing endorsement of "uninhibited, robust, and wide-open" debate on public issues in _New York Times Co. v. Sullivan_. In _R. A. V. v. City of St. Paul_, the Court, in an opinion by Justice Scalia, explained and qualified the categorical exclusions for defamation, obscenity, and fighting words. These categories of speech are not "entirely invisible to the Constitution," but instead "can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content." Content discrimination unrelated to that "distinctively proscribable content" runs afool of the First Amendment. Therefore, the city's bias-motivated crime ordinance, interpreted as banning the use of fighting words known to offend on the basis of race, color, creed, religion, or gender, but not on such other possible bases as political affiliation, union membership, or homosexuality, was invalidated for its content discrimination. "The First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects."

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1003 343 U.S. at 265-66.
1004 343 U.S. at 266.
1007 505 U.S. at 391. On the other hand, the First Amendment does permit enhancement of a criminal penalty based on the defendant's motive in selecting a victim of a particular race. _Wisconsin v. Mitchell_, 508 U.S. 476 (1993). The law has long recognized motive as a permissible element in sentencing, the Court noted. Id. at 485. _R.A.V._ was distinguished as involving a limitation on "speech" rather than conduct, and because the state might permissibly conclude that bias-inspired crimes inflict greater societal harm than do non-bias-inspired crimes (e.g., they are more likely to provoke retaliatory crimes). Id. at 487–88. _See generally_ Laurence H. Tribe,
Defamation.—One of the most seminal shifts in constitutional jurisprudence occurred in 1964 with the Court’s decision in *New York Times Co. v. Sullivan*. The *Times* had published a paid advertisement by a civil rights organization criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King, and containing several factual errors. The plaintiff, a city commissioner in charge of the police department, claimed that the advertisement had libeled him even though he was not referred to by name or title and even though several of the incidents described had occurred prior to his assumption of office. Unanimously, the Court reversed the lower court’s judgment for the plaintiff. To the contention that the First Amendment did not protect libelous publications, the Court replied that constitutional scrutiny could not be foreclosed by the “label” attached to something. “Like ... the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”

“Like ... the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”

Erroneous statement is protected, the Court asserted, there being no exception “for any test of truth.” Error is inevitable in any free debate and to place liability upon that score, and especially to place on the speaker the burden of proving truth, would introduce self-censorship and stifle the free expression which the First Amendment protects. Nor would injury to official reputation af-
ford a warrant for repressing otherwise free speech. Public officials are subject to public scrutiny and “[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation.”

That neither factual error nor defamatory content could penetrate the protective circle of the First Amendment was the “lesson” to be drawn from the great debate over the Sedition Act of 1798, which the Court reviewed in some detail to discern the “central meaning of the First Amendment.”

Thus, it appears, the libel law under consideration failed the test of constitutionality because of its kinship with seditious libel, which violated the “central meaning of the First Amendment.”

“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

In the wake of the Times ruling, the Court decided two cases involving the type of criminal libel statute upon which Justice Frankfurter had relied in analogy to uphold the group libel law in Beauharnais. In neither case did the Court apply the concept of Times to void them altogether. Garrison v. Louisiana held that a statute that did not incorporate the Times rule of “actual malice” was invalid, while in Ashton v. Kentucky a common-law definition of criminal libel as “any writing calculated to create disturbances of the peace, corrupt the public morals or lead to any act, which, when done, is indictable” was too vague to be constitutional.

The teaching of Times and the cases following it is that expression on matters of public interest is protected by the First Amendment. Within that area of protection is commentary about the public actions of individuals. The fact that expression contains falsehoods does not deprive it of protection, because otherwise such expression in the public interest would be deterred by monetary judgments and self-censorship imposed for fear of judgments. But, over the years, the Court has developed an increasingly complex set of standards governing who is protected to what degree with respect to which matters of public and private interest.

1013 376 U.S. at 272-73.
1014 376 U.S. at 273.
1015 376 U.S. at 279-80. The same standard applies for defamation contained in petitions to the government, the Court having rejected the argument that the petition clause requires absolute immunity. McDonald v. Smith, 472 U.S. 479 (1985).
1017 379 U.S. 64 (1964).
Individuals to whom the *Times* rule applies presented one of the first issues for determination. At times, the Court has keyed it to the importance of the position held. “There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”

But this focus seems to have become diffused and the concept of “public official” has appeared to take on overtones of anyone holding public elective or appointive office. Moreover, candidates for public office were subject to the *Times* rule and comment on their character or past conduct, public or private, insofar as it touches upon their fitness for office, is protected.

Thus, a wide range of reporting about both public officials and candidates is protected. Certainly, the conduct of official duties by public officials is subject to the widest scrutiny and criticism. But the Court has held as well that criticism that reflects generally upon an official’s integrity and honesty is protected.

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1023 Garrison v. Louisiana, 379 U.S. 64 (1964), involved charges that judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to “racketeer influences.” The Court rejected an attempted distinction that these criticisms were not of the manner in which the judges conducted their courts but were personal attacks upon their integrity and honesty. “Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation.... The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official’s fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.” Id. at 76–77.
for public office, the Court has said, place their whole lives before the public, and it is difficult to see what criticisms could not be related to their fitness.  

For a time, the Court’s decisional process threatened to expand the Times privilege so as to obliterate the distinction between private and public figures. First, the Court created a subcategory of “public figure,” which included those otherwise private individuals who have attained some prominence, either through their own efforts or because it was thrust upon them, with respect to a matter of public interest, or, in Chief Justice Warren’s words, those persons who are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.” More recently, the Court has curtailed the definition of “public figure” by playing down the matter of public interest and emphasizing the voluntariness of the assumption of a role in public affairs that will make of one a “public figure.”

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1024 In Monitor Patriot Co. v. Roy, 401 U.S. 265, 274–75 (1971), the Court said: “The principal activity of a candidate in our political system, his ‘office,’ so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of ‘purely private’ concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry ‘Foul’ when an opponent or an industrious reporter attempts to demonstrate the contrary…. Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case.”

1025 Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Chief Justice Warren concurring in the result). Curtis involved a college football coach, and Associated Press v. Walker, decided in the same opinion, involved a retired general active in certain political causes. The suits arose from reporting that alleged, respectively, the fixing of a football game and the leading of a violent crowd in opposition to enforcement of a desegregation decree. The Court was extremely divided, but the rule that emerged was largely the one developed in the Chief Justice’s opinion. Essentially, four Justices opposed application of the Times standard to “public figures,” although they would have imposed a lesser but constitutionally based burden on public figure plaintiffs. Id. at 133 (plurality opinion of Justices Harlan, Clark, Stewart, and Fortas). Three Justices applied Times, id. at 162 (Chief Justice Warren), and 172 (Justices Brennan and White). Two Justices would have applied absolute immunity. Id. at 170 (Justices Brennan and White). See also Greenbelt Cooperative Pub. Ass’n v. Bresler, 398 U.S. 6 (1970).

1026 Public figures “[f]or the most part [are] those who … have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).
Second, in a fragmented ruling, the Court applied the *Times* standard to private citizens who had simply been involved in events of public interest, usually, though not invariably, not through their own choosing.\(^{1027}\) But, in *Gertz v. Robert Welch, Inc.* \(^{1028}\) the Court set off on a new path of limiting recovery for defamation by private persons. Henceforth, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved, and punitive damages will be recoverable only upon the *Times* showing of “actual malice.”

The Court’s opinion by Justice Powell established competing constitutional considerations. On the one hand, imposition upon the press of liability for every misstatement would deter not only false speech but much truth as well; the possibility that the press might have to prove everything it prints would lead to self-censorship and the consequent deprivation of the public of its access to information. On the other hand, there is a legitimate state interest in compensating individuals for the harm inflicted on them by defamatory falsehoods. An individual’s right to the protection of his own good name is, at bottom, but a reflection of our society’s concept of the worth of the individual. Therefore, an accommodation must be reached. The *Times* rule had been a proper accommodation when public officials or public figures were concerned, inasmuch as by their own efforts they had brought themselves into the public eye, had created a need in the public for information about them, and had at the same time attained an ability to counter defamatory falsehoods published about them. Private individuals are not in the same position and need greater protection. “We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” \(^{1029}\) Some degree of fault must be shown, then.

Generally, juries may award substantial damages in tort for presumed injury to reputation merely upon a showing of publication. But this discretion of juries had the potential to inhibit the exercise of freedom of the press, and moreover permitted juries to penalize unpopular opinion through the awarding of damages.

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\(^{1029}\) 418 U.S. at 347.
Therefore, defamation plaintiffs who do not prove actual malice—that is, knowledge of falsity or reckless disregard for the truth—will be limited to compensation for actual provable injuries, such as out-of-pocket loss, impairment of reputation and standing, personal humiliation, and mental anguish and suffering. A plaintiff who proves actual malice will be entitled as well to collect punitive damages.\footnote{418 U.S. at 348-50. Justice Brennan would have adhered to \textit{Rosenbloom}, id. at 361, while Justice White thought the Court went too far in constitutionalizing the law of defamation. Id. at 369.}

Subsequent cases have revealed a trend toward narrowing the scope of the “public figure” concept. A socially prominent litigant in a particularly messy divorce controversy was held not to be such a person,\footnote{\textit{Time, Inc. v. Firestone}, 424 U.S. 448 (1976).} and a person convicted years before of contempt after failing to appear before a grand jury was similarly not a public figure even as to commentary with respect to his conviction.\footnote{\textit{Wolston v. Reader’s Digest Ass’n}, 443 U.S. 157 (1979).} Also not a public figure for purposes of allegedly defamatory comment about the value of his research was a scientist who sought and received federal grants for research, the results of which were published in scientific journals.\footnote{\textit{Hutchinson v. Proxmire}, 443 U.S. 111 (1979).} Public figures, the Court reiterated, are those who (1) occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or (2) have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved, and are public figures with respect to comment on those issues.\footnote{\textit{443 U.S. at 134} (quoting \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 345 (1974)).}

Commentary about matters of “public interest” when it defames someone is apparently, after \textit{Firestone}\footnote{\textit{Time, Inc. v. Firestone}, 424 U.S. 448 (1976).} and \textit{Gertz}, to be protected to the degree that the person defamed is a public official or candidate for public office, public figure, or private figure. That there is a controversy, that there are matters that may be of “public interest,” is insufficient to make a private person a “public figure” for purposes of the standard of protection in defamation actions.

The Court has elaborated on the principles governing defamation actions brought by private figures. First, when a private plaintiff sues a media defendant for publication of information that is a matter of public concern—the \textit{Gertz} situation, in other words—the burden is on the plaintiff to establish the falsity of the informa-
tion. Thus, the Court held in *Philadelphia Newspapers v. Hepps*, the common law rule that defamatory statements are presumptively false must give way to the First Amendment interest that true speech on matters of public concern not be inhibited. This means, as the dissenter pointed out, that a *Gertz* plaintiff must establish falsity in addition to establishing some degree of fault (e.g. negligence). On the other hand, the Court held in *Dun & Bradstreet v. Greenmoss Builders* that the *Gertz* standard limiting award of presumed and punitive damages applies only in cases involving matters of public concern, and that the sale of credit reporting information to subscribers is not such a matter of public concern. What significance, if any, is to be attributed to the fact that a media defendant rather than a private defendant has been sued is left unclear. The plurality in *Dun & Bradstreet* declined to follow the lower court's rationale that *Gertz* protections are unavailable to nonmedia defendants, and a majority of Justices were in agreement on that point. But in *Philadelphia Newspapers*, the Court expressly reserved the issue of "what standards would apply if the plaintiff sues a nonmedia defendant."

Satellite considerations besides the issue of who is covered by the *Times* privilege are of considerable importance. The use of the expression "actual malice" has been confusing in many respects, because it is in fact a concept distinct from the common law meaning of malice or the meanings common understanding might give to it. Constitutional "actual malice" means that the defamation was published with knowledge that it was false or with reckless disregard of whether it was false. Reckless disregard is not simply negligent behavior, but publication with serious doubts as to
the truth of what is uttered. A defamation plaintiff under the Times or Gertz standard has the burden of proving by “clear and convincing” evidence, not merely by the preponderance of evidence standard ordinarily borne in civil cases, that the defendant acted with knowledge of falsity or with reckless disregard. Moreover, the Court has held, a Gertz plaintiff has the burden of proving the actual falsity of the defamatory publication. A plaintiff suing the press for defamation under the Times or Gertz standards is not limited to attempting to prove his case without resort to discovery of the defendant’s editorial processes in the establishment of “actual malice.” The state of mind of the defendant may be inquired into and the thoughts, opinions, and conclusions with respect to the material gathered and its review and handling are proper subjects of discovery. As with other areas of protection or qualified protection under the First Amendment (as well as some other constitutional provisions), appellate courts, and ultimately the Supreme Court, must independently review the findings below to ascertain that constitutional standards were met.

There had been some indications that statements of opinion, unlike assertions of fact, are absolutely protected, but the Court

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1046 Because the defendants in these cases have typically been media defendants (but see Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965)), and because of the language in the Court’s opinions, some have argued that only media defendants are protected under the press clause and individuals and others are not protected by the speech clause in defamation actions. See discussion supra, under “Freedom of Expression: Is There a Difference Between Speech and Press?”


1049 See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) (“under the First Amendment there is no such thing as a false idea”); Greenbelt Cooperative
held in Milkovich v. Lorain Journal Co.\(^{1050}\) that there is no constitutional distinction between fact and opinion, hence no "wholesale defamation exemption" for any statement that can be labeled "opinion."\(^{1051}\) The issue instead is whether, regardless of the context in which a statement is uttered, it is sufficiently factual to be susceptible of being proved true or false. Thus, if statements of opinion may "reasonably be interpreted as stating actual facts about an individual,"\(^{1052}\) then the truthfulness of the factual assertions may be tested in a defamation action. There are sufficient protections for free public discourse already available in defamation law, the Court concluded, without creating "an artificial dichotomy between 'opinion' and fact."\(^{1053}\)

Substantial meaning is also the key to determining whether inexact quotations are defamatory. Journalistic conventions allow some alterations to correct grammar and syntax, but the Court in Masson v. New Yorker Magazine\(^{1054}\) refused to draw a distinction on that narrow basis. Instead, "a deliberate alteration of words [in a quotation] does not equate with knowledge of falsity for purposes of [New York Times] unless the alteration results in a material change in the meaning conveyed by the statement."\(^{1055}\)

**Invasion of Privacy.**—Governmental power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication implicates directly First Amendment rights. Privacy is a concept composed of several aspects.\(^{1056}\) As a tort concept, it embraces at least four branches of protected interests: protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from pub-

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\(^{1051}\) 497 U.S. at 18.

\(^{1052}\) 497 U.S. at 20. In Milkovich the Court held to be actionable assertions and implications in a newspaper sports column that a high school wrestling coach had committed perjury in testifying about a fight involving his team.

\(^{1053}\) 497 U.S. at 19.


\(^{1055}\) 501 U.S. at 517.

\(^{1056}\) See, e.g., William Prosser, Law of Torts § 117 (5th ed. 1984); Prosser, Privacy, 48 Calif. L. Rev. 383 (1960); J. Thomas McCarthy, The Rights of Publicity and Privacy (1987); Thomas Emerson, The System of Freedom of Expression 541–61 (1970). It should be noted that we do not have here the question of the protection of one's privacy from governmental invasion.
licity which unreasonably places one in a false light before the public. 1057

While the Court has variously recognized valid governmental interests in extending protection to privacy, 1058 it has at the same time interposed substantial free expression interests in the balance. Thus, in *Time, Inc. v. Hill*, 1059 the *Times* privilege was held to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. When, in *Gertz v. Robert Welch, Inc.*, 1060 the Court held that the *Times* privilege was not applicable in defamation cases unless the plaintiff is a public official or public figure, even though plaintiff may have been involved in a matter of public interest, the question arose whether *Hill* applies to all “false-light” cases or only such cases involving public officials or public figures. 1061 And, more important, *Gertz* left unresolved the issue “whether the State may ever define and protect an area of privacy free from unwanted publicity in the press.” 1062

In *Cox Broadcasting*, the Court declined to pass on the broad question, holding instead that the accurate publication of information obtained from public records is absolutely privileged. Thus, the State could not permit a civil recovery for invasion of privacy occasioned by the reporting of the name of a rape victim obtained from court records and from a proceeding in open court. 1063 Nevertheless, the Court in appearing to retreat from what had seemed to be settled principle, that truth is a constitutionally required defense in any defamation action, whether plaintiff be a public official, public figure, or private individual, may have preserved for itself the discretion to recognize a constitutionally permissible tort of invasion of privacy through publication of truthful informa-

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1057 Restatement (Second), of Torts §§ 652A–652I (1977). These four branches were originally propounded in Prosser’s 1960 article, incorporated in the Restatement, and now “routinely accept[ed],” McCarthy, § 5.8[A].


1062 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

1063 More specifically, the information was obtained “from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.” 420 U.S. at 491. There was thus involved both the First Amendment and the traditional privilege of the press to report the events of judicial proceedings. Id. at 493, 494–96.
Thus, Justice White for the Court noted that the defense of truth is constitutionally required in suits by public officials or public figures. But "[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamatory action brought by a private person as distinguished from a public official or public figure." 420 U.S. at 490. If truth is not a constitutionally required defense, then it would be possible for the States to make truthful defamation of private individuals actionable and, more important, truthful reporting of matters that constitute invasions of privacy actionable. See Brasco v. Reader's Digest, 4 Cal.3d 520, 483 P.2d 34, 93 Cal.Rptr. 866 (1971); Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969), cert. denied, 398 U.S. 960 (1970). Concurring in Cohn, 420 U.S. at 497, Justice Powell contended that the question of truth as a constitutionally required defense was long settled in the affirmative and that Gertz itself, which he wrote, was explainable on no other basis. But he too would reserve the question of actionable invasions of privacy through truthful reporting. "In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions." 420 U.S. at 500.

Emotional Distress Tort Actions.—In Hustler Magazine, Inc. v. Falwell, 1066 the Court applied the New York Times v. Sullivan standard to recovery of damages by public officials and public figures for the tort of intentional infliction of emotional distress. The case involved an advertisement "parody" portraying the plaintiff, described by the Court as a "nationally known minister active as a commentator on politics and public affairs," as engaged in "a drunken incestuous rendezvous with his mother in an outhouse." 1067 Affirming liability in this case, the Court believed,

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1067 485 U.S. at 47-48.
would subject “political cartoonists and satirists … to damage awards without any showing that their work falsely defamed its subject.” 1068 A proffered “outrageousness” standard for distinguishing such parodies from more traditional political cartoons was rejected. While not doubting that “the caricature of respondent … is at best a distant cousin of [some] political cartoons … and a rather poor relation at that,” the Court explained that “[o]utrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views.” 1069 Therefore, proof of intent to cause injury, “the gravamen of the tort,” is insufficient “in the area of public debate about public figures.” Additional proof that the publication contained a false statement of fact made with actual malice was necessary, the Court concluded, in order “to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.” 1070

“Right of Publicity” Tort Actions.—In Zacchini v. Scripps-Howard Broadcasting Co., 1071 the Court held unprotected by the First Amendment a broadcast of a video tape of the “entire act” of a “human cannonball” in the context of the performer’s suit for damages against the company for having “appropriated” his act, thereby injuring his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party’s right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information which would be made available to the public, whereas permitting this tort action would have an impact only on “who gets to do the publishing.” 1072 In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make

1068 485 U.S. at 53.
1069 485 U.S. at 55.
1070 485 U.S. at 52-53.
1071 433 U.S. 562 (1977). The “right of publicity” tort is conceptually related to one of the privacy strands, “appropriation” of one’s name or likeness for commercial purposes. Id. at 569–72. Justices Powell, Brennan, and Marshall dissented, finding the broadcast protected, id. at 579, and Justice Stevens dissented on other grounds. Id. at 582.
1072 433 U.S. at 573-74. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.
the investment required to produce a performance of interest to the public. 1073

Publication of Legally Confidential Information.—While a State may have numerous and important valid interests in assuring the confidentiality of certain information, it may not maintain this confidentiality through the criminal prosecution of nonparticipant third parties, including the press, who disclose or publish the information. 1074 The case arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body’s proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute, which the state courts construed to apply to nonparticipant divulging. Although the Court recognized the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here “lies near the core of the First Amendment” because the free discussion of public affairs, including the operation of the judicial system, is primary and the State’s interests were simply insufficient to justify the encroachment on freedom of speech and of the press. 1075 The scope of the privilege thus conferred by this decision on the press and on individuals is, however, somewhat unclear, because the Court appeared to reserve consideration of broader questions than those presented by the facts of the case. 1076 It does appear, however, that government would find it difficult to punish the publication of almost any information by a nonparticipant to the process in which the information was developed to the same degree

1073 433 U.S. at 576-78. This discussion is the closest the Court has come in considering how copyright laws in particular are to be reconciled with the First Amendment. The Court’s emphasis is that they encourage the production of work for the public’s benefit.

1074 Landmark Communications v. Virginia, 435 U.S. 829 (1978). The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish. Id. at 848. See also Smith v. Daily Mail Pub. Co., 433 U.S. 97 (1979).

1075 435 U.S. at 838-42. The state court’s utilization of the clear-and-present-danger test was disapproved in its application; additionally, the Court questioned the relevance of the test in this case. Id. at 842-45.

1076 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), in the context of a civil proceeding, had held that the First Amendment did not permit the imposition of liability on the press for truthful publication of information released to the public in official court records, id. at 496, but had expressly reserved the question “whether the publication of truthful information withheld by law from the public domain is similarly privileged,” id. at 497 n.27, and Landmark on its face appears to answer the question affirmatively. Caution is impelled, however, by the Court’s similar reservation. “We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark’s publication is protected by the First Amendment.” 435 U.S. at 840.
as it would be foreclosed from obtaining prior restraint of such publication.\textsuperscript{1077} There are also limits on the extent to which government may punish disclosures by participants in the criminal process, the Court having invalidated a restriction on a grand jury witness’s disclosure of his own testimony after the grand jury had been discharged.\textsuperscript{1078}

**Obscenity.**—Although public discussion of political affairs is at the core of the First Amendment, the guarantees of speech and press, it should have been noticed from the previous subsections, are broader. “We do not accede to appellee’s suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right.”\textsuperscript{1079} The right to impart and to receive “information and ideas, regardless of their social worth . . . is fundamental to our free society.”\textsuperscript{1080} Indeed, it is primarily with regard to the entertaining function of expression that the law of obscenity is concerned, inasmuch as the Court has rejected any concept of “ideological” obscenity.\textsuperscript{1081} However, this function is not the reason why obscenity is outside the protection of the First Amendment, although the Court has never really been clear about what that reason is.

Adjudication over the constitutional law of obscenity began in \textit{Roth v. United States},\textsuperscript{1082} in which the Court in an opinion by Justice Brennan settled in the negative the “dispositive question”

\textsuperscript{1077} See Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976).
\textsuperscript{1081} Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). The last case involved the banning of the movie \textit{Lady Chatterley’s Lover} on the ground that it dealt too sympathetically with adultery. “It is contended that the State’s action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.” Id. at 688–89.
\textsuperscript{1082} 354 U.S. 476 (1957). Heard at the same time and decided in the same opinion was \textit{Alberts v. California}, involving, of course, a state obscenity law. The Court’s first opinion in the obscenity field was Butler v. Michigan, 352 U.S. 380 (1957), considered infra. Earlier the Court had divided four-to-four and thus affirmed a state court judgment that Edmund Wilson’s \textit{Memoirs of Hecate County} was obscene. Doubleday & Co. v. New York, 335 U.S. 848 (1948).
“whether obscenity is utterance within the area of protected speech and press.” The Court then undertook a brief historical survey to demonstrate that “the unconditional phrasing of the First Amendment was not intended to protect every utterance.” All or practically all of the States that ratified the First Amendment had laws making blasphemy or profanity or both crimes, and provided for prosecutions of libels as well. It was this history that had caused the Court in <i>Beauharnais</i> to conclude that “libelous utterances are not within the area of constitutionally protected speech,” and this history was deemed to demonstrate that “obscenity, too, was outside the protection intended for speech and press.” The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people .... All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.” It was objected that obscenity legislation punishes because of incitation to impure thoughts and without proof that obscene materials create a clear and present danger of antisocial conduct. But since obscenity was not protected at all, such tests as clear and present danger were irrelevant.

“However,” Justice Brennan continued, “sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press .... It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.” The standard that the Court thereupon

1083 Roth v. United States, 354 U.S. 476, 481 (1957). Justice Brennan later changed his mind on this score, arguing that, because the Court had failed to develop a workable standard for distinguishing the obscene from the non-obscene, regulation should be confined to the protection of children and non-consenting adults. See <i>Paris Adult Theatre I v. Slaton</i>, 413 U.S. 49, 73 (1973).

1084 354 U.S. at 482-83. The reference is to <i>Beauharnais v. Illinois</i>, 343 U.S. 250 (1952).


1086 354 U.S. at 486, also quoting <i>Beauharnais v. Illinois</i>, 343 U.S. 250, 266 (1952).

1087 354 U.S. at 487, 488.
adopted for the designation of material as unprotected obscenity was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” The Court defined material appealing to prurient interest as “material having a tendency to excite lustful thoughts,” and defined prurient interest as “a shameful or morbid interest in nudity, sex, or excretion.”

In the years after Roth, the Court struggled with many obscenity cases with varying degrees of success. The cases can be grouped topically, but, with the exception of those cases dealing with protection of children, unwilling adult recipients, and procedure, these cases are best explicated chronologically.

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1088 354 U.S. at 489.
1089 354 U.S. at 487 n.20. A statute defining “prurient” as “that which incites lasciviousness or lust” covers more than obscenity, the Court later indicated in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1984); obscenity consists in appeal to “a shameful or morbid” interest in sex, not in appeal to “normal, healthy sexual desires.” Brockett involved a facial challenge to the statute, so the Court did not have to explain the difference between “normal, healthy” sexual desires and “shameful” or “morbid” sexual desires.


1091 Protection of unwilling adults was the emphasis in Rowan v. Post Office Dep't, 397 U.S. 728 (1970), which upheld a scheme by which recipients of objectionable mail could put their names on a list and require the mailer to send no more such material. But, absent intrusions into the home, FCC v. Pacifica Found., 438 U.S. 726 (1978), or a degree of captivity that makes it impractical for the unwilling viewer or auditor to avoid exposure, government may not censor content, in the context of materials not meeting constitutional standards for denomination as pornography, to protect the sensibilities of some. It is up to offended individuals to turn away. Erznoznik v. City of Jacksonville, 422 U.S. 205, 202–12 (1975). But see Pinkus v. United States, 436 U.S. 293, 298–301 (1978) (jury in passing on what community standards are must include "sensitive persons" within the community).

1092 The First Amendment requires that procedures for suppressing distribution of obscene materials provide for expedited consideration, for placing the burden of proof on government, and for hastening judicial review. Additionally, Fourth Amendment search and seizure law has been suffused with First Amendment principles, so that the law governing searches for and seizures of allegedly obscene ma-
Manual Enterprises v. Day\textsuperscript{1093} upset a Post Office ban upon the mailing of certain magazines addressed to homosexual audiences, but resulted in no majority opinion of the Court. Nor did a majority opinion emerge in Jacobellis v. Ohio, which reversed a conviction for exhibiting a motion picture.\textsuperscript{1094} Chief Justice Warren’s concurrence in Roth\textsuperscript{1095} was adopted by a majority in Ginzburg v. United States,\textsuperscript{1096} in which Justice Brennan for the Court held that in “close” cases borderline materials could be determined to be obscene if the seller “pandered” them in a way that indicated he was catering to prurient interests. The same five-Judge majority, with Justice Harlan concurring, the same day affirmed a state conviction of a distributor of books addressed to a sado-masochistic audience, applying the “pandering” test and concluding that material could be held legally obscene if it appealed to the prurient interests of the deviate group to which it was di-

\textsuperscript{1093} 370 U.S. 478 (1962).

\textsuperscript{1094} 378 U.S. 184 (1964). Without opinion, citing Jacobellis, the Court reversed a judgment that Henry Miller's Tropic of Cancer was obscene. Grove Press v. Gerstein, 378 U.S. 577 (1964). Jacobellis is best known for Justice Stewart’s concurrence, contending that criminal prohibitions should be limited to “hard-core pornography.” The category “may be indefinable,” he added, but “I know it when I see it, and the motion picture involved in this case is not that.” Id. at 197. The difficulty with this visceral test is that other members of the Court did not always “see it” the same way; two years later, for example, Justice Stewart was on opposite sides in two obscenity decisions decided on the same day. A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts, 383 U.S. 413, 421 (1966) (concurring on basis that book was not obscene); Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting from finding that material was obscene).

\textsuperscript{1095} Roth v. United States, 354 U.S. 476, 494 (1957).

rected. Unanimity was shattered, however, when on the same day the Court held that *Fanny Hill*, a novel at that point 277 years old, was not legally obscene. The prevailing opinion again restated the *Roth* tests that, to be considered obscene, material must (1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value.

After the divisions engendered by the disparate opinions in the three 1966 cases, the Court over the next several years submerged its differences by *per curiam* dispositions of nearly three dozen cases, in all but one of which it reversed convictions or civil determinations of obscenity. The initial case was *Redrup v. New York*, in which, after noting that the cases involved did not present special questions requiring other treatment, such as concern for juveniles, protection of unwilling adult recipients, or prescription of pandering, the Court succinctly summarized the varying positions of the seven Justices in the majority and said: “[w]hichever of the constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand . . . .” And so things went for several years.

Changing membership on the Court raised increasing speculation about the continuing vitality of *Roth*; it seemed unlikely the Court would long continue its *Redrup* approach. The change when it occurred strengthened the powers of government, federal, state, and local, to outlaw or restrictively regulate the sale and dissemination of materials found objectionable, and developed new

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1100 386 U.S. 767 (1967).
1101 386 U.S. at 771.
1102 386 U.S. at 770-71. The majority was thus composed of Chief Justice Warren and Justices Black, Douglas, Brennan, Stewart, White, and Fortas.
1104 See United States v. Reidel, 402 U.S. 351 (1971) (federal prohibition of dissemination of obscene materials through the mails is constitutional); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (customs seizures of obscene materials from baggage of travelers are constitutional). In *Grove Press v. Maryland State Bd. of Censors*, 401 U.S. 480 (1971), a state court determination that the motion picture "I Am Curious (Yellow)" was obscene was affirmed by an equally divided Court, Justice Douglas not participating. And *Stanley v. Georgia*, 394 U.S. 557, 560–64, 568 (1969), had insisted that Roth remained the governing standard.
standards for determining which objectionable materials are legally obscene.

At the end of the October 1971 Term, the Court requested argument on the question whether the display of sexually oriented films or of sexually oriented pictorial magazines, when surrounded by notice to the public of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected. By a five-to-four vote the following Term, the Court in Paris Adult Theatre I v. Slaton adhered to the principle established in Roth that obscene material is not protected by the First and Fourteenth Amendments even if access is limited to consenting adults. Chief Justice Burger for the Court observed that the States have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It matters not that the States may be acting on the basis of unverifiable assumptions in arriving at the decision to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Nor does the Constitution embody any concept of laissez faire, or of privacy, or of Millsean “free will,” that curbs governmental efforts to suppress pornography.

In Miller v. California, the Court then undertook to enunciate standards by which unprotected pornographic materials were to be identified. Because of the inherent dangers in undertaking to regulate any form of expression, laws to regulate pornography must be carefully limited; their scope is to be confined to materials that

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1106 413 U.S. 49 (1973).
1107 413 U.S. at 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice Brennan argued that the Court’s Roth approach allowing the suppression of pornography was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other, but more basically by deterrence of protected expression caused by the uncertainty. Id. at 73. “I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents.” Id. at 113. Justices Stewart and Marshall joined this opinion; Justice Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. Id. at 70.
“depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed.”¹¹⁰ The law “must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”¹¹¹ The standard that a work must be “utterly without redeeming social value” before it may be suppressed was disavowed and discarded. In determining whether material appeals to a prurient interest or is patently offensive, the trier of fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the local community standard where the trier of fact sits.¹¹² Prurient interest and patent offensiveness, the Court indicated, “are essentially questions of fact.”¹¹³ By contrast, the third or “value” prong of the Miller test is not subject to a community standards test; instead, the appropriate standard is “whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole.”¹¹⁴

¹¹⁰ Miller v. California, 413 U.S. 15, 27 (1973). The Court stands ready to read into federal statutes the standards it has formulated. United States v. 12 200–Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973) (Court is prepared to construe statutes proscribing materials that are “obscene,” “lewd,” “lascivious,” “filthy,” “indecent,” and “immoral” as limited to the types of “hard core” pornography reachable under the Miller standards). For other cases applying Miller standards to federal statutes, see Hamling v. United States, 418 U.S. 87, 110–16 (1974) (use of the mails); United States v. Orito, 413 U.S. 139 (1973) (transportation of pornography in interstate commerce). The Court’s insistence on specificity in state statutes, either as written by the legislature or as authoritatively construed by the state court, appears to have been significantly weakened, in fact if not in enunciation, in Ward v. Illinois, 431 U.S. 767 (1977).

¹¹¹ 413 U.S. at 30–34. “A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a ‘reasonable’ person in other areas of the law.” Hamling v. United States, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a “community.” In federal cases, it will probably be the judicial district from which the jurors are drawn, id. at 105–106. Indeed, the jurors may be instructed to apply “community standards” without any definition being given of the “community.” Jenkins v. Georgia, 418 U.S. 153, 157 (1974). In a federal prosecution for use of the mails to transmit pornography, the fact that the legislature of the State within which the transaction takes place has abolished pornography regulation except for dealings with children does not preclude permitting the jurors in the federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature’s decision but they are not bound by it. Smith v. United States, 431 U.S. 291 (1977).

The Court in *Miller* reiterated that it was not permitting an unlimited degree of suppression of materials. Only “hard core” materials were to be deemed without the protection of the First Amendment, and the Court’s idea of the content of “hard core” pornography was revealed in its examples: “(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.” Subsequently, the Court held that a publication was not obscene if it “provoked only normal, healthy sexual desires.” To be obscene it must appeal to “a shameful or morbid interest in nudity, sex, or excretion.” The Court has also indicated that obscenity is not be limited to pictures; books containing only descriptive language may be suppressed.

First Amendment values, the Court stressed in *Miller*, “are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.” But the Court had conferred on juries as triers of fact the determination, based upon their understanding of community standards, whether material was “patently offensive.” Did not this virtually immunize these questions from appellate review? In *Jenkins v. Georgia*, the Court, while adhering to the *Miller* standards, stated that “juries [do not] have unbridled discretion in determining what is ‘patently offensive.’” *Miller* was intended to make clear that only “hard-core” materials could be suppressed and this concept and the Court’s descriptive itemization of some types of hardcore materials were “intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination.” The Court’s own viewing of the motion picture in question convinced it that “[n]othing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the ‘patently offensive’ element of those standards, nor is there anything suffi-

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1114 Miller v. California, 413 U.S. 15, 25 (1973). Quoting *Miller’s* language in *Hamling v. United States*, 418 U.S. 87, 114 (1974), the Court reiterated that it was only “hard-core” material that was unprotected. “While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is ‘patently offensive’ within the meaning of the obscenity test set forth in the *Miller* cases.” Referring to this language in *Ward v. Illinois*, 431 U.S. 767 (1977), the Court upheld a state court’s power to construe its statute to reach sadomasochistic materials not within the confines of the *Miller* language.


1117 413 U.S. at 25.

ciently similar to such material to justify similar treatment." But in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.

The decisions from the *Paris Adult Theatre* and *Miller* era were rendered by narrow majorities, but nonetheless have guided the Court since. There is no indication that the dissenting viewpoints in those cases will gain ascendancy in the foreseeable future; if anything, government authority to define and regulate obscenity may be strengthened. Also, the Court's willingness to allow substantial regulation of non-obscene but sexually explicit or indecent expression reduces the importance (outside the criminal area) of whether material is classified as obscene.

Even as to materials falling within the constitutional definition of obscene, the Court has recognized a limited private, protected interest in possession within the home, unless those materials constitute child pornography. *Stanley v. Georgia* was an appeal from a state conviction for possession of obscene films discovered in appellant's home by police officers armed with a search warrant for other items which were not found. Unanimously, the Court

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1119 418 U.S. at 161. The film at issue was *Carnal Knowledge*.
1120 Hamling v. United States, 418 U.S. 87 (1974). In Smith v. United States, 431 U.S. 291, 305–06 (1977), the Court explained that jury determinations in accordance with their own understanding of the tolerance of the average person in their community are not unreviewable. Judicial review would pass on (1) whether the jury was properly instructed to consider the entire community and not simply the members' own subjective reaction or the reactions of a sensitive or of a callous minority, (2) whether the conduct depicted fell within the examples specified in *Miller*, (3) whether the work lacked serious literary, artistic, political, or scientific value, and (4) whether the evidence was sufficient. The Court indicated that the value test of *Miller* "was particularly amenable to judicial review." The value test is not to be measured by community standards, the Court later held in Pope v. Illinois, 481 U.S. 497 (1987), but instead by a "reasonable person" standard. An erroneous instruction on this score, however, may be "harmless error." Id. at 503.
1122 None of the dissenters in *Miller* and *Paris Adult Theatre* (Douglas, Brennan, Stewart, and Marshall) remains on the Court. Justice Stevens agrees with Justice Brennan that "government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults," Pope v. Illinois, 481 U.S. 497, 513 (Stevens, J., dissenting), but it is doubtful whether any other members of the current Court share this view. Justice White's dissenting opinion in Barnes v. Glen Theatre, Inc., 501 U.S. 560, 587 (1991), joined by Justice Blackmun and Justice Marshall, seems to reflect similar views with respect to regulation of non-obscene nude dancing, but does not address regulation of obscenity. Both Justice White and Justice Blackmun voted with the majority in *Miller* and *Paris Adult Theatre*.
1124 Justice Marshall wrote the opinion of the Court and was joined by Justices Douglas, Harlan, and Fortas, and Chief Justice Warren. Justice Black concurred.
reversed, holding that the mere private possession of obscene materials in the home cannot be made a criminal offense. The Constitution protects the right to receive information and ideas, the Court said, regardless of their social value, and “that right takes on an added dimension” in the context of a prosecution for possession of something in one’s own home. “For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”\(^{1125}\) Despite the unqualified assertion in *Roth* that obscenity was not protected by the First Amendment, the Court observed, it and the cases following were concerned with the governmental interest in regulating commercial distribution of obscene materials. *Roth* and the cases following that decision are not impaired by today’s decision, the Court insisted,\(^ {1126}\) but in its rejection of each of the state contentions made in support of the conviction the Court appeared to be rejecting much of the basis of *Roth*. First, there is no governmental interest in protecting an individual’s mind from the effect of obscenity. Second, the absence of ideological content in the films was irrelevant, since the Court will not draw a line between transmission of ideas and entertainment. Third, there is no empirical evidence to support a contention that exposure to obscene materials may incite a person to antisocial conduct; even if there were such evidence, enforcement of laws proscribing the offensive conduct is the answer. Fourth, punishment of mere possession is not necessary to punishment of distribution. Fifth, there was little danger that private possession would give rise to the objections underlying a proscription upon public dissemination, exposure to children and unwilling adults.\(^ {1127}\)

*Stanley’s* broad rationale has been given a restrictive reading, and the holding has been confined to its facts. Any possible implication that *Stanley* was applicable outside the home and recognized a right to obtain pornography or a right in someone to supply it was soon dispelled.\(^ {1128}\) The Court has consistently rejected *Stanley’s* theoretical underpinnings, upholding morality-based regula-

\(^{394}\) U.S. at 568. Justice Stewart concurred and was joined by Justices Brennan and White on a search and seizure point. Justice Stewart, however, had urged the First Amendment ground in an earlier case. Mapp v. Ohio, 367 U.S. 643, 686 (1961) (concurring opinion).

\(^{1125}\) 394 U.S. at 564.

\(^{1126}\) 394 U.S. at 560-64, 568.

\(^{1127}\) 394 U.S. at 565-68.

tion of the behavior of consenting adults.  Also, Stanley has been held inapplicable to possession of child pornography in the home, the Court determining that the state interest in protecting children from sexual exploitation far exceeds the interest in Stanley of protecting adults from themselves.  Apparently for this reason, a state’s conclusion that punishment of mere possession is a necessary or desirable means of reducing production of child pornography will not be closely scrutinized.

Child Pornography.—In New York v. Ferber, the Court recognized another category of expression that is outside the coverage of the First Amendment, the pictorial representation of children in films or still photographs in a variety of sexual activities or exposures of the genitals. The basic reason such depictions could be prohibited was the governmental interest in protecting the physical and psychological well-being of children whose participation in the production of these materials would subject them to exploitation and harm. The state may go beyond a mere prohibition on the use of the children, because it is not possible to protect children adequately without prohibiting the exhibition and dissemination of the materials and advertising about them. Thus, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.” But, since expression is involved, government must carefully define what conduct is to be prohibited and may reach only “works that visually depict sexual conduct by children below a specified age.”

The reach of the state may even extend to private possession of child pornography in the home. In Osborne v. Ohio the Court upheld a state law criminalizing the possession or viewing of child pornography as applied to someone who possessed such materials in his home. Distinguishing Stanley v. Georgia, the Court ruled

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1131 458 U.S. at 763-64.
1132 458 U.S. at 764 (emphasis original). The Court’s statement of the modified Miller standards for child pornography is at 764–65.
that Ohio's interest in preventing exploitation of children far exceeded what it characterized as Georgia’s “paternalistic interest” in protecting the minds of adult viewers of pornography. Because of the greater importance of the state interest involved, the Court saw less need to require states to demonstrate a strong necessity for regulating private possession as well as commercial distribution and sale.

In Ashcroft v. Free Speech Coalition, the Court held unconstitutional the federal Child Pornography Prevention Act (CPPA) to the extent that it prohibited pictures that were not produced with actual minors. Prohibited pictures included computer-generated (“virtual”) child pornography, and photographs of adult actors who appeared to be minors. The Court observed that statutes that prohibit child pornography that use real children are constitutional because they target “[t]he production of the work, not the content.” The CPPA, by contrast, targeted the content, not the means of production. The government’s rationales for the CPPA included that “[p]edophiles might use the materials to encourage children to participate in sexual activity” and might “whet their own sexual appetites” with it, “thereby increasing . . . the sexual abuse and exploitation of actual children.” The Court found these rationales inadequate because the government “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts” and “may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’” The government also argued that the existence of “virtual” child pornography “can make it harder to prosecute pornographers who do use real minors,” because, “[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children.” This rationale, the Court found, “turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech.”

Non-obscene But Sexually Explicit and Indecent Expression.—There is expression, either spoken or portrayed, which is offensive to some but is not within the constitutional standards of unprotected obscenity. Nudity portrayed in films or stills cannot be

\[1136\] 495 U.S. at 108.
\[1137\] 122 S. Ct. 1389 (2002).
\[1138\] 122 S. Ct. at 1397; see also id. at 1397.
\[1139\] 122 S. Ct. at 1397.
\[1140\] 122 S. Ct. at 1403.
\[1141\] 122 S. Ct. at 1397.
\[1142\] 122 S. Ct. at 1404.
presumed obscene nor can offensive language ordinarily be punished simply because it offends someone. Nonetheless, government may regulate sexually explicit but non-obscene expression in a variety of ways. Legitimate governmental interests may be furthered by appropriately narrow regulation, and the Court’s view of how narrow regulation must be is apparently influenced not only by its view of the strength of the government’s interest in regulation, but also by its view of the importance of the expression itself. In other words, sexually explicit expression does not receive the same degree of protection afforded purely political speech.

Government has a “compelling” interest in the protection of children from seeing or hearing indecent material, but total bans applicable to adults and children alike are constitutionally suspect.

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1144 E.g., Cohen v. California, 403 U.S. 15 (1971). Special rules apply to broadcast speech, which, because of its intrusion into the home and the difficulties of protecting children, is accorded “the most limited First Amendment protection” of all forms of communication; non-obscene but indecent language may be curtailed, the time of day and other circumstances determining the extent of curtailment. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). However, efforts by Congress and the FCC to extend the indecency ban to 24 hours a day were rebuffed by an appeals court. Action for Children’s Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (invalidating regulations promulgated pursuant to Pub. L. No. 100–459, § 608), cert. denied, 503 U.S. 913 (1992). Earlier, the same court had invalidated an FCC restriction on indecent, non-obscene broadcasts from 6 a.m. to midnight, finding that the FCC had failed to adduce sufficient evidence to support the restraint. Action for Children’s Television v. FCC, 852 F.2d 1332, 1335 (D.C. Cir. 1988). In 1992, however, Congress imposed a 6 a.m.-to-midnight ban on indecent programming, with a 10 p.m.-to-midnight exception for public radio and television stations that go off the air at or before midnight. Pub. L. No. 102–356, § 16 (1992), 47 U.S.C. § 303 note. This time, after a three-judge panel found the statute unconstitutional, the en banc court of appeals upheld it, except for its 10 p.m.-to-midnight ban on indecent material on non-public stations. Action for Children’s Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996).
1145 Justice Scalia, concurring in Sable Communications v. FCC, 492 U.S. 115, 132 (1989), suggested that there should be a “sliding scale” taking into account the definition of obscenity: “[t]he more narrow the understanding of what is ‘obscene,’ and hence the more pornographic what is embraced within the residual category of ‘indecency,’ the more reasonable it becomes to insist upon greater assurance of insulation from minors.” Barnes v. Glen Theatre, 501 U.S. 560 (1991), upholding regulation of nude dancing even in the absence of threat to minors, may illustrate a general willingness by the Court to apply soft rather than strict scrutiny to regulation of more sexually explicit expression.

See Sable Communications v. FCC, 492 U.S. 115 (1989) (FCC’s “dial-a-porn” rules imposing a total ban on “indecent” speech are unconstitutional, given less restrictive alternatives—e.g., credit cards or user IDs—of preventing access by children). Pacifica Foundation is distinguishable, the Court reasoned, because that case did not involve a “total ban” on broadcast, and also because there is no “captive audience” for the “dial-it” medium, as there is for the broadcast medium. 492 U.S. at 127–28. Similar rules apply in regulation of cable TV. In Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 755 (1996), the Court, acknowledging that protection of children from sexually explicit programming is a “compelling” governmental interest (but refusing to determine whether strict scrutiny applies), nonetheless struck down a requirement that cable operators segregate...
In *Reno v. American Civil Liberties Union*, the Court struck down two provisions of the Communications Decency Act of 1996 (CDA), one of which would have prohibited use of an “interactive computer service” to display indecent material “in a manner available to a person under 18 years of age.” This prohibition would, in effect, have banned indecent material from all Internet sites except those accessible by adults only. Although intended “to deny minors access to potentially harmful speech . . . , [the CDA’s] burden on adult speech,” the Court wrote, “is unacceptable if less restrictive alternatives would be at least as effective . . . . [T]he Government may not ‘reduce[e] the adult population . . . to . . . only what is fit for children.’”

In *Reno*, the Court distinguished *FCC v. Pacifica Foundation*, in which it had upheld the FCC’s restrictions on indecent and block indecent programming on leased access channels. The segregate and block restrictions, which included a requirement that a request for access be in writing, and which allowed for up to 30 days’ delay in blocking or unblocking a channel, were not sufficiently protective of adults’ speech and viewing interests to be considered either narrowly or reasonably tailored to serve the government’s compelling interest in protecting children. In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), the Supreme Court, explicitly applying strict scrutiny to a content-based speech restriction on cable TV, struck down a federal statute designed to “shield children from hearing or seeing images resulting from signal bleed.”

The Court seems to be becoming less absolute in viewing the protection of all minors (regardless of age) from all indecent material (regardless of its educational value and parental approval) to be a compelling governmental interest. In striking down the Communications Decency Act of 1996, the Court would “neither accept nor reject the Government’s submission that the First Amendment does not forbid a blanket prohibition on all ‘indecent’ and ‘patently offensive’ messages communicated to a 17-year-old – no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government’s interest in protecting minors is not equally strong throughout the coverage of this broad statute.” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 878 (1997). In *Playboy Entertainment Group*, 529 U.S. at 825, the Court wrote: “Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech.” The Court also would “not discount the possibility that a graphic image could have a negative impact on a young child” (id. at 826), thereby suggesting again that it may take age into account when applying strict scrutiny.


The other provision the Court struck down would have prohibited indecent communications, by telephone, fax, or e-mail, to minors.

521 U.S. at 874–75. The Court did not address whether, if less restrictive alternatives would not be as effective, the Government would then be permitted to reduce the adult population to only what is fit for children. Courts of appeals, however, have written that “[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.” *ACLU v. Reno*, 217 F.3d 162, 179 (3d Cir. 2000), vacated and remanded sub nom., Ashcroft v. ACLU, 122 S. Ct. 1700 (2002); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988).

radio and television broadcasts, because (1) “[t]he CDA’s broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet,” (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts “would justify a criminal prosecution,” and (3) radio and television, unlike the Internet, have, “as a matter of history . . . ‘received the most limited First Amendment protection,’ . . . in large part because warnings could not adequately protect the listener from unexpected program content. . . . [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.”1151

After the Supreme Court struck down the CDA, Congress enacted the Child Online Protection Act (COPA), which banned “material that is harmful to minors” on Web sites that have the objective of earning a profit.1152 The Third Circuit upheld a preliminary injunction against enforcement of the statute on the ground that, “because the standard by which COPA gauges whether material is ‘harmful to minors’ is based on identifying ‘contemporary community standards[,]’ the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.”1153 This is because it results in communications available to a nationwide audience being judged by the standards of the community most likely to be offended. The Supreme Court vacated and remanded, holding “that COPA’s reliance on community standards to identify ‘material that is harmful to minors’ does not by itself render the statute substantially overbroad for purposes of the First Amendment.”1154

The government may also take notice of objective conditions attributable to the commercialization of sexually explicit but non-obscene materials. Thus, the Court recognized a municipality’s authority to zone land to prevent deterioration of urban areas, upholding an ordinance providing that “adult theaters” showing motion pictures that depicted “specified sexual activities” or “specified anatomical areas” could not be located within 100 feet of any two other establishments included within the ordinance or within 500

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1151 521 U.S. at 867.
1152 “Harmful to minors” statutes ban the distribution of material to minors that is not necessarily obscene under the Miller test. In Ginsberg v. New York, 390 U.S. 629, 641 (1968), the Supreme Court, applying a rational basis standard, upheld New York’s harmful-to-minors statute.
1153 ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).
feet of a residential area. Similarly, an adult bookstore is subject to closure as a public nuisance if it is being used as a place for prostitution and illegal sexual activities, since the closure “was directed at unlawful conduct having nothing to do with books or other expressive activity.” However, a city was held constitutionally powerless to prohibit drive-in motion picture theaters from showing films containing nudity if the screen is visible from a public street or place. Also, the FCC was unable to justify a ban on transmission of “indecent” but not obscene telephone messages.

The Court has recently held, however, that “live” productions containing nudity can be regulated to a greater extent than had been allowed for films and publications. Whether this represents a distinction between live performances and other entertainment media, or whether instead it signals a more permissive approach overall to governmental regulation of non-obscene but sexually explicit material, remains to be seen. In Barnes v. Glen Theatre, Inc., the Court upheld application of Indiana’s public indecency statute to require that dancers in public performances of nude, non-obscene erotic dancing wear “pasties” and a “G-string” rather than appear totally nude. There was no opinion of the Court, three Justices viewing the statute as a permissible regulation of “societal order and morality,” one viewing it as a permissible means of regulating supposed secondary effects of prostitution and other

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1155 Young v. American Mini Theatres, 427 U.S. 50 (1976). Four of the five majority Justices thought the speech involved deserved less First Amendment protection than other expression, id. at 63–71, while Justice Powell, concurring, thought the ordinance was sustainable as a measure that served valid governmental interests and only incidentally affected expression. Id. at 73. Justices Stewart, Brennan, Marshall, and Blackmun dissented. Id. at 84, 88. Young was followed in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), upholding a city ordinance prohibiting location of adult theaters within 1,000 feet of residential areas, churches, or parks, and within one mile of any school. Rejecting the claim that the ordinance regulated content of speech, the Court indicated that such time, place and manner regulations are valid if “designed to serve a substantial governmental interest” and if “allow[ing] for reasonable alternative avenues of communication.” Id. at 50. The city had a substantial interest in regulating the “undesirable secondary effects” of such businesses. And, while the suitability for adult theaters of the remaining 520 acres within the city was disputed, the Court held that the theaters “must fend for themselves in the real estate market,” and are entitled only to “a reasonable opportunity to open and operate.” Id. at 54. The Supreme Court also upheld zoning of sexually oriented businesses in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990), and City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002).

1157 Erznoznik v. City of Jacksonville, 422 U.S. 204 (1975).
1160 501 U.S. at 568 (Chief Justice Rehnquist, joined by Justices O’Connor and Kennedy).
criminal activity, and a fifth Justice seeing no need for special First Amendment protection from a law of general applicability directed at conduct rather than expression. All but one of the Justices agreed that nude dancing is entitled to some First Amendment protection, but the result of *Barnes* was a bare minimum of protection. Numerous questions remain unanswered. In addition to the uncertainty over applicability of *Barnes* to regulation of the content of films or other shows in “adult” theaters, there is also the issue of its applicability to nudity in operas or theatrical productions not normally associated with commercial exploitation of sex. But broad implications for First Amendment doctrine are probably unwarranted. The Indiana statute was not limited in

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1161 501 U.S. at 581 (Justice Souter).
1164 Although Justice Souter relied on what were essentially zoning cases (*Young v. American Mini Theatres* and *Renton v. Playtime Theatres*) to justify regulation of expression itself, he nonetheless pointed out that a pornographic movie featuring one of the respondent dancers was playing nearby without interference by the authorities. This suggests that, at least with respect to direct regulation of the degree of permissible nudity, he might draw a distinction between “live” and film performances even while acknowledging the harmful “secondary” effects associated with both.
1165 The Court has not ruled directly on such issues. See *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975) (invalidating the denial of use of a public auditorium for a production of the musical “Hair,” in the absence of procedural safeguards that must accompany a system of prior restraint). Presumably the *Barnes* plurality’s public-morality rationale would apply equally to the “adult” stage and to the operatic theater, while Justice Souter’s secondary effects rationale would not. But the plurality ducked this issue, reinterpretng the lower court record to deny that Indiana had distinguished between “adult” and theatrical productions. 501 U.S. at 564 n.1 (Chief Justice Rehnquist); id. at 574 n.2 (Justice Scalia). On the other hand, the fact that the state authorities disclaimed any intent to apply the statute to theatrical productions demonstrated to dissenting Justice White (who was joined by Justices Marshall, Blackmun, and Stevens) that the statute was not a general prohibition on public nudity, but instead was targeted at “the communicative aspect of the erotic dance.” Id. at 591.
1166 The Court had only recently affirmed that music is entitled to First Amendment protection independently of the message conveyed by any lyrics (*Ward v. Rock Against Racism*, 491 U.S. 781 (1989)), so it seems implausible that the Court is signaling a narrowing of protection to only ideas and opinions. Rather, the Court seems
application to barrooms; had it been, then the Twenty-first Amendment would have afforded additional authority to regulate the erotic dancing.

In *Erie v. Pap’s A.M.*, \[1167\] the Supreme Court again upheld the application of a statute prohibiting public nudity to an “adult” entertainment establishment. Although there was again only a plurality opinion, parts of that opinion were joined by five justices. These five adopted Justice Souter’s position in *Barnes*, that the statute satisfied the *O’Brien* test because it was intended “to combat harmful secondary effects,” such as “prostitution and other criminal activity.” \[1168\] Justice Souter, however, though joining the plurality opinion, also dissented in part. He continued to believe that secondary effects were an adequate justification for banning nude dancing, but did not believe “that the city has made a sufficient evidentiary showing to sustain its regulation,” and therefore would have remanded the case for further proceedings. \[1169\] He acknowledged his “mistake” in *Barnes* in failing to make the same demand for evidence. \[1170\]

The plurality opinion found that Erie’s public nudity ban “regulates conduct, and any incidental impact on the expressive element of nude dancing is de minimis,” because Erie allowed dancers to perform wearing only pasties and G-strings. \[1171\] It may follow that “requiring dancers to wear pasties and G-strings may not greatly reduce … secondary effects, but *O’Brien* requires only that the regulation further the interest of combating such effects,” not that it further it to a particular extent. \[1172\] The plurality opinion did not address the question of whether statutes prohibiting public
nudity could be applied to serious theater, but its reliance on secondary effects suggests that they could not.

**Speech Plus—The Constitutional Law of Leafleting, Picketing, and Demonstrating**

Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech, broadcast speech, or writing in newspapers, periodicals, and pamphlets. There is also “expressive conduct,” which includes picketing, patrolling, and marching, distribution of leaflets and pamphlets and addresses to publicly assembled audiences, door-to-door solicitation and many forms of “sit-ins.” There is also a class of conduct now only vaguely defined which has been denominated “symbolic conduct,” which includes such actions as flag desecration and draft-card burnings. Because all these ways of expressing oneself involve conduct—action—rather than mere speech, they are all much more subject to regulation and restriction than is simple speech. Some of them may be forbidden altogether. But to the degree that these actions are intended to communicate a point of view the First Amendment is relevant and protects some of them to a great extent. Sorting out the conflicting lines of principle and doctrine is the point of this section.

**The Public Forum.**—In 1895, while on the highest court of Massachusetts, future Justice Oliver Wendell Holmes rejected a contention that public property was by right open to the public as a place where the right of speech could be recognized, and on review the United States Supreme Court endorsed Holmes’ view. Years later, beginning with *Hague v. CIO,* the Court reconsidered the issue. Justice Roberts wrote in *Hague:* “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” While this opinion was not itself joined by a majority of the Justices, the view was subsequently endorsed by the Court in several opinions.
The Roberts view was called into question in the 1960s, however, when the Court seemed to leave the issue open, and when a majority endorsed an opinion by Justice Black asserting his own narrower view of speech rights in public places. More recent decisions have restated and quoted the Roberts language from Hague, and that is now the position of the Court. Public streets and parks, including those adjacent to courthouses and foreign embassies, as well as public libraries and the grounds of legislative bodies, are open to public demonstrations, although the uses to which public areas are dedicated may shape the range of permissible expression and conduct that may occur there. Moreover, not all public properties are thereby public fo-

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1181 Narrowly drawn statutes which serve the State’s interests in security and in preventing obstruction of justice and influencing of judicial officers are constitutional. Cox v. Louisiana, 379 U.S. 559 (1965). A restriction on carrying signs or placards on the grounds of the Supreme Court is unconstitutional as applied to the public sidewalks surrounding the Court, since it does not sufficiently further the governmental purposes of protecting the building and grounds, maintaining proper order, or insulating the judicial decisionmaking process from lobbying. United States v. Grace, 461 U.S. 171 (1983).
1182 In Boos v. Barry, 485 U.S. 312 (1988), the Court struck down as content-based a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into “public odium” or “public disrepute.” However, another aspect of the District’s law, making it unlawful for three or more persons to congregate within 500 feet of an embassy and refuse to obey a police dispersal order, was upheld; under a narrowing construction, the law had been held applicable only to congregations directed at an embassy, and reasonably believed to present a threat to the peace or security of the embassy.
1183 E.g., Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining ordinance prohibiting noisemaking adjacent to school if that noise disturbs or threatens to disturb the operation of the school); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); Cameron v. Johnson, 390 U.S. 611 (1968) (preservation of access to courthouse);
rums. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government."1186 "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." Thus, by the nature of the use to which the property is put or by tradition, some sites are simply not as open for expression as streets and parks are.1188 But if government does open non-traditional forums for expressive activities, it may not discriminate on the basis of content or viewpoint in according access.1189 The Court in accepting the public forum concept has nevertheless been divided with respect to the reach of the doctrine. The concept is likely, therefore, to continue be a focal point of judicial debate in coming years.

Speech in public forums is subject to time, place, and manner regulations, which take into account such matters as control of traffic in the streets, the scheduling of two meetings or demonstrations at the same time and place, the preventing of blockages of building entrances, and the like.1191 Such regulations are closely scrutinized in order to protect free expression, and, to be valid, must be justified without reference to the content or subject matter

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1186 Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance prohibiting picketing “before or about” any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).


of speech, must serve a significant governmental interest, and must leave open ample alternative channels for communication of the information. A recent formulation is that a time, place, or manner regulation “must be narrowly tailored to serve the government’s legitimate, content-neutral interests, but . . . need not be the least-restrictive or least-intrusive means of doing so.” All that is required is that “the means chosen are not substantially broader than necessary to achieve the government’s interest . . . .” A content-neutral time, place, and manner regulation of the use of a public forum must also “contain adequate standards to guide the official’s decision and render it subject to effective judicial review.” Unlike a content-based licensing scheme, however, it need not “adhere to the procedural requirements set forth in Freedman.” These requirements include that the “burden of proving that the film [or other speech] is unprotected expression must rest on the censor,” and that the censor must, “within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.”

Corollary to the rule forbidding regulation premised on content is the principle, a merging of free expression and equal protection standards, that government may not discriminate between different kinds of messages in affording access. In order to ensure

1198 Freedman v. Maryland, 380 U.S. 1, 58-59 (1965).
1199 Police Department v. Mosley, 408 U.S. 92 (1972) (ordinance void that barred all picketing around school building except labor picketing); Carey v. Brown, 447 U.S. 455 (1980) (same); Widmar v. Vincent, 454 U.S. 263 (1981) (college rule permitting access to all student organizations except religious groups); Niemotko v. Maryland, 340 U.S. 268 (1951) (permission to use parks for some groups but not for others). These principles apply only to the traditional public forum and to the govern-
mentally created "limited public forum." Government may, without creating a limited public forum, place "reasonable" restrictions on access to nonpublic areas. See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983) (use of school mail system); and Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985) (charitable solicitation of federal employees at workplace). See also Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city may sell commercial advertising space on the walls of its rapid transit cars but refuse to sell political advertising space); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (denial of permission to Ku Klux Klan, allegedly in order to avoid Establishment Clause violation, to place a cross in plaza on grounds of state capitol); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (University's subsidy for printing costs of student publications, available for student "news, information, opinion, entertainment, or academic communications," could not be withheld because of the religious content of a student publication); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (school district rule prohibiting after-hours use of school property for showing of a film presenting a religious perspective on child-rearing and family values, but allowing after-hours use for non-religious social, civic, and recreational purposes).


In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Court reaffirmed the holdings of the earlier cases, and, additionally, both Justice Stewart, for the Court, id. at 155 n.4, and Justice Harlan concurring, id. at 162–64, asserted that the principles of Freedman v. Maryland, 380 U.S. 51 (1965), governing systems of prior censorship of motion pictures, were relevant to permit systems for parades and demonstrations. The Court also voided an injunction against a protest meeting that was issued ex parte, without notice to the protesters and with, of course, no opportunity for them to rebut the representations of the seekers of the injunction. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968).
these demonstrators resulted in violence,\textsuperscript{1202} and may not vary a demonstration licensing fee based on an estimate of the amount of hostility likely to be engendered,\textsuperscript{1203} but the Court's position with regard to the "heckler's veto," the governmental termination of a speech or demonstration because of hostile crowd reaction, remains quite unclear.\textsuperscript{1204} The Court has defined three different categories of public property for public forum analysis. First, there is the public forum, places such as streets and parks which have traditionally been used for public assembly and debate, where the government may not prohibit all communicative activity and must justify content-neutral time, place, and manner restrictions as narrowly tailored to serve some legitimate interest. Government may also open property for communicative activity, and thereby create a public forum. Such a forum may be limited—hence the expression "limited public forum"—for "use by certain groups, e.g., \textit{Widmar v. Vincent} (student groups), or for discussion of certain subjects, e.g., \textit{City of Madison Joint School District v. Wisconsin PERC} (school board business),"\textsuperscript{1205} but within the framework of such legitimate limitations discrimination based on content must be justified by compelling governmental interests.\textsuperscript{1206} Thirdly, government "may reserve the forum for its intended purposes, communicative or otherwise,

\textsuperscript{1202}The only precedent is \textit{Kunz v. New York}, 340 U.S. 290 (1951). The holding was on a much narrower basis, but in dictum the Court said: "The court below has mistakenly derived support for its conclusions from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder and violence." Id. at 294. A different rule applies to labor picketing. See \textit{Milk Wagon Drivers Local 753 v. Meadowmoor Dairies}, 312 U.S. 287 (1941) (background of violence supports prohibition of all peaceful picketing). The military may ban a civilian, previously convicted of destroying government property, from reentering a military base, and may apply the ban to prohibit the civilian from reentering the base for purposes of peaceful demonstration during an Armed Forces Day "open house." \textit{United States v. Albertini}, 472 U.S. 675 (1985).

\textsuperscript{1203}\textit{Forsyth County v. Nationalist Movement}, 505 U.S. 123 (1992) (a fee based on anticipated crowd response necessarily involves examination of the content of the speech, and is invalid as a content regulation).

\textsuperscript{1204}Dicta clearly indicate that a hostile reaction will not justify suppression of speech, \textit{Hague v. CIO}, 307 U.S. 496, 502 (1939); \textit{Cox v. Louisiana}, 379 U.S. 536, 551 (1965); \textit{Bachellar v. Maryland}, 397 U.S. 564, 567 (1970), and one holding appears to point this way. \textit{Gregory v. City of Chicago}, 394 U.S. 111 (1969). On the other hand, the Court has upheld a breach of the peace conviction of a speaker who refused to cease speaking upon the demand of police who feared imminent violence. \textit{Feiner v. New York}, 340 U.S. 315 (1951). In \textit{Niemotko v. Maryland}, 340 U.S. 268, 273 (1951) (concurring opinion), Justice Frankfurter wrote: "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd whatever its size and temper and not against the speaker."


\textsuperscript{1206}460 U.S. at 46 n.7.
as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”

The distinction between the second and third categories can therefore determine the outcome of a case, since speakers may be excluded from the second category only for a “compelling” governmental interest, while exclusion from the third category need only be “reasonable.” Yet, distinguishing between the two categories creates no small difficulty, as evidenced by recent case law.

The Court has held that a school system did not create a limited public forum by opening an interschool mail system to use by selected civic groups “that engage in activities of interest and educational relevance to students,” and that, in any event, if a limited public forum had thereby been created a teachers union rivaling the exclusive bargaining representative could still be excluded as not being “of a similar character” to the civic groups. Less problematic was the Court’s conclusion that utility poles and other municipal property did not constitute a public forum for the posting of signs. More problematic was the Court’s conclusion that the Combined Federal Campaign, the Federal Government’s forum for coordinated charitable solicitation of federal employees, is not a limited public forum. Exclusion of various advocacy groups from participation in the Campaign was upheld as furthering “reasonable” governmental interests in offering a forum to “traditional health and welfare charities,” avoiding the appearance of governmental favoritism of particular groups or viewpoints, and avoiding disruption of the federal workplace by controversy.

1207 460 U.S. at 46. Candidate debates on public television are an example of this third type of public forum: the “nonpublic forum.” Arkansas Educational Television Comm’n v. Forbes, 523 U.S. 666, 679 (1998). “Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine [i.e., public broadcasters ordinarily are entitled to the editorial discretion to engage in viewpoint discrimination], candidate debates present the narrow exception to this rule.” Id. at 675. A public broadcaster, therefore, may not engage in viewpoint discrimination in granting or denying access to candidates. Under the third type of forum analysis, however, it may restrict candidate access for “a reasonable, viewpoint-neutral” reason, such as a candidate’s “objective lack of support.” Id. at 683.

1208 Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983). This was a 5–4 decision, with Justice White’s opinion of the Court being joined by Chief Justice Burger and by Justices Blackmun, Rehnquist, and O’Connor, and with Justice Brennan’s dissent being joined by Justices Marshall, Powell, and Stevens. See also Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (student newspaper published as part of journalism class is not a public forum).

1209 City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding an outright ban on use of utility poles for signs). The Court noted that “it is of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum.” Id. at 815 n.32.

1210 Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985). Precedential value of Cornelius may be subject to question, since it was de-
pinpointed the government’s intention as the key to whether a public forum has been created: “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse.” Under this categorical approach, the government has wide discretion in maintaining the nonpublic character of its forums, and may regulate in ways that would be impermissible were it to designate a limited public forum.

Application of the doctrine continues to create difficulty. A majority of Justices could not agree on the public forum status of a sidewalk located entirely on Postal Service property. The Court was also divided over whether nonsecured areas of an airport terminal, including shops and restaurants, constituted a public forum. Holding that the terminal was not a public forum, the Court upheld restrictions on the solicitation and receipt of funds. But the Court also invalidated a ban on the sale or distribution of literature to passers-by within the same terminal, four Justices believing that the terminal constituted a public forum, and a fifth contending that the multipurpose nature of the forum (shopping mall as well as airport) made restrictions on expression less “reasonable.”

The Supreme Court has not explicitly held that the Internet is a public forum. It has, however, noted that the Internet “constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can ‘publish’ information.” Although particular Web sites, like particular newspapers, would not constitute public

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1211 473 U.S. at 802. Justice Blackmun criticized “the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers.” Id. at 813–14.

1212 Justice Kennedy criticized this approach in ISKCON v. Lee, 505 U.S. 672, 695 (1992) (concurring), contending that recognition of government’s authority to designate the forum status of property ignores the nature of the First Amendment as “a limitation on government, not a grant of power.” Justice Brennan voiced similar misgivings in his dissent in United States v. Kokinda: “public forum categories—originally conceived of as a way of preserving First Amendment rights—have been used ... as a means of upholding restrictions on speech.” 497 U.S. at 741 (emphasis in original) (citation omitted).


fora, the Internet as a whole has been viewed as a public forum, despite its lack of a historic tradition. A federal court of appeals wrote: “Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. Compare Forbes, 523 U.S. at 679 (“reject[ing] the view that traditional public forum status extends beyond its historic confines” [to a public television station]) with Reno v. ACLU, 521 U.S. 844, 851-53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web).” A three-judge federal district court wrote: “In providing even filtered Internet access, public libraries create a public forum open to any speaker around the world to communicate with library patrons via the Internet on a virtually unlimited number of topics."

**Quasi-Public Places.**—The First Amendment precludes government restraint of expression and it does not require individuals to turn over their homes, businesses or other property to those wishing to communicate about a particular topic. But it may be that in some instances private property is so functionally akin to public property that private owners may not forbid expression upon it. In Marsh v. Alabama, the Court held that the private owner of a company town could not forbid distribution of religious materials by a Jehovah’s Witness on a street in the town’s business district. The town, wholly owned by a private corporation, had all the attributes of any American municipality, aside from its ownership, and was functionally like any other town. In those circumstances, the Court reasoned, “the more an owner, for his advantage, opens up his property for use by the public in general, the more do his

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1217 Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternative citations to Forbes and Reno omitted).
1219 In Garner v. Louisiana, 368 U.S. 157, 185, 201–07 (1961), Justice Harlan, concurring, would have reversed breach of the peace convictions of “sit-in” demonstrators who conducted their “sit-in” at lunch counters of department stores. He asserted that the protesters were sitting at the lunch counters where they knew they would not be served in order to demonstrate that segregation at such counters existed. “Such a demonstration ... is as much a part of the ‘free trade in ideas’ ... as is verbal expression, more commonly thought of as ‘speech.’” Conviction for breach of peace was void in the absence of a clear and present danger of disorder. The Justice would not, however protect “demonstrations conducted on private property over the objection of the owner ... , just as it would surely not encompass verbal expression in a private home if the owner has not consented.” He had read the record to indicate that the demonstrators were invitees in the stores and that they had never been asked to leave by the owners or managers. See also Frisby v. Schultz, 487 U.S. 474 (1988) (government may protect residential privacy by prohibiting altogether picketing that targets a single residence).
rights become circumscribed by the statutory and constitutional rights of those who use it.” 1221 This precedent lay unused for some twenty years until the Court first indicated a substantial expansion of it, and then withdrew to a narrow interpretation.

First, in Food Employees Union v. Logan Valley Plaza, 1222 the Court held constitutionally protected the picketing of a store located in a shopping center by a union objecting to the store’s employment of nonunion labor. Finding that the shopping center was the functional equivalent of the business district involved in Marsh, the Court announced there was “no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the ‘business district’ is not under the same ownership.” 1223 “[T]he State,” said Justice Marshall, “may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.” 1224 The Court observed that it would have been hazardous to attempt to distribute literature at the entrances to the center and it reserved for future decision “whether respondents’ property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.” 1225

Four years later, the Court answered the reserved question in the negative, 1226 Several members of an antiwar group had attempted to distribute leaflets on the mall of a large shopping center, calling on the public to attend a protest meeting. Center guards invoked a trespass law against them, and the Court held they could rightfully be excluded. The center had not dedicated its property to a public use, the Court said; rather, it invited the public in specifically to carry on business with those stores located in the center. Plaintiffs’ leafleting, not directed to any store or to the customers qua customers of any of the stores, was unrelated to any activity in the center. Unlike the situation in Logan Valley

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1221 326 U.S. at 506.
1222 Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).
1223 391 U.S. at 319. Justices Black, Harlan, and White dissented. Id. at 327, 333, 337.
1224 391 U.S. at 319-20.
1225 391 U.S. at 320 n.9.
Plaza, there were reasonable alternatives by which plaintiffs could reach those who used the center. Thus, in the absence of a relationship between the purpose of the expressive activity and the business of the shopping center, the property rights of the center owner will overbalance the expressive rights to persons who would use their property for communicative purposes.

Then, the Court formally overruled Logan Valley Plaza, holding that shopping centers are not functionally equivalent to the company town involved in Marsh. Suburban malls may be the “new town squares” in the view of sociologists, but they are private property in the eye of the law. The ruling came in a case in which a union of employees engaged in an economic strike against one store in a shopping center was barred from picketing the store within the mall. The rights of employees in such a situation are generally to be governed by federal labor laws rather than the First Amendment, although there is also the possibility that state constitutional provisions may be interpreted more expansively by state courts to protect some kinds of public issue picketing in shopping centers and similar places. Henceforth, only when private property “has taken on all the attributes of a town” is it to be treated as a public forum.

Picketing and Boycotts by Labor Unions.—Though “logically relevant” to what might be called “public issue” picketing, the cases dealing with application of economic pressures by labor unions are set apart by different “economic and social interests,” and consequently are dealt with separately here.

It was in a labor case that the Court first held picketing to be entitled to First Amendment protection. Striking down a flat prohibition on picketing to influence or induce someone to do some-
thing, the Court said: “In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution ....” The Court further reasoned that “the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.”

The Court soon recognized several caveats. Peaceful picketing may be enjoined if it is associated with violence and intimidation. Although initially the Court continued to find picketing protected in the absence of violence, it soon decided a series of cases recognizing a potentially far-reaching exception: injunctions against peaceful picketing in the course of a labor controversy may be enjoined when such picketing is counter to valid state policies in a domain open to state regulation. These cases proceeded upon a distinction drawn by Justice Douglas. “Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulations.”

The apparent culmination of this course of decision was the

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1233 310 U.S. at 102.
1234 310 U.S. at 104-05. See also Carlson v. California, 310 U.S. 106 (1940). In AFL v. Swing, 312 U.S. 321 (1941), the Court held unconstitutional an injunction against peaceful picketing based on a State's common-law policy against picketing in the absence of an immediate dispute between employer and employee.
1235 Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).
1237 Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding on basis of state policy forbidding agreements in restraint of trade an injunction against picketing to persuade business owner not to deal with non-union peddlers); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950) (upholding injunction against union picketing protesting non-union proprietor's failure to maintain union shop card and observe union's limitation on weekend business hours); Building Service Emp. Intern. Union v. Gazzam, 339 U.S. 532 (1950) (injunction against picketing to persuade innkeeper to sign contract that would force employees to join union in violation of state policy that employees' choice not be coerced); Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953) (injunction against picketing in conflict with state's Right to Work Statute).
Vogt case, in which Justice Frankfurter broadly rationalized all the cases and derived the rule that "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." While the Court has not disavowed this broad language, the Vogt exception has apparently not swallowed the entire Thornhill rule. The Court has indicated that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment."

Public Issue Picketing and Parading.—The early cases held that picketing and parading were forms of expression entitled to some First Amendment protection. Those early cases did not, however, explicate the difference in application of First Amendment principles which the difference between mere expression and speech-plus would entail. Many of these cases concerned disruptions or feared disruptions of the public peace occasioned by the expressive activity and the ramifications of this on otherwise protected activity. A series of other cases concerned the permissible characteristics of permit systems in which parades and meetings were licensed, and more recent cases have expanded the procedural guarantees which must accompany a permissible licensing system. In one case, however, the Court applied the rules developed with regard to labor picketing to uphold an injunction against the picketing of a grocery chain by a black group to compel the chain to adopt a quota-hiring system for blacks. The Supreme Court affirmed the state courts' ruling that, while no law prevented

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1240 The dissenters in Vogt asserted that the Court had "come full circle" from Thornhill. 354 U.S. at 295 (Justice Douglas, joined by Chief Justice Warren and Justice Black).

1241 NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 63 (1964) (requiring – and finding absent in NLRA – "clearest indication" that Congress intended to prohibit all consumer picketing at secondary establishments). See also Youngdahl v. Rainfair, 355 U.S. 131, 139 (1957) (indicating that where violence is scattered through time and much of it was unconnected with the picketing, the State should proceed against the violence rather than the picketing).


the chain from hiring blacks on a quota basis, picketing to coerce the adoption of racially discriminatory hiring was contrary to state public policy.1245

A series of civil rights picketing and parading cases led the Court to formulate standards much like those it has established in the labor field, but more protective of expressive activity. The process began with Edwards v. South Carolina,1246 in which the Court reversed a breach of the peace conviction of several blacks for their refusal to disperse as ordered by police. The statute was so vague, the Court concluded, that demonstrators could be convicted simply because their presence “disturbed” people. Describing the demonstration upon the grounds of the legislative building in South Carolina’s capital, Justice Stewart observed that “[t]he circumstances in this case reflect an exercise of these basic [First Amendment] constitutional rights in their most pristine and classic form.”1247 In subsequent cases, the Court observed: “We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech.”1248 “The conduct which is the subject to this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited.”1249

The Court must determine, of course, whether the regulation is aimed primarily at conduct, as is the case with time, place, and manner regulations, or whether instead the aim is to regulate content of speech. In a series of decisions, the Court refused to permit restrictions on parades and demonstrations, and reversed convictions imposed for breach of the peace and similar offenses, when, in the Court’s view, disturbance had resulted from opposition to the messages being uttered by demonstrators.1250 More recently, how-

1245 Hughes v. Superior Court, 339 U.S. 460 (1950). This ruling, allowing content-based restriction, seems inconsistent with NAACP v. Claiborne Hardware, discussed infra under this topic.
1249 379 U.S. at 563.
ever, the Court upheld a ban on residential picketing in *Frisby v. Shultz*, finding that the city ordinance was narrowly tailored to serve the “significant” governmental interest in protecting residential privacy. As interpreted, the ordinance banned only picketing that targets a single residence, and it is unclear whether the Court would uphold a broader restriction on residential picketing.

In 1982 the Justices confronted a case, that, like *Hughes v. Superior Court*, involved a “contrary-to-public-policy” restriction on picketing and parading. *NAACP v. Claiborne Hardware Co.* may join in terms of importance such cases as *New York Times Co. v. Sullivan* in requiring the States to observe new and enhanced constitutional standards in order to impose liability upon persons for engaging in expressive conduct implicating the First Amendment. The case arose in the context of a protest against racial conditions by black citizens of Claiborne County, Mississippi. Listing demands that included desegregation of public facilities, hiring of black policemen, hiring of more black employees by local stores, and ending of verbal abuse by police, a group of several hundred blacks unanimously voted to boycott the area’s white merchants. The boycott was carried out through speeches and non-violent picketing and solicitation of others to cease doing business with the merchants. Individuals were designated to watch stores and identify blacks patronizing the stores; their names were then announced at meetings and published. Persuasion of others included social pressures and threats of social ostracism. Acts of violence did occur from time to time, directed in the main at blacks who did not observe the boycott.

The state Supreme Court imposed joint and several liability upon leaders and participants in the boycott, and upon the NAACP, for all of the merchants’ lost earnings during a seven-year period on the basis of the common law tort of malicious interference with the merchants’ business, holding that the existence of acts of physical force and violence and the use of force, violence, and threats to achieve the ends of the boycott deprived it of any First Amendment protection.

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1252 An earlier case involving residential picketing had been resolved on equal protection rather than First Amendment grounds, the ordinance at issue making an exception for labor picketing: *Carey v. Brown*, 447 U.S. 455 (1980).
1254 458 U.S. 886 (1982). The decision was unanimous, with Justice Rehnquist concurring in the result and Justice Marshall not participating. The Court’s decision was by Justice Stevens.
Reversing, the Court observed that the goals of the boycotters were legal and that most of their means were constitutionally protected; while violence was not protected, its existence alone did not deprive the other activities of First Amendment coverage. Thus, speeches and nonviolent picketing, both to inform the merchants of grievances and to encourage other blacks to join the boycott, were protected activities, and association for those purposes was also protected. The some members of the group might have engaged in violence or might have advocated violence did not result in loss of protection for association, absent a showing that those associating had joined with intent to further the unprotected activities. Nor was protection to be denied because nonparticipants had been urged to join by speech, by picketing, by identification, by threats of social ostracism, and by other expressive acts: “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.” The boycott had a disruptive effect upon local economic conditions and resulted in loss of business for the merchants, but these consequences did not justify suppression of the boycott. Government may certainly regulate certain economic activities having an incidental effect upon speech (e.g., labor picketing or business conspiracies to restrain competition), but that power of government does not extend to suppression of picketing and other boycott activities involving, as this case did, speech upon matters of public affairs with the intent of affecting governmental action and motivating private actions to achieve racial equality.

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1257 458 U.S. at 908.
1258 458 U.S. at 910. The Court cited Thomas v. Collins, 323 U.S. 516, 537 (1945), a labor picketing case, and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971), a public issues picketing case, which had also relied on the labor cases. Compare NLRB v. Retail Store Employees, 447 U.S. 607, 618–19 (1980) (Justice Stevens concurring) (labor picketing that coerces or “signals” others to engage in activity that violates valid labor policy, rather than attempting to engage reason, prohibitable). To the contention that liability could be imposed on “store watchers” and on a group known as “Black Hats” who also patrolled stores and identified black patronizers of the businesses, the Court did not advert to the “signal” theory. “There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others.” 458 U.S. at 925.
1259 See, e.g., FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411 (1990) (upholding application of per se antitrust liability to trial lawyers association’s boycott designed to force higher fees for representation of indigent defendants by court-appointed counsel).
1260 458 U.S. at 912-15. In evaluating the permissibility of government regulation in this context that has an incidental effect on expression, the Court applied the standards of United States v. O’Brien, 391 U.S. 367, 376–77 (1968), which requires that the regulation be within the constitutional power of government, that it further an important or substantial governmental interest, that it be unrelated
The critical issue, however, had been the occurrence of violent acts and the lower court’s conclusion that they deprived otherwise protected conduct of protection. “The First Amendment does not protect violence . . . . No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, ‘precision of regulation’ is demanded . . . . Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.”

In other words, the States may impose damages for the consequences of violent conduct, but they may not award compensation for the consequences of nonviolent, protected activity. Thus, the state courts had to compute, upon proof by the merchants, what damages had been the result of violence, and could not include losses suffered as a result of all the other activities comprising the boycott. And only those nonviolent persons who associated with others with an awareness of violence and an intent to further it could similarly be held liable. Since most of the acts of violence had occurred early on, in 1966, there was no way constitutionally that much if any of the later losses of the merchants could be recovered in damages. As to the head of the local NAACP, the Court refused to permit imposition of damages based upon speeches that could be read as advocating violence, inasmuch as any violent acts that occurred were some time after the speeches, and a “clear and present danger” analysis of the speeches would not find them punishable. The award against the NAACP fell with the denial of damages against its local head, and, in any event, the protected right of association required a rule that would immunize the

to the suppression of speech, and that it impose no greater restraint on expression than is essential to achievement of the interest.

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1261 458 U.S. at 916-17.
1262 458 U.S. at 917-18.
1264 458 U.S. at 920-26. The Court distinguished Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which an injunction had been sustained against both violent and nonviolent activity, not on the basis of special rules governing labor picketing, but because the violence had been “pervasive.” 458 U.S. at 923.
1265 458 U.S. at 926-29. The head’s “emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in Brandenburg v. Ohio, 395 U.S. 444 (1969).”
NAACP without a finding that it “authorized—either actually or apparently—or ratified unlawful conduct.”

_Claiborne Hardware_ is, thus, a seminal decision in the Court’s effort to formulate standards governing state power to regulate or to restrict expressive conduct that comes close to or crosses over the line to encompass some violent activities; it requires great specificity and the drawing of fine discriminations by government so as to reach only that portion of the activity that does involve violence or the threat of violence, and forecloses the kind of “public policy” limit on demonstrations that was approved in _Hughes v. Superior Court_.

More recently, disputes arising from anti-abortion protests outside abortion clinics have occasioned another look at principles distinguishing lawful public demonstrations from proscribable conduct. In _Madsen v. Women’s Health Center_, the Court refined principles governing issuance of “content-neutral” injunctions that restrict expressive activity. The appropriate test, the Court stated, is “whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant govern-

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1267 “Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.”

1268 “[P]etitioners’ ultimate objectives were unquestionably legitimate. The charge of illegality . . . derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.”

1269 “The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. [The burden can be met only] by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognizes the importance of avoiding the imposition of punishment for constitutionally protected activity…. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.” 458 U.S. at 933-34.


1268 The Court rejected the argument that the injunction was necessarily content-based or viewpoint-based because it applied only to anti-abortion protesters. “An injunction by its very nature applies only to a particular group (or individuals)…. It does so, however, because of the group’s past actions in the context of a specific dispute.” There had been no similarly disruptive demonstrations by pro-abortion factions at the abortion clinic. 512 U.S. at 762.
mental interest.” 1270 Regular time, place, and manner analysis (requiring that regulation be narrowly tailored to serve a significant governmental interest) “is not sufficiently rigorous,” the Court explained, “because injunctions create greater risk of censorship and discriminatory application, and because of the established principle that an injunction should be no broader than necessary to achieve its desired goals.” 1271 Applying its new test, the Court upheld an injunction prohibiting protesters from congregating, picketing, patrolling, demonstrating, or entering any portion of the public right-of-way within 36 feet of an abortion clinic. Similarly upheld were noise restrictions designed to ensure the health and well-being of clinic patients. Other aspects of the injunction, however, did not pass the test. Inclusion of private property within the 36-foot buffer was not adequately justified, nor was inclusion in the noise restriction of a ban on “images observable” by clinic patients. A ban on physically approaching any person within 300 feet of the clinic unless that person indicated a desire to communicate burdened more speech than necessary. Also, a ban on demonstrating within 300 feet of the residences of clinic staff was not sufficiently justified, the restriction covering a much larger zone than an earlier residential picketing ban that the Court had upheld. 1272

In Schenck v. Pro-Choice Network of Western New York, 1273 the Court applied Madsen to another injunction that placed restrictions on demonstrating outside an abortion clinic. The Court upheld the portion of the injunction that banned “demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities” what the Court called “fixed buffer zones.” 1274 It struck down a prohibition against demonstrating “within fifteen feet of any person or vehicles seeking access to or leaving such facilities” what it called “floating buffer zones.” 1275 The Court cited “public safety and order” 1276 in upholding the fixed buffer zones, but it found that the floating buffer zones “burden more speech than is necessary to serve the relevant governmental interests” 1277 because they make it “quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction.” 1278

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1270 512 U.S. at 765.  
1271 512 U.S. at 765.  
1273 519 U.S. 357 (1997).  
1274 519 U.S. at 366 n.3.  
1275 519 U.S. at 366 n.3.  
1276 519 U.S. at 376.  
1277 519 U.S. at 377.  
1278 519 U.S. at 378.
upheld a “provision, specifying that once sidewalk counselors who had entered the buffer zones were required to ‘cease and desist’ their counseling, they had to retreat 15 feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones.” 1279

In *Hill v. Colorado*, 1280 the Court upheld a Colorado statute that makes it unlawful, within 100 feet of the entrance to any health care facility, to “knowingly approach” within eight feet of another person, without that person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.” 1281 This decision is notable because it upheld a statute, and not, as in *Madsen* and *Schenck*, merely an injunction directed to particular parties. The Court found the statute to be a content-neutral time, place, and manner regulation of speech that “reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners....” 1282 The restrictions are content-neutral because they regulate only the places where some speech may occur, and because they apply equally to all demonstrators, regardless of viewpoint. Although the restrictions do not apply to all speech, the “kind of cursory examination” that might be required to distinguish casual conversation from protest, education, or counseling is not “problematic.” 1283 The law is narrowly tailored to achieve the state’s interests. The eight-foot restriction does not significantly impair the ability to convey messages by signs, and ordinarily allows speakers to come within a normal conversational distance of their targets. Because the statute allows the speaker to remain in one place, persons who wish to hand out leaflets may position themselves beside entrances near the path of oncoming pedestrians, and consequently are not deprived of the opportunity to get the attention of persons entering a clinic.

Different types of issues were presented by *Hurley v. Irish-American Gay Group*, 1284 in which the Court held that a state’s public accommodations law could not be applied to compel private organizers of a St. Patrick’s Day parade to accept in the parade a unit that would proclaim a message that the organizers did not wish to promote. Each participating unit affects the message conveyed by the parade organizers, the Court observed, and applica-

1279 519 U.S. at 367.
1280 530 U.S. 703 (2000).
1281 530 U.S. at 707.
1282 530 U.S. at 714.
1283 530 U.S. at 722.
tion of the public accommodations law to the content of the organizers’ message contravened the “fundamental rule . . . that a speaker has the autonomy to choose the content of his own message.”

**Leafleting, Handbilling, and the Like.**—In *Lovell v. City of Griffin*, the Court struck down a permit system applying to the distribution of circulars, handbills, or literature of any kind. The First Amendment, the Court said, “necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest.” State courts, responding to what appeared to be a hint in *Lovell* that prevention of littering and other interests might be sufficient to sustain a flat ban on literature distribution, upheld total prohibitions and were reversed. “Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions . . . . We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.”

In *Talley v. California*, the Court struck down an ordinance which banned all handbills that did not carry the name and address of the author, printer, and sponsor; conviction for violating the ordinance was set aside on behalf of one distributing leaflets urging boycotts against certain merchants because of their employment discrimination. The basis of the decision is not readily ascertainable. On the one hand, the Court celebrated anonymity. “Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all . . . . [I]dentification and fear of reprisal might deter perfectly peace-

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1285 515 U.S. at 573.
1286 303 U.S. 444 (1938).
1287 303 U.S. at 452.
1288 303 U.S. at 451.
1289 Schneider v. Town of Irvington, 308 U.S. 147, 161, 162 (1939). The Court noted that the right to distribute leaflets was subject to certain obvious regulations, id. at 160, and called for a balancing, with the weight inclined to the First Amendment rights. See also Jamison v. Texas, 318 U.S. 413 (1943).
1290 362 U.S. 60 (1960).
ful discussion of public matters of importance.” 1291 On the other hand, responding to the City’s defense that the ordinance was aimed at providing a means to identify those responsible for fraud, false advertising, and the like, the Court noted that it “is in no manner so limited ... [and] [t]herefore we do not pass on the validity of an ordinance limited to these or any other supposed evils.” 1292

Talley’s anonymity rationale was strengthened in McIntyre v. Ohio Elections Comm’n, 1293 invalidating Ohio’s prohibition on the distribution of anonymous campaign literature. There is a “respected tradition of anonymity in the advocacy of political causes,” the Court noted, and neither of the interests asserted by Ohio justified the limitation. The State’s interest in informing the electorate was “plainly insufficient,” and, while the more weighty interest in preventing fraud in the electoral process may be accomplished by a direct prohibition, it may not be accomplished indirectly by an indiscriminate ban on a whole category of speech. Ohio could not apply the prohibition, therefore, to punish anonymous distribution of pamphlets opposing a referendum on school taxes. 1294

The handbilling cases were distinguished in City Council v. Taxpayers for Vincent, 1295 in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. While a city’s concern over visual blight could be addressed by an anti-littering ordinance not restricting the expressive activity of distributing handbills, in the case of utility pole signs “it is the medium of expression itself” that creates the visual blight. Hence, the city’s prohibition, unlike a prohibition on distributing handbills,

1291 362 U.S. at 64, 65.
1292 362 U.S. at 64. In Zwickler v. Koota, 389 U.S. 241 (1967), the Court directed a lower court to consider the constitutionality of a statute which made it a criminal offense to publish or distribute election literature without identification of the name and address of the printer and of the persons sponsoring the literature. The lower court voided the law, but changed circumstances on a new appeal caused the Court to dismiss. Golden v. Zwickler, 394 U.S. 103 (1969).
1294 In Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), the Court struck down a Colorado statute requiring initiative-petition circulators to wear identification badges. It found that “the restraint on speech in this case is more severe than was the restraint in McIntyre” because “[p]etition circulation is a less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition... [T]he badge requirement compels personal name identification at the precise moment when the circulator’s interest in anonymity is greatest.” Id. at 199. In Watchtower Bible and Tract Society v. Village of Stratton, 122 S. Ct. 2080, 2089 (2002), concern for the right to anonymity was one reason that the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit.
was narrowly tailored to curtail no more speech than necessary to accomplish the city’s legitimate purpose. Ten years later, however, the Court unanimously invalidated a town’s broad ban on residential signs that permitted only residential identification signs, “for sale” signs, and signs warning of safety hazards. Prohibiting homeowners from displaying political, religious, or personal messages on their own property entirely foreclosed “a venerable means of communication that is unique and important,” and that is “an unusually cheap form of communication” without viable alternatives for many residents. The ban was thus reminiscent of total bans on leafleting, distribution of literature, and door-to-door solicitation that the Court had struck down in the 1930s and 1940s. The prohibition in Vincent was distinguished as not removing a “uniquely valuable or important mode of communication,” and as not impairing citizens’ ability to communicate.

**Sound Trucks, Noise.**—Physical disruption may occur by other means than the presence of large numbers of demonstrators. For example, the use of sound trucks to convey a message on the streets may disrupt the public peace and may disturb the privacy of persons off the streets. The cases, however, afford little basis for a general statement of constitutional principle. *Saia v. New York,* while it spoke of “loud-speakers as today indispensable instruments of effective public speech,” held only that a particular prior licensing system was void. A five-to-four majority upheld a statute in *Kovacs v. Cooper,* which was ambiguous with regard to whether all sound trucks were banned or only “loud and rau-cous” trucks and which the state court had interpreted as having the latter meaning. In another case, the Court upheld an antinoise ordinance which the state courts had interpreted narrowly to bar only noise that actually or immediately threatened to disrupt normal school activity during school hours. But the Court was careful to tie its ruling to the principle that the particular requirements of education necessitated observance of rules designed to

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1296 Justice Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.


1298 512 U.S. at 54, 57.

1299 512 U.S. at 54. The city’s legitimate interest in reducing visual clutter could be addressed by “more temperate” measures, the Court suggested. Id. at 58.


1301 336 U.S. 77 (1949).

preserve the school environment. More recently, reaffirming that government has "a substantial interest in protecting its citizens from unwelcome noise," the Court applied time, place, and manner analysis to uphold New York City's sound amplification guidelines designed to prevent excessive noise and assure sound quality at outdoor concerts in Central Park.

Door-to-Door Solicitation.—In one of the Jehovah's Witness cases, the Court struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in a community, the aims of the ordinance being to protect privacy, to protect the sleep of many who worked night shifts, and to protect against burglars posing as canvassers. The five-to-four majority concluded that on balance "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." More recently, while striking down an ordinance because of vagueness, the Court observed that it "has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officers the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." The Court indicated that its precedents supported measures that would require some form of notice to officials and the obtaining of identification in order that persons could canvas house-to-house for charitable or political purposes.

However, an ordinance that limited solicitation of contributions door-to-door by charitable organizations to those which use at least 75% of their receipts directly for charitable purposes, defined so as to exclude the expenses of solicitation, salaries, overhead, and other administrative expenses, was invalidated as overbroad.
vacy rationale was rejected, inasmuch as just as much intrusion was likely by permitted as by non-permitted solicitors. A rationale of prevention of fraud was unavailing, inasmuch as it could not be said that all associations that spent more than 25% of their receipts on overhead were actually engaged in a profit making enterprise, and, in any event, more narrowly drawn regulations, such as disclosure requirements, could serve this governmental interest.

_Schaumburg_ was extended in _Secretary of State of Maryland v. Joseph H. Munson Co._, and _Riley v. National Federation of the Blind_. In _Munson_ the Court invalidated a Maryland statute limiting professional fundraisers to 25% of the amount collected plus certain costs, and allowing waiver of this limitation if it would effectively prevent the charity from raising contributions. And in _Riley_ the Court invalidated a North Carolina fee structure containing even more flexibility. The Court sees “no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent,” and is similarly hostile to any scheme that shifts the burden to the fundraiser to show that a fee structure is reasonable. Moreover, a requirement that fundraisers disclose to potential donors the percentage of donated funds previously used for charity was also invalidated in _Riley_, the Court indicating that the “more benign and narrowly tailored” alternative of disclosure to the state (accompanied by state publishing of disclosed percentages) could make the information publicly available without so threatening the effectiveness of solicitation.

In _Watchtower Bible and Tract Society v. Village of Stratton_, the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy—religious, political, or commercial—without first registering with the mayor and receiving a permit. “It is offensive to the very notion of a free society,” the

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1262 AMENDMENT 1—RELIGION, FREE SPEECH, ETC.

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**Footnotes:**


1310 A fee of up to 20% of collected receipts was deemed reasonable, a fee between 20 and 35% was permissible if the solicitation involved advocacy or the dissemination of information, and a fee in excess of 35% was presumptively unreasonable, but could be upheld upon one of two showings: that advocacy or dissemination of information was involved, or that otherwise the charity’s ability to collect money or communicate would be significantly diminished.

1311 487 U.S. at 793.

1312 487 U.S. at 800. North Carolina’s requirement for licensing of professional fundraisers was also invalidated in _Riley_, id. at 801–02.

1313 122 S. Ct. 2080 (2002).
Court wrote, “that a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” The ordinance violated the right to anonymity, burdened the freedom of speech of those who hold “religious or patriotic views” that prevent them from applying for a license, and effectively banned “a significant amount of spontaneous speech” that might be engaged in on a holiday or weekend when it was not possible to obtain a permit.

**The Problem of “Symbolic Speech”**.—Very little expression is “mere” speech. If it is oral, it may be noisy enough to be disturbing, and, if it is written, it may be litter; in either case, it may amount to conduct that is prohibitable in specific circumstances. Moving beyond these simple examples, one may see as well that conduct may have a communicative content, intended to express a point of view. Expressive conduct may consist in flying a particular flag as a symbol or in refusing to salute a flag as a symbol. Sit-ins and stand-ins may effectively express a protest about certain things.

Justice Jackson wrote: “There is no doubt that, in connection with the pledge, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind.” When conduct or action has a communicative content to it, governmental regulation or prohibition implicates the First Amendment, but this does not mean that such conduct or action is necessarily immune from governmental process. Thus, while the Court has had few opportu-

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1263AMENDMENT 1—RELIGION, FREE SPEECH, ETC.

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1314 122 S. Ct. at 2089.
1315 122 S. Ct. at 2090.
1317 E.g., Schneider v. Town of Irvington, 308 U.S. 147 (1939).
1321 In Brown v. Louisiana, 383 U.S. 131 (1966), the Court held protected a peaceful, silent stand-in in a segregated public library. Speaking of speech and assembly, Justice Fortas said for the Court: “As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.” Id. at 141–42. See also Garner v. Louisiana, 368 U.S. 157, 185, 201 (1961) (Justice Harlan concurring). On a different footing is expressive conduct in a place where such conduct is prohibited for reasons other than suppressing speech. See Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding Park Service restriction on overnight sleeping as applied to demonstrators wishing to call attention to the plight of the homeless).
nities to formulate First Amendment standards in this area, in up-
holding a congressional prohibition on draft-card burnings, it has
stated the generally applicable rule. “[A] government regulation is
sufficiently justified if it is within the constitutional power of Gov-
ernment; if it furthers an important or substantial governmental
interest; if the governmental interest is unrelated to the suppres-
sion of free expression; and if the incidental restriction on alleged
First Amendment freedom is no greater than is essential to the fur-
therance of that government interest.” 1323 The Court has suggested
that this standard is virtually identical to that applied to time,
place, or manner restrictions on expression. 1324

Although almost unanimous in formulating and applying the
test in O’Brien, the Court splintered when it had to deal with one
of the more popular forms of “symbolic” conduct of the late 1960s
and early 1970s—flag burning and other forms of flag desecration.
The Court remains closely divided to this day. No unifying theory
capable of application to a wide range of possible flag abuse actions
emerged from the early cases. Thus, in Street v. New York, 1325
the defendant had been convicted under a statute punishing desecra-
tion “by words or act” upon evidence that when he burned the flag
he had uttered contemptuous words. The conviction was set aside
because it might have been premised on his words alone or on his
words and the act together, and no valid governmental interest
supported penalizing verbal contempt for the flag. 1326

A few years later the Court reversed two other flag desecration
convictions, one on due process/vagueness grounds, the other under
the First Amendment. were decided by the Court in a manner that
indicated an effort to begin to resolve the standards of First
Amendment protection of “symbolic conduct.” In Smith v.
Goguen, 1327 a statute punishing anyone who “publicly . . . treats
contemptuously the flag of the United States . . . ,” was held uncon-
stitutionally vague, and a conviction for wearing trousers with a

1324 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 & n.8
1325 394 U.S. at 581-93. Four dissenters concluded that the First Amendment did
not preclude a flat proscription of flag burning or flag desecration for expressive
purposes. Id. at 594 (Chief Justice Warren), 609 (Justice Black), 610 (Justice White),
and 615 (Justice Fortas). In Radich v. New York, 401 U.S. 531 (1971), aff’d 26
N.Y.2d 114, 257 N.E.2d 30 (1970), an equally divided Court, Justice Douglas not
participating, sustained a flag desecration conviction of one who displayed sculptures
in a gallery, using the flag in some apparently sexually bizarre ways to reg-
ister a social protest. Defendant subsequently obtained his release on habeas corpus,
United States ex rel. Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972), cert.
small United States flag sewn to the seat was overturned. The language subjected the defendant to criminal liability under a standard “so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag.”

The First Amendment was the basis for reversal in Spence v. Washington, in which a conviction under a statute punishing the display of a United States flag to which something is attached or superimposed was set aside; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, the factual context and environment in which it was undertaken, the Court held it to be protected. The context included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the State had a valid interest in preserving the flag as a national symbol, but whether that interest extended beyond protecting the physical integrity of the flag was left unclear.

The underlying assumption that flag burning could be prohibited as a means of protecting the flag’s symbolic value was later rejected. Twice, in 1989 and again in 1990, the Court held that prosecutions for flag burning at a public demonstration violated the First Amendment. First, in Texas v. Johnson the Court rejected a state desecration statute designed to protect the flag’s symbolic value, and then in United States v. Eichman rejected a more limited federal statute purporting to protect only the flag’s physical integrity. Both cases were decided by 5–to–4 votes, with Justice Brennan writing the Court’s opinions.

The Texas statute invalid...
dated in Johnson defined the prohibited act of “desecration” as any physical mistreatment of the flag that the actor knew would seriously offend other persons. This emphasis on causing offense to others meant that the law was not “unrelated to the suppression of free expression” and that consequently the deferential standard of United States v. O’Brien was inapplicable. Applying strict scrutiny, the Court ruled that the State’s prosecution of someone who burned a flag at a political protest was not justified under the State’s asserted interest in preserving the flag as a symbol of nationhood and national unity. The Court’s opinion left little doubt that the existing Federal statute, 18 U.S.C. § 700, and the flag desecration laws of 47 other states would suffer a similar fate in a similar case. Doubt remained, however, as to whether the Court would uphold a “content-neutral” statute protecting the physical integrity of the flag.

Immediately following Johnson, Congress enacted a new flag protection statute providing punishment for anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States.” The law was designed to be content-neutral, and to protect the “physical integrity” of the flag. Nonetheless, in overturning convictions of flag burners, the Court found that the law suffered from “the same fundamental flaw” as the Texas law in Johnson. The government’s underlying interest, characterized by the Court as resting upon “a perceived need to preserve the flag’s status as a symbol of our Nation and certain national ideals,” still related to the suppression of free expression. Support for this interpretation was found in the fact that most of the prohibited acts are usually associated with disrespectful treatment of the flag; this suggested to the Court “a focus on those acts likely to damage the flag’s symbolic value.” As in Johnson, such a law could not withstand “most exacting scrutiny” analysis.

The Court’s ruling in Eichman rekindled congressional efforts, postponed with enactment of the Flag Protection Act, to amend the Constitution to authorize flag desecration legislation at the federal

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1335 See H.R. Rep. No. 231, 101st Cong., 1st Sess. 8 (1989) (“The purpose of the bill is to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner”).
1336 United States v. Eichman, 496 U.S. at 316.
1337 496 U.S. at 317.
and state levels. In both the House and the Senate these measures failed to receive the necessary two-thirds vote.  

RIGHTS OF ASSEMBLY AND PETITION

Background and Development

The right of petition took its rise from the modest provision made for it in chapter 61 of Magna Carta (1215). To this meager beginning are traceable, in some measure, Parliament itself and its procedures for the enactment of legislation, the equity jurisdiction of the Lord Chancellor, and proceedings against the Crown by “petition of right.” Thus, while the King summoned Parliament for the purpose of supply, the latter—but especially the House of Commons—petitioned the King for a redress of grievances as its price for meeting the financial needs of the Monarch, and as it increased in importance it came to claim the right to dictate the form of the King’s reply, until, in 1414, Commons declared itself to be “as well assenters as petitioners.” Two hundred and fifty years later, in 1669, Commons further resolved that every commoner in England possessed “the inherent right to prepare and present petitions” to it “in case of grievance,” and of Commons “to receive the same” and to judge whether they were “fit” to be received. Finally Chapter 5 of the Bill of Rights of 1689 asserted the right of the subjects to petition the King and “all commitments and prosecutions for such petitioning to be illegal.”

Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if the First Amendment read: “the right of the people peaceably to assemble” in order to “petition the government.” Today, however, the right of peaceful assembly is, in the language of the Court, “cognate to those of free speech and free press and is equally fundamental…. [It] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause…. The holding of meetings for peaceful political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on

1339 C. Stephenson & F. Marcham, Sources of English Constitutional History 125 (1937).
1340 12 Encyclopedia of the Social Sciences 98 (1934).
1341 United States v. Cruikshank, 92 U.S. 542, 552 (1876), reflects this view.
that score. The question . . . is not as to the auspices under which
the meeting is held but as to its purposes; not as to the relation
of the speakers, but whether their utterances transcend the bounds
of the freedom of speech which the Constitution protects."1342
Furthermore, the right of petition has expanded. It is no longer con-
fined to demands for "a redress of grievances," in any accurate
meaning of these words, but comprehends demands for an exercise
by the Government of its powers in furtherance of the interest and
prosperity of the petitioners and of their views on politically con-
tentious matters.1343 The right extends to the "approach of citizens
or groups of them to administrative agencies (which are both crea-
tures of the legislature, and arms of the executive) and to courts,
the third branch of Government. Certainly the right to petition ex-
tends to all departments of the Government. The right of access to
the courts is indeed but one aspect of the right of petition."1344

The right of petition recognized by the First Amendment first
came into prominence in the early 1830's, when petitions against
slavery in the District of Columbia began flowing into Congress in
a constantly increasing stream, which reached its climax in the
winter of 1835. Finally on January 28, 1840, the House adopted as
a standing rule: "That no petition, memorial, resolution, or other
paper praying the abolition of slavery in the District of Columbia,
or any State or Territories of the United States in which it now ex-
ists, shall be received by this House, or entertained in any way
whatever." Because of efforts of John Quincy Adams, this rule was
repealed five years later. 1345 For many years now the rules of the
House of Representatives have provided that members having peti-
tions to present may deliver them to the Clerk and the petitions,
except such as in the judgment of the Speaker are of an obscene
or insulting character, shall be entered on the Journal and the
Clerk shall furnish a transcript of such record to the official report-
ers of debates for publication in the Record.1346 Even so, petitions
for the repeal of the espionage and sedition laws and against mili-
tary measures for recruiting resulted, in World War I, in imprison-

Lowry, 301 U.S. 242 (1937).
(1961).
1344 California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510
Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980), cert. denied, 449 U.S. 842 (1980)
(boycott of States not ratifying ERA may not be subjected to antitrust suits for eco-
nomic losses because of its political nature).
1345 The account is told in many sources. E.g., S. Bemis, John Quincy Adams
And the Union, chs. 17, 18 and pp. 446–47 (1956).
1346 Rule 22, ¶ 1, Rules of the House of Representatives, H.R. Doc. No. 256,
ment. Processions for the presentation of petitions in the United States have not been particularly successful. In 1894 General Coxey of Ohio organized armies of unemployed to march on Washington and present petitions, only to see their leaders arrested for unlawfully walking on the grass of the Capitol. The march of the veterans on Washington in 1932 demanding bonus legislation was defended as an exercise of the right of petition. The Administration, however, regarded it as a threat against the Constitution and called out the army to expel the bonus marchers and burn their camps. Marches and encampments have become more common since, but the results have been mixed.

**The Cruikshank Case.**—The right of assembly was first before the Supreme Court in 1876 in the famous case of *United States v. Cruikshank* The Enforcement Act of 1870 forbade conspiring or going onto the highways or onto the premises of another to intimidate any other person from freely exercising and enjoying any right or privilege granted or secured by the Constitution of the United States. Defendants had been indicted under this Act on charges of having deprived certain citizens of their right to assemble together peaceably with other citizens “for a peaceful and lawful purpose.” While the Court held the indictment inadequate because it did not allege that the attempted assembly was for a purpose related to the Federal Government, its dicta broadly declared the outlines of the right of assembly. “The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States.” Absorption of the assembly and petition clauses into the liberty protected by the due process clause of the Fourteenth Amendment

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1347 1918 ATT’Y GEN. ANN. REP. 48.
1348 See, however, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), in which the Court gave as one of its reasons for striking down a tax on persons leaving the State its infringement of the right of every citizen to come to the seat of government and to transact any business he might have with it.
1349 92 U.S. 542 (1876).
means, or course, that the Cruikshank limitation is no longer applicable.\textsuperscript{1352}

\textbf{The Hague Case}.—Illustrative of this expansion is Hague v. CIO,\textsuperscript{1353} in which the Court, though splintered with regard to reasoning and rationale, struck down an ordinance which vested an uncontrolled discretion in a city official to permit or deny any group the opportunity to conduct a public assembly in a public place. Justice Roberts, in an opinion which Justice Black joined and with which Chief Justice Hughes concurred, found protection against state abridgment of the rights of assembly and petition in the privileges and immunities clause of the Fourteenth Amendment. “The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.”\textsuperscript{1354} Justices Stone and Reed invoked the due process clause of the Fourteenth Amendment for the result, thereby claiming the rights of assembly and petition for aliens as well as citizens. “I think respondents’ right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioner have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose.”\textsuperscript{1355} This due process view of Justice Stone has carried the day over the privileges and immunities approach.

Later cases tend to merge the rights of assembly and petition into the speech and press clauses, and, indeed, all four rights may well be considered as elements of an inclusive right to freedom of expression. Certain conduct may call forth a denomination of petition\textsuperscript{1356} or assembly,\textsuperscript{1357} but there seems little question that no

\textsuperscript{1353} 307 U.S. 496 (1939).
\textsuperscript{1354} 307 U.S. at 515. For another holding that the right to petition is not absolute, see McDonald v. Smith, 472 U.S. 479 (1985) (the fact that defamatory statements were made in the context of a petition to government does not provide absolute immunity from libel).
\textsuperscript{1355} 307 U.S. at 525.
\textsuperscript{1357} \textit{E.g.}, Coates v. City of Cincinnati, 402 U.S. 611 (1971).
AMENDMENT 1—RELIGION, FREE SPEECH, ETC.  1271

substantive issue turns upon whether one may be said to be engaged in speech or assembly or petition.
BEARING ARMS

SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

IN GENERAL

In spite of extensive recent discussion and much legislative action with respect to regulation of the purchase, possession, and transportation of firearms, as well as proposals to substantially curtail ownership of firearms, there is no definitive resolution by the courts of just what right the Second Amendment protects. The opposing theories, perhaps oversimplified, are an “individual rights” thesis whereby individuals are protected in ownership, possession, and transportation, and a “states’ rights” thesis whereby it is said the purpose of the clause is to protect the States in their authority to maintain formal, organized militia units.¹ Whatever the Amendment may mean, it is a bar only to federal action, not extending to state ² or private ³ restraints. The Supreme Court has given effect to the dependent clause of the Amendment in the only case in which it has tested a congressional enactment against the constitutional prohibition, seeming to affirm individual protection


but only in the context of the maintenance of a militia or other such public force.

In United States v. Miller, the Court sustained a statute requiring registration under the National Firearms Act of sawed-off shotguns. After reciting the original provisions of the Constitution dealing with the militia, the Court observed that “[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view.” The significance of the militia, the Court continued, was that it was composed of “civilians primarily, soldiers on occasion.” It was upon this force that the States could rely for defense and securing of the laws, on a force that “comprised all males physically capable of acting in concert for the common defense,” who, “when called for service . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” Therefore, “[i]n the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than 18 inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”

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4307 U.S. 174 (1939). The defendants had been released on the basis of the trial court determination that prosecution would violate the Second Amendment and no briefs or other appearances were filed on their behalf; the Court acted on the basis of the Government’s representations.

5Id. at 178.

6Id. at 179.

7Id. at 178. In Cases v. United States, 131 F. 2d 916, 922 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943), the court, upholding a similar provision of the Federal Firearms Act, said: “Apparently, then, under the Second Amendment, the federal government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia. See Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (dictum: Miller holds that the “Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia’”). See also Hickman v. Block, 81 F.3d 98 (9th Cir.) (plaintiff lacked standing to challenge denial of permit to carry concealed weapon, because Second Amendment is a right held by states, not by private citizens), cert. denied 519 U.S. 912 (1996); United States v. Gomez, 92 F.3d 770, 775 n. 7 (9th Cir. 1996) (interpreting federal prohibition on possession of firearm by a felon as having a justification defense “ensures that [the provision] does not collide with the Second Amendment”). United States v. Wright, 117 F.3d 1265 (11th Cir.), cert. denied 522 U.S. 1007 (1997) (member of Georgia unorganized militia unable to establish that his possession of machine guns and pipe bombs bore any connection to the preservation or efficiency of a well regulated militia).
Since this decision, Congress has placed greater limitations on the receipt, possession, and transportation of firearms, and proposals for national registration or prohibition of firearms altogether have been made. At what point regulation or prohibition of what classes of firearms would conflict with the Amendment, if at all, the *Miller* case does little more than cast a faint degree of illumination toward an answer. Pointing out that interest in the “character of the Second Amendment right has recently burgeoned,” Justice Thomas, concurring in the Court’s invalidation (on other grounds) of the Brady Handgun Violence Prevention Act, questioned whether the Second Amendment bars federal regulation of gun sales, and suggested that the Court might determine “at some future date ... whether Justice Story was correct ... that the right to bear arms ‘has justly been considered, as the palladium of the liberties of a republic.’”

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10 Printz v. United States, 521 U.S. 898, 937-39 (1997) (quoting 3 Commentaries § 1890, p. 746 (1833)). Justice Scalia, in extra-judicial writing, has sided with the individual rights interpretation of the Amendment. See ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW, 136-37 n.13 (A. Gutmann, ed., 1997) (responding to Professor Tribe’s critique of “my interpretation of the Second Amendment as a guarantee that the federal government will not interfere with the individual’s right to bear arms for self-defense”).
In fact, save for the curious case of Engblom v. Carey, 677 F. 2d 957 (2d Cir. 1982), on remand, 572 F. Supp. 44 (S.D.N.Y.), aff'd. per curiam, 724 F.2d 28 (2d Cir. 1983), there has been no judicial explication at all.

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QUARTERING SOLDIERS

THIRD AMENDMENT

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

IN GENERAL

There has been no Supreme Court explication of this Amendment, which was obviously one guarantee of the preference for the civilian over the military.¹

¹In fact, save for the curious case of Engblom v. Carey, 677 F. 2d 957 (2d Cir. 1982), on remand, 572 F. Supp. 44 (S.D.N.Y.), aff'd. per curiam, 724 F.2d 28 (2d Cir. 1983), there has been no judicial explication at all.
FOURTH AMENDMENT

SEARCH AND SEIZURE

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SEARCH AND SEIZURE

FOURTH AMENDMENT

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

SEARCH AND SEIZURE

History and Scope of the Amendment

History.—Few provisions of the Bill of Rights grew so directly out of the experience of the colonials as the Fourth Amendment, embodying as it did the protection against the utilization of the “writs of assistance.” But while the insistence on freedom from unreasonable searches and seizures as a fundamental right gained expression in the Colonies late and as a result of experience, there was also a rich English experience to draw on. “Every man’s house is his castle” was a maxim much celebrated in England, as was demonstrated in Semayne’s Case, decided in 1603. A civil case of execution of process, Semayne’s Case nonetheless recognized the right of the homeowner to defend his house against unlawful entry even by the King’s agents, but at the same time recognized the authority of the appropriate officers to break and enter upon notice in order to arrest or to execute the King’s process. Most famous of the English cases was Entick v. Carrington, one of a series of civil actions against state officers who, pursuant to general warrants, had raided many homes and other places in search of materials

1 Apparently the first statement of freedom from unreasonable searches and seizures appeared in The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772, in the drafting of which Samuel Adams took the lead. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 199, 205-06 (1971).
2 5 Coke’s Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604). One of the most forceful expressions of the maxim was that of William Pitt in Parliament in 1763: “The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.”
3 19 Howell’s State Trials 1029, 95 Eng. 807 (1705).
connected with John Wilkes’ polemical pamphlets attacking not only governmental policies but the King himself. 4

Entick, an associate of Wilkes, sued because agents had forcibly broken into his house, broken into locked desks and boxes, and seized many printed charts, pamphlets and the like. In an opinion sweeping in terms, the court declared the warrant and the behavior it authorized subversive “of all the comforts of society,” and the issuance of a warrant for the seizure of all of a person’s papers rather than only those alleged to be criminal in nature “contrary to the genius of the law of England.” 5 Besides its general character, said the court, the warrant was bad because it was not issued on a showing of probable cause and no record was required to be made of what had been seized. Entick v. Carrington, the Supreme Court has said, is a “great judgment,” “one of the landmarks of English liberty,” “one of the permanent monuments of the British Constitution,” and a guide to an understanding of what the Framers meant in writing the Fourth Amendment. 6

In the colonies, smuggling rather than seditious libel afforded the leading examples of the necessity for protection against unreasonable searches and seizures. In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize “prohibited and uncustomed” goods, and commanding all subjects to assist in these endeavors. The writs once issued remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain the issuance of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism. 7 Otis lost and the writs were issued and utilized, but his arguments were much cited in the colonies not only on the immediate subject but also with regard to judicial review.

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595 Eng. 817, 818.


Scope of the Amendment.—The language of the provision which became the Fourth Amendment underwent some modest changes on its passage through the Congress, and it is possible that the changes reflected more than a modest significance in the interpretation of the relationship of the two clauses. Madison's introduced version provided “The rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.” As reported from committee, with an inadvertent omission corrected on the floor, the section was almost identical to the introduced version, and the House defeated a motion to substitute “and no warrant shall issue” for “by warrants issuing” in the committee draft. In some fashion, the rejected amendment was inserted in the language before passage by the House and is the language of the ratified constitutional provision.

As noted above, the noteworthy disputes over search and seizure in England and the colonies revolved about the character of warrants. There were, however, lawful warrantless searches, primarily searches incident to arrest, and these apparently gave rise to no disputes. Thus, the question arises whether the Fourth Amendment's two clauses must be read together to mean that the only searches and seizures which are “reasonable” are those which meet the requirements of the second clause, that is, are pursuant to warrants issued under the prescribed safeguards, or whether the two clauses are independent, so that searches under warrant must comply with the second clause but that there are “reasonable” searches under the first clause which need not comply with the second clause. This issue has divided the Court for some time, has

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8 1 ANNALS OF CONGRESS 434-35 (June 8, 1789).
9 The word “secured” was changed to “secure” and the phrase “against unreasonable searches and seizures” was reinstated. Id. at 754 (August 17, 1789).
10 It has been theorized that the author of the defeated revision, who was chairman of the committee appointed to arrange the amendments prior to House passage, simply inserted his provision and that it passed unnoticed. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 101-03 (1937).
11 The amendment was originally in one clause as quoted above; it was the insertion of the defeated amendment to the language which changed the text into two clauses and arguably had the effect of extending the protection against unreasonable searches and seizures beyond the requirements imposed on the issuance of warrants. It is also possible to read the two clauses together to mean that some seizures even under warrants would be unreasonable, and this reading has indeed been effectuated in certain cases, although for independent reasons. Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967); but see id. at 303 (reserving the question
seen several reversals of precedents, and is important for the resolution of many cases. It is a dispute which has run most consistently throughout the cases involving the scope of the right to search incident to arrest. While the right to search the person of the arrestee without a warrant is unquestioned, how far afield into areas within and without the control of the arrestee a search may range is an interesting and crucial matter.

The Court has drawn a wavering line. In *Harris v. United States*, it approved as “reasonable” the warrantless search of a four-room apartment pursuant to the arrest of the man found there. A year later, however, a reconstituted Court majority set aside a conviction based on evidence seized by a warrantless search pursuant to an arrest and adopted the “cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable.” This rule was set aside two years later by another reconstituted majority which adopted the premise that the test “is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.” Whether a search is reasonable, the Court said, “must find resolution in the facts and circumstances of each case.” However, the Court soon returned to its emphasis upon the warrant. “The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that ‘no Warrants shall issue, but upon probable cause,’ plays a crucial part.” Therefore, “the police must, whenever practicable, obtain advance judicial approval of searches and seizures through a warrant procedure.” Exceptions to searches under warrants were to

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12 Whether “there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.”


14 Whether or not there is to be a rule or a principle generally preferring or requiring searches pursuant to warrant to warrantless searches, however, has ramifications far beyond the issue of searches pursuant to arrest. *United States v. United States District Court*, 407 U.S. 297, 320 (1972).


be closely contained by the rationale undergirding the necessity for the exception, and the scope of a search under one of the exceptions was similarly limited. 19

During the 1970s the Court was closely divided on which standard to apply. 20 For a while, the balance tipped in favor of the view that warrantless searches are per se unreasonable, with a few carefully prescribed exceptions. 21 Gradually, guided by the variable expectation of privacy approach to coverage of the Fourth Amendment, the Court broadened its view of permissible exceptions and of the scope of those exceptions. 22

By 1992, it was no longer the case that the "warrants-with-narrow-exceptions" standard normally prevails over a "reasonable-
ness” approach. Exceptions to the warrant requirement have multiplied, tending to confine application of the requirement to cases that are exclusively “criminal” in nature. And even within that core area of “criminal” cases, some exceptions have been broadened. The most important category of exception is that of administrative searches justified by “special needs beyond the normal need for law enforcement.” Under this general rubric the Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons, and has upheld drug testing of public and transportation employees. In all of these instances the warrant and probable cause requirements are dispensed with in favor of a reasonableness standard that balances the government’s regulatory interest against the individual’s privacy interest; in all of these instances the government’s interest has been found to outweigh the individual’s. The broad scope of the administrative search exception is evidenced by the fact that an overlap between law enforcement objectives and administrative “special needs” does not result in application of the warrant requirement; instead, the Court has upheld warrantless inspection of automobile junkyards and dismantling operations in spite of the strong law enforcement component of the regulation. In the law enforcement context, where search by warrant is still the general rule, there has also been some loosening of the requirement. For example, the Court has shifted focus from whether exigent circumstances justified failure to obtain a warrant, to whether an officer had a “reasonable” belief that an exception to the warrant requirement applied; in another case the scope of a valid search “incident to arrest,” once limited to areas within the immediate reach of the arrested suspect, was expanded to a “protective sweep” of the entire home if arresting officers have a reasonable belief that the home harbors an individual who may pose a danger.

Another matter of scope recently addressed by the Court is the category of persons protected by the Fourth Amendment—who constitutes “the people.” This phrase, the Court determined, “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with [the United

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24 See various headings infra under the general heading “Valid Searches and Seizures Without Warrants.”


The Fourth Amendment therefore does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The community of protected people includes U.S. citizens who go abroad, and aliens who have voluntarily entered U.S. territory and developed substantial connections with this country. There is no resulting broad principle, however, that the Fourth Amendment constrains federal officials wherever and against whomever they act.

**The Interest Protected.**—For the Fourth Amendment to be applicable to a particular set of facts, there must be a “search” and a “seizure,” occurring typically in a criminal case, with a subsequent attempt to use judicially what was seized. Whether there was a search and seizure within the meaning of the Amendment, whether a complainant’s interests were constitutionally infringed, will often turn upon consideration of his interest and whether it was officially abused. What does the Amendment protect? Under the common law, there was no doubt. Said Lord Camden in *Entick v. Carrington.*

“The great end for which men entered in society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole . . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my license but he is liable to an action though the damage be nothing . . . .” Protection of property interests as the basis of the Fourth Amendment found easy acceptance in the Supreme Court and that acceptance controlled decision in numerous cases. For
example, in *Olmstead v. United States*, the holding that wiretapping was not covered by the Amendment was that there had been no actual physical invasion of the defendant's premises; where there had been an invasion, a technical trespass, electronic surveillance was deemed subject to Fourth Amendment restrictions.

The Court later rejected this approach, however. "The premise that property interests control the right of the Government to search and seize has been discredited... We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." Thus, because the Amendment "protects people, not places," the requirement of actual physical trespass is dispensed with and electronic surveillance was made subject to the Amendment's requirements.

The test propounded in *Katz* is whether there is an expectation of privacy upon which one may "justifiably" rely. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." That is, the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion."
Katz’s focus on privacy was revitalized in *Kyllo v. United States*,40 in which the Court invalidated the warrantless use of a thermal imaging device directed at a private home from a public street. The rule devised by the Court to limit police use of new technology that can “shrink the realm of guaranteed privacy” is that “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ . . . constitutes a search – at least where (as here) the technology in question is not in general public use.”41 Relying on Katz, the Court rejected as “mechanical” the Government’s attempted distinction between off-the-wall and through-the-wall surveillance. Permitting all off-the-wall observations, the Court observed, “would leave the homeowner at the mercy of advancing technology – including technology that could discern all human activity in the home.”

While the sanctity of the home has been strongly reaffirmed, protection of privacy in other contexts becomes more problematic. The two-part test that Justice Harlan suggested in *Katz* often provides the starting point for analysis.42 The first element, the “subjective expectation” of privacy, has largely dwindled as a viable standard, because, as Justice Harlan noted in a subsequent case, “our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.”43 As for the second element, whether one

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41 121 S. Ct. at 2043.
43 United States v. White, 401 U.S. 745, 786 (1971). See *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979) (government could not condition “subjective expectations” by, say, announcing that henceforth all homes would be subject to warrantless entry, and thus destroy the “legitimate expectation of privacy”).
has a “legitimate” expectation of privacy that society finds “reasonable” to recognize, the Court has said that “[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.”

Thus, protection of the home is at the apex of Fourth Amendment coverage because of the right associated with ownership to exclude others; but ownership of other things, i.e., automobiles, does not carry a similar high degree of protection. That a person has taken normal precautions to maintain his privacy, that is, precautions customarily taken by those seeking to exclude others, is usually a significant factor in determining legitimacy of expectation. Some expectations, the Court has held, are simply not those which society is prepared to accept.

What seems to have emerged is a balancing standard that requires “an assessing of the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement.” While Justice Harlan saw a greater need to restrain police officers through the warrant requirement as the intrusions on individual privacy grow more extensive, the Court’s solicitude for law enforcement objectives frequently tilts the balance in the other direction.

\footnote{Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).}


\footnote{E.g., United States v. Chadwick, 433 U.S. 1, 11 (1977); Katz v. United States, 389 U.S. 347, 352 (1967). But cf. South Dakota v. Opperman, 428 U.S. 364 (1976) (no legitimate expectation of privacy in automobile left with doors locked and windows rolled up). In Rawlings v. Kentucky, 448 U.S. 98 (1980), the fact that defendant had dumped a cache of drugs into his companion’s purse, having known her for only a few days and knowing others had access to the purse, was taken to establish that he had no legitimate expectation the purse would be free from intrusion.}


\footnote{United States v. White, 401 U.S. 745, 786-87 (1971) (Justice Harlan dissenting).}
Application of this balancing test, because of the Court’s weighing in of law enforcement investigative needs and the Court’s subjective evaluation of privacy needs, has led to the creation of a two-tier or sliding-tier scale of privacy interests. The privacy test was originally designed to permit a determination that a Fourth Amendment protected interest had been invaded. If it had been, then ordinarily a warrant was required, subject only to the narrowly defined exceptions, and the scope of the search under those exceptions was “strictly tied to and justified by the circumstances which rendered its initiation permissible.” But the Court now uses the test to determine whether the interest invaded is important or persuasive enough so that a warrant is required to justify it; if the individual has a lesser expectation of privacy, then the invasion may be justified, absent a warrant, by the reasonableness of the intrusion. Exceptions to the warrant requirement are no longer evaluated solely by the justifications for the exception, e.g., exigent circumstances, and the scope of the search is no longer tied to and limited by the justification for the exception. The result

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52 Terry v. Ohio, 392 U.S. 1, 19 (1968).
53 The prime example is the home, so that for entries either to search or to arrest, “the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” Payton v. New York, 445 U.S. 573, 590 (1980); Steagald v. United States, 451 U.S. 204, 212 (1981). And see Mincey v. Arizona, 437 U.S. 385 (1978).
54 Privacy in the home is not limited to intimate matters. “In the home all details are intimate details, because the entire area is held safe from prying government eyes.” Kyllo v. United States, 121 S. Ct. 2038, 2045 (2001).
55 E.g., Texas v. White, 423 U.S. 67 (1975) (if probable cause to search automobile existed at scene, it can be removed to station and searched without warrant); United States v. Robinson, 414 U.S. 218 (1973) (once an arrest has been validly made, search pursuant thereto is so minimally intrusive in addition that scope of search is not limited by necessity of security of officer); United States v. Edwards, 415 U.S. 800 (1974) (incarcerated suspect; officers need no warrant to take his clothes for test because little additional intrusion). But see Ybarra v. Illinois, 444 U.S. 85 (1979) (officers on premises to execute search warrant of premises may not without more search persons found on premises).
has been a considerable expansion, beyond what existed prior to
*Katz*, of the power of police and other authorities to conduct
searches.

**Arrests and Other Detentions.**—That the Fourth Amend-
ment was intended to protect against arbitrary arrests as well as
against unreasonable searches was early assumed by Chief Justice
Marshall and is now established law. At common law, warrantless
arrests of persons who had committed a breach of the
peace or a felony were permitted, and this history is reflected in
the fact that the Fourth Amendment is satisfied if the arrest is
made in a public place on probable cause, regardless of whether a
warrant has been obtained. However, in order to effectuate an ar-
rest in the home, absent consent or exigent circumstances, police
officers must have a warrant. The Fourth Amendment applies to
"seizures" and it is not necessary that a detention be a formal ar-
rest in order to bring to bear the requirements of warrants or prob-
able cause in instances in which warrants may be forgiven. Some

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56 Ex parte Burford, 7 U.S. (3 Cr.) 448 (1806).
57 Giordenello v. United States, 357 U.S. 480, 485-86 (1958); United States v.
common law warrantless arrest was also permissible for some misdemeanors not in-
volving a breach of the peace. See the lengthy historical treatment in Atwater v.
Santana, 427 U.S. 38 (1976) (sustaining warrantless arrest of suspect in her home
when she was initially approached in her doorway and then retreated into house).
However, a suspect arrested on probable cause but without a warrant is entitled to
a prompt, nonadversary hearing before a magistrate under procedures designed to
provide a fair and reliable determination of probable cause in order to keep the ar-
means a hearing that is administratively convenient. See County of Riverside v.
McLaughlin, 500 U.S. 44, 56 (1991) (authorizing "as a general matter" detention for
up to 48 hours without a probable-cause hearing, after which time the burden shifts
to the government to demonstrate extraordinary circumstances justifying further de-
tention).
to enter private residence without a warrant to make an arrest); Steagald v. United
without search warrant and discovered incriminating evidence; violated Fourth
Amendment in absence of warrant to search the home); Hayes v. Florida, 470 U.S.
811 (1985) (officers went to suspect's home and took him to police station for finger-
painting).
61 United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Justice
Stewart) ("[A] person has been 'seized' within the meaning of the Fourth Amend-
ment only if, in view of all the circumstances surrounding the incident, a reasonable
person would have believed that he was not free to leave"). See also Reid v. Georgia,
448 U.S. 438 (1980); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975);
Terry v. Ohio, 392 U.S. 1, 16-19 (1968). Apprehension by the use of deadly force is
a seizure subject to the Fourth Amendment's reasonableness requirement. See,
e.g., Tennessee v. Garner, 471 U.S. 1 (1985) (police officer's fatal shooting of a flee-
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objective justification must be shown to validate all seizures of the person, including seizures that involve only a brief detention short of arrest, although the nature of the detention will determine whether probable cause or some reasonable and articulable suspicion is necessary.\(^{62}\)

The Fourth Amendment does not require an officer to consider whether to issue a citation rather than arresting (and placing in custody) a person who has committed a minor offense—even a minor traffic offense. In \textit{Atwater v. City of Lago Vista},\(^{63}\) the Court, even while acknowledging that the case before it involved “gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment,” refused to require that “case-by-case determinations of government need” to place traffic offenders in custody be subjected to a reasonableness inquiry, “lest every discretionary judgment in the field be converted into an occasion for constitutional review.”\(^{64}\) Citing some state statutes that limit warrantless arrests for minor offenses, the Court contended that the matter is better left to statutory rule than to application of broad constitutional principle.\(^{65}\) Thus, \textit{Atwater} and \textit{County of Riverside v. McLaughlin}\(^{66}\) together mean that—as far as the Constitution is concerned—police officers have almost unbridled discretion to decide whether to issue a summons for a minor traffic offense or whether instead to place the offending motorist in jail, where she may be kept for up to 48 hours with little recourse.

Until relatively recently, the legality of arrests was seldom litigated in the Supreme Court because of the rule that a person detained pursuant to an arbitrary seizure—unlike evidence obtained as a result of an unlawful search—remains subject to custody and presentation to court.\(^{67}\) But the application of self-incrimination and other exclusionary rules to the States and the heightening of their scope in state and federal cases alike brought forth the rule that verbal evidence, confessions, and other admissions, like all derivative evidence obtained as a result of unlawful seizures, could be presented in court without further exigency or justification.


\(^{64}\) 532 U.S. at 346-47.

\(^{65}\) 532 U.S. at 352.


\(^{\text{ing suspect}}\); Brower v. County of Inyo, 489 U.S. 593 (1989) (police roadblock designed to end car chase with fatal crash).
excluded.\textsuperscript{68} Thus, a confession made by one illegally in custody must be suppressed, unless the causal connection between the illegal arrest and the confession had become so attenuated that the latter should not be deemed “tainted” by the former.\textsuperscript{69} Similarly, fingerprints and other physical evidence obtained as a result of an unlawful arrest must be suppressed.\textsuperscript{70}

**Searches and Inspections in Noncriminal Cases.**—Certain early cases held that the Fourth Amendment was applicable only when a search was undertaken for criminal investigatory purposes,\textsuperscript{71} and the Supreme Court until recently employed a reasonableness test for such searches without requiring either a warrant or probable cause in the absence of a warrant.\textsuperscript{72} But in 1967, the Court held in two cases that administrative inspections to detect building code violations must be undertaken pursuant to warrant if the occupant objects.\textsuperscript{73} “We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman’s search for the fruits and instrumentalities of crime. . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely ‘peripheral.’ It is surely anomalous to say that the individual and

\textsuperscript{68}Wong Sun v. United States, 371 U.S. 471 (1963). Such evidence is the “fruit of the poisonous tree,” Nardone v. United States, 308 U.S. 338, 341 (1939), that is, evidence derived from the original illegality. Previously, if confessions were voluntary for purposes of the self-incrimination clause, they were admissible notwithstanding any prior official illegality. Colombe v. Connecticut, 367 U.S. 568 (1961).

\textsuperscript{69}Although there is a presumption that the illegal arrest is the cause of the subsequent confession, the presumption is rebuttable by a showing that the confession is the result of “an intervening . . . act of free will.” Wong Sun v. United States, 371 U.S. 471, 486 (1963). The factors used to determine whether the taint has been dissipated are the time between the illegal arrest and the confession, whether there were intervening circumstances (such as consultation with others, Miranda warnings, etc.), and the degree of flagrancy and purposefulness of the official conduct. Brown v. Illinois, 422 U.S. 590 (1975) (Miranda warnings alone insufficient); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982).

\textsuperscript{70}Davis v. Mississippi, 394 U.S. 721 (1969); Taylor v. Alabama, 457 U.S. 687 (1982). In United States v. Crews, 445 U.S. 463 (1980), the Court, unanimously but for a variety of reasons, held proper the identification in court of a defendant, who had been wrongly arrested without probable cause, by the crime victim. The court identification was not tainted by either the arrest or the subsequent in-custody identification. See also Hayes v. Florida, 470 U.S. 811, 815 (1985), suggesting in dictum that a “narrowly circumscribed procedure for fingerprinting detentions on less than probable cause” may be permissible.

\textsuperscript{71}In re Strouse, 23 Fed. Cas. 261 (No. 13,548) (D. Nev. 1871); In re Meador, 16 Fed. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869).


his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

Certain administrative inspections utilized to enforce regulatory schemes with regard to such items as alcohol and firearms are, however, exempt from the Fourth Amendment warrant requirement and may be authorized simply by statute.

Camara and See were reaffirmed in Marshall v. Barlow's, Inc., in which the Court held violative of the Fourth Amendment a provision of the Occupational Safety and Health Act which authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violations of regulations, without a warrant or other legal process. The liquor and firearms exceptions were distinguished on the basis that those industries had a long tradition of close government supervision, so that a person in those businesses gave up his privacy expectations.

But OSHA was a relatively recent statute and it regulated practically every business in or affecting interstate commerce; it was not open to a legislature to extend regulation and then follow it with warrantless inspections. Additionally, OSHA inspectors had unbounded discretion in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and certainly with no assurances as to limitation on scope and standards of inspections. Further, warrantless inspections were not necessary to serve an important governmental interest, inasmuch as most businesses would consent to inspection and it was not inconvenient to require OSHA to resort to an administrative warrant in order to inspect sites where consent was refused.

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Biswell, 406 U.S. 311 (1972). Colonnade, involving liquor, was based on the long history of close supervision of the industry. Biswell, involving firearms, introduced factors that were subsequently to prove significant. Thus, while the statute was of recent enactment, firearms constituted a pervasively regulated industry, so that dealers had no reasonable expectation of privacy, inasmuch as the law provides for regular inspections. Further, warrantless inspections were needed for effective enforcement of the statute.

436 U.S. 307 (1978). Dissenting, Justice Stevens, with Justices Rehnquist and Blackmun, argued that not the warrant clause but the reasonableness clause should govern administrative inspections. Id. at 325.

Administrative warrants issued on the basis of less than probable cause but only on a showing that a specific business had been chosen for inspection on the basis of a general administrative plan would suffice. Even without a necessity for probable cause, the requirement would assure the interposition of a neutral officer to establish that the inspection was reasonable and was properly authorized. Id. at 321, 322. The dissenter objected that the warrant clause was being constitutionally diluted. Id. at 325. Administrative warrants were approved also in Camara v. Municipal Court, 387 U.S. 523, 538 (1967). Previously, one of the reasons given for finding administrative and noncriminal inspections not covered by the Fourth Amendment was the fact that the warrant clause would be as rigorously applied to them...
In Donovan v. Dewey,78 however, Barlow’s was substantially limited and a new standard emerged permitting extensive governmental inspection of commercial property,79 absent warrants. Under the Federal Mine Safety and Health Act, governing underground and surface mines (including stone quarries), federal officers are directed to inspect underground mines at least four times a year and surface mines at least twice a year, pursuant to extensive regulations as to standards of safety. The statute specifically provides for absence of advanced notice and requires the Secretary of Labor to institute court actions for injunctive and other relief in cases in which inspectors are denied admission. Sustaining the statute, the Court proclaimed that government had a “greater latitude” to conduct warrantless inspections of commercial property than of homes, because of “the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.”80

Dewey was distinguished from Barlow’s in several ways. First, Dewey involved a single industry, unlike the broad coverage in Barlow’s. Second, the OSHA statute gave minimal direction to inspectors as to time, scope, and frequency of inspections, while FMSHA specified a regular number of inspections pursuant to standards. Third, deference was due Congress’ determination that unannounced inspections were necessary if the safety laws were to be effectively enforced. Fourth, FMSHA provided businesses the opportunity to contest the search by resisting in the civil proceeding the Secretary had to bring if consent was denied.81 The standard

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79 There is no suggestion that warrantless inspections of homes is broadened. Id. at 598, or that warrantless entry under exigent circumstances is curtailed. See, e.g., Michigan v. Tyler, 436 U.S. 499 (1978) (no warrant required for entry by firefighters to fight fire; once there, firefighters may remain for reasonable time to investigate the cause of the fire).
81 Id. at 596-97, 604-05. Pursuant to the statute, however, the Secretary has promulgated regulations providing for the assessment of civil penalties for denial of entry and Dewey had been assessed a penalty of $1,000. Id. at 597 n.3. It was also
of a long tradition of government supervision permitting warrantless inspections was dispensed with, because it would lead to “absurd results,” in that new and emerging industries posing great hazards would escape regulation. Dewey suggests, therefore, that warrantless inspections of commercial establishments are permissible so long as the legislature carefully drafts its statute.

Dewey was applied in New York v. Burger to inspection of automobile junkyards and vehicle dismantling operations, a situation where there is considerable overlap between administrative and penal objectives. Applying the Dewey three-part test, the Court concluded that New York has a substantial interest in stemming the tide of automobile thefts, that regulation of vehicle dismantling reasonably serves that interest, and that statutory safeguards provided adequate substitute for a warrant requirement. The Court rejected the suggestion that the warrantless inspection provisions were designed as an expedient means of enforcing the penal laws, and instead saw narrower, valid regulatory purposes to be served: e.g., establishing a system for tracking stolen automobiles and parts, and enhancing the ability of legitimate businesses to compete. “[A] State can address a major social problem both by way of an administrative scheme and through penal sanctions,” the Court declared; in such circumstances warrantless administrative searches are permissible in spite of the fact that evidence of criminal activity may well be uncovered in the process.

In other contexts, the Court has also elaborated the constitutional requirements affecting administrative inspections and searches. Thus, in Michigan v. Tyler, it subdivided the process by which an investigation of the cause of a fire may be conducted. Entry to fight the fire is, of course, an exception based on exigent circumstances, and no warrant or consent is needed; firemen on the scene may seize evidence relating to the cause under the plain view doctrine. Additional entries to investigate the cause of the fire must be made pursuant to warrant procedures governing administrative searches. Evidence of arson discovered in the course of such an administrative inspection is admissible at trial, but if the investigator finds probable cause to believe that arson has occurred and re-

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82 Donovan v. Dewey, 452 U.S. 594, 606 (1981). Duration of regulation will now be a factor in assessing the legitimate expectation of privacy of a business. Id. Accord, New York v. Burger, 482 U.S. 691 (1987) (although duration of regulation of vehicle dismantling was relatively brief, history of regulation of junk business generally was lengthy, and current regulation of dismantling was extensive).
83 482 U.S. at 712 (emphasis original).
quires further access to gather evidence for a possible prosecution, he must obtain a criminal search warrant. 86

One curious case has approved a system of “home visits” by welfare caseworkers, in which the recipients are required to admit the worker or lose eligibility for benefits. 87 In another unusual case, the Court held that a sheriff’s assistance to a trailer park owner in disconnecting and removing a mobile home constituted a “seizure” of the home. 88

In addition, there are now a number of situations, some of them analogous to administrative searches, where “special needs’ beyond normal law enforcement . . . justify departures from the usual warrant and probable cause requirements.” 89 In one of these cases the Court, without acknowledging the magnitude of the leap from one context to another, has taken the Dewey/Burger rationale—developed to justify warrantless searches of business establishments—and applied it to justify the significant intrusion into personal privacy represented by urinalysis drug testing. Because of the history of pervasive regulation of the railroad industry, the Court reasoned, railroad employees have a diminished expectation of privacy that makes mandatory urinalysis less intrusive and more reasonable. 90

86 The Court also held that, after the fire was extinguished, if fire investigators were unable to proceed at the moment, because of dark, steam, and smoke, it was proper for them to leave and return at daylight without any necessity of complying with its mandate for administrative or criminal warrants. Id. at 510-11. But cf. Michigan v. Clifford, 464 U.S. 287 (1984) (no such justification for search of private residence begun at 1:30 p.m. when fire had been extinguished at 7 a.m.).

87 Wyman v. James, 400 U.S. 309 (1971). It is not clear what rationale the majority utilized. It appears to have proceeded on the assumption that a “home visit” was not a search and that the Fourth Amendment does not apply when criminal prosecution is not threatened. Neither premise is valid under Camara and its progeny, although Camara preceded Wyman. Presumably, the case would today be analyzed under the expectation of privacy/need/structural protection theory of the more recent cases.

88 Soldal v. Cook County, 506 U.S. 56, 61 (1992) (home “was not only seized, it literally was carried away, giving new meaning to the term ‘mobile home’”).


90 Skinner, 489 U.S. at 627.
With respect to automobiles, the holdings are mixed. Random stops of automobiles to check drivers’ licenses, vehicle registrations, and safety conditions were condemned as too intrusive; the degree to which random stops would advance the legitimate governmental interests involved did not outweigh the individual’s legitimate expectations of privacy. On the other hand, in South Dakota v. Opperman, the Court sustained the admission of evidence found when police impounded an automobile from a public street for multiple parking violations and entered the car to secure and inventory valuables for safekeeping. Marijuana was discovered in the glove compartment.

**Searches and Seizures Pursuant to Warrant**

Emphasis upon the necessity of warrants places the judgment of an independent magistrate between law enforcement officers and the privacy of citizens, authorizes invasion of that privacy only upon a showing that constitutes probable cause, and limits that invasion by specification of the person to be seized, the place to be searched, and the evidence to be sought. While a warrant is issued *ex parte*, its validity may be contested in a subsequent suppression hearing if incriminating evidence is found and a prosecution is brought.

**Issuance by Neutral Magistrate.**—In numerous cases, the Court has referred to the necessity that warrants be issued by a
“judicial officer” or a “magistrate.” 95 “The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.” 96 These cases do not mean that only a judge or an official who is a lawyer may issue warrants, but they do stand for two tests of the validity of the power of the issuing party to so act. “He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search.” 97 The first test cannot be met when the issuing party is himself engaged in law enforcement activities, 98 but the Court has not required that an issuing party have that independence of tenure and guarantee of salary which characterizes federal judges. 99 And in passing on the second test, the Court has been essentially pragmatic in assessing whether the issuing party possesses the capacity to determine probable cause. 100

98 Coolidge v. New Hampshire, 403 U.S. 443, 449-51 (1971) (warrant issued by state attorney general who was leading investigation and who as a justice of the peace was authorized to issue warrants); Mancusi v. DeForte, 392 U.S. 364, 370-72 (1968) (subpoena issued by district attorney could not qualify as a valid search warrant); Lo-Ji Sales v. New York, 442 U.S. 319 (1979) (justice of the peace issued open-ended search warrant for obscene materials, accompanied police during its execution, and made probable cause determinations at the scene as to particular items).
99 Jones v. United States, 362 U.S. 257, 270-71 (1960) (approving issuance of warrants by United States Commissioners, many of whom were not lawyers and none of whom had any guarantees of tenure and salary); Shadwick v. City of Tampa, 407 U.S. 345 (1972) (approving issuance of arrest warrants for violation of city ordinances by city clerks who were assigned to and supervised by municipal court judges). The Court reserved the question “whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. Many persons may not qualify as the kind of ‘public civil officers’ we have come to associate with the term ‘magistrate.’ Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations.” Id. at 352.
100 Id. at 350-54 (placing on defendant the burden of demonstrating that the issuing official lacks capacity to determine probable cause). See also Connally v.
**Probable Cause.**—The concept of “probable cause” is central to the meaning of the warrant clause. Neither the Fourth Amendment nor the federal statutory provisions relevant to the area define “probable cause”; the definition is entirely a judicial construct. An applicant for a warrant must present to the magistrate facts sufficient to enable the officer himself to make a determination of probable cause. “In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.”\(^{101}\) Probable cause is to be determined according to “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”\(^{102}\) Warrants are favored in the law and utilization of them will not be thwarted by a hypertechnical reading of the supporting affidavit and supporting testimony.\(^{103}\) For the same reason, reviewing courts will accept evidence of a less “judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant.”\(^{104}\) Courts will sustain the determination of probable cause so long as “there was substantial basis for [the magistrate] to conclude that” there was probable cause.\(^{105}\)

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\(^{104}\) Jones v. United States, 352 U.S. 257, 270-71 (1966). Similarly, the preference for proceeding by warrant leads to a stricter rule for appellate review of trial court decisions on warrantless stops and searches than is employed to review probable cause to issue a warrant. Ornelas v. United States, 517 U.S. 690 (1996) (determinations of reasonable suspicion to stop and probable cause to search without a warrant should be subjected to *de novo* appellate review).

Much litigation has concerned the sufficiency of the complaint to establish probable cause. Mere conclusory assertions are not enough.\textsuperscript{106} In \textit{United States v. Ventresca},\textsuperscript{107} however, an affidavit by a law enforcement officer asserting his belief that an illegal distillery was being operated in a certain place, explaining that the belief was based upon his own observations and upon those of fellow investigators, and detailing a substantial amount of these personal observations clearly supporting the stated belief, was held to be sufficient to constitute probable cause. “Recital of some of the underlying circumstances in the affidavit is essential,” the Court said, observing that “where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause,” the reliance on the warrant process should not be deterred by insistence on too stringent a showing.\textsuperscript{108}

Requirements for establishing probable cause through reliance on information received from an informant has divided the Court in several cases. Although involving a warrantless arrest, \textit{Draper v. United States}\textsuperscript{109} may be said to have begun the line of cases. A previously reliable, named informant reported to an officer that the defendant would arrive with narcotics on a particular train, and described the clothes he would be wearing and the bag he would be carrying; the informant, however, gave no basis for his information. FBI agents met the train, observed that the defendant fully answered the description, and arrested him. The Court held that the corroboration of part of the informer’s tip established probable cause to support the arrest. A case involving a search warrant, \textit{Jones v. United States},\textsuperscript{110} apparently utilized a test of considering the affidavit as a whole to see whether the tip plus the corroborating information provided a substantial basis for finding probable cause, but the affidavit also set forth the reliability of the informer and sufficient detail to indicate that the tip was based on the in-

\textsuperscript{106}Byars v. United States, 273 U.S. 28 (1927) (affiant stated he “has good reason to believe and does believe” that defendant has contraband materials in his possession); Giordenello v. United States, 357 U.S. 480 (1958) (complainant merely stated his conclusion that defendant had committed a crime). See also Nathanson v. United States, 290 U.S. 41 (1933).

\textsuperscript{107}380 U.S. 102 (1965).

\textsuperscript{108}Id. at 109.

\textsuperscript{109}358 U.S. 307 (1959). For another case applying essentially the same probable cause standard to warrantless arrests as govern arrests by warrant, see McCray v. Illinois, 386 U.S. 300 (1967) (informant’s statement to arresting officers met \textit{Aguilar} probable cause standard). See also Whitely v. Warden, 401 U.S. 560, 566 (1971) (standards must be “at least as stringent” for warrantless arrest as for obtaining warrant).

\textsuperscript{110}362 U.S. 257 (1960).
formant’s personal observation. *Aguilar v. Texas*[^1] held insufficient an affidavit which merely asserted that the police had “reliable information from a credible person” that narcotics were in a certain place, and held that when the affiant relies on an informant’s tip he must present two types of evidence to the magistrate. First, the affidavit must indicate the informant’s basis of knowledge—the circumstances from which the informant concluded that evidence was present or that crimes had been committed—and, second, the affiant must present information which would permit the magistrate to decide whether or not the informant was trustworthy. Then, in *Spinelli v. United States*,[^2] the Court applied *Aguilar* in a situation in which the affidavit contained both an informant’s tip and police information of a corroborating nature.

The Court rejected the “totality” test derived from *Jones* and held that the informant’s tip and the corroborating evidence must be separately considered. The tip was rejected because the affidavit contained neither any information which showed the basis of the tip nor any information which showed the informant’s credibility. The corroborating evidence was rejected as insufficient because it did not establish any element of criminality but merely related to details which were innocent in themselves. No additional corroborating weight was due as a result of the bald police assertion that defendant was a known gambler, although the tip related to gambling. Returning to the totality test, however, the Court in *United States v. Harris*[^3] approved a warrant issued largely on an informant’s tip that over a two-year period he had purchased illegal whiskey from the defendant at the defendant’s residence, most recently within two weeks of the tip. The affidavit contained rather detailed information about the concealment of the whiskey, and asserted that the informant was a “prudent person,” that defendant had a reputation as a bootlegger, that other persons had supplied similar information about him, and that he had been found in control of illegal whiskey within the previous four years. The Court determined that the detailed nature of the tip, the personal observation thus revealed, and the fact that the informant had admitted to criminal behavior by his purchase of whiskey were sufficient to enable the magistrate to find him reliable, and that the supporting


[^2]: 393 U.S. 410 (1969). Both concurring and dissenting Justices recognized tension between *Draper* and *Aguilar*. See id. at 423 (Justice White concurring), id. at 429 (Justice Black dissenting and advocating the overruling of *Aguilar*).

[^3]: 403 U.S. 573 (1971). See also *Adams v. Williams*, 407 U.S. 143, 147 (1972) (approving warrantless stop of motorist based on informant’s tip that “may have been insufficient” under *Aguilar* and *Spinelli* as basis for warrant).
evidence, including defendant’s reputation, could supplement this determination.

The Court expressly abandoned the two-part Aguilar-Spinelli test and returned to the “totality of the circumstances” approach to evaluate probable cause based on an informant’s tip in Illinois v. Gates.114 The main defect of the two-part test, Justice Rehnquist concluded for the Court, was in treating an informant’s reliability and his basis for knowledge as independent requirements. Instead, “a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.”115 In evaluating probable cause, “[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”116

**Particularity.**—“The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.”117

This requirement thus acts to limit the scope of the search, inasmuch as the executing officers should be limited to looking in places where the described object could be expected to be found.118

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115 462 U.S. at 213.

116 462 U.S. at 238.


118 “This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Kremen v. United States, 353 U.S. 346 (1957); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931); see United States v. Di Re, 332 U.S. 581, 586-87 (1948). The scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible. Warden v. Hayden, 387 U.S. 294, 310 (1967) (Mr. Justice Fortas concurring); see, e.g., Preston v. United States, 376 U.S. 364, 367-68 (1964); Agnello v. United States, 296 U.S. 20, 30-31 (1925).” Terry v. Ohio, 392 U.S. 1, 18-19, (1968). See also Andresen v. Maryland, 427 U.S. 463, 470-82 (1976), and id. at 484, 492-93 (Justice Brennan dissenting). In Stanley v. Georgia, 394 U.S. 557, 569 (1969), Justices Stewart, Brennan, and White would have based decision on the principle that a valid warrant for gambling paraphernalia did not authorize police upon discovering motion picture films in the course of the search to project the films to learn their contents.
**First Amendment Bearing on Probable Cause and Particularity.**—Where the warrant process is used to authorize seizure of books and other items entitled either to First Amendment protection or to First Amendment consideration, the Court has required government to observe more exacting standards than in other cases. Seizure of materials arguably protected by the First Amendment is a form of prior restraint that requires strict observance of the Fourth Amendment. At a minimum, a warrant is required, and additional safeguards may be required for large-scale seizures. Thus, in *Marcus v. Search Warrant*, the seizure of 11,000 copies of 280 publications pursuant to warrant issued *ex parte* by a magistrate who had not examined any of the publications but who had relied on the conclusory affidavit of a policeman was voided. Failure to scrutinize the materials and to particularize the items to be seized was deemed inadequate, and it was further noted that police “were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity.” A state procedure which was designed to comply with *Marcus* by the presentation of copies of books to be seized to the magistrate for his scrutiny prior to issuance of a warrant was nonetheless found inadequate by a plurality of the Court, which concluded that “since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [appellant] was not afforded a hearing on the question of the obscenity even of the seven novels [seven of 59 listed titles were reviewed by the magistrate] before the warrant issued, the procedure was . . . constitutionally deficient.” Confusion remains, however, about the necessity for and the character of prior adversary hearings on the issue of obscenity. In a later decision the Court held that, with adequate safeguards, no pre-seizure adversary hearing on the issue of obscenity is required if the film is seized not for the purpose of destruction as contraband (the purpose in *Marcus* and *A Quantity of Books*), but instead to preserve a copy for evidence. It is constitutionally permissible to seize a copy of a film pursuant to a warrant as long as there is a prompt post-seizure adversary hearing on the obscenity issue. Until there is a judicial determination of obscenity, the Court advised, the film may continue to be exhibited; if no other

copy is available either a copy of it must be made from the seized film or the film itself must be returned.\textsuperscript{124}

The seizure of a film without the authority of a constitutionally sufficient warrant is invalid; seizure cannot be justified as incidental to arrest, inasmuch as the determination of obscenity may not be made by the officer himself.\textsuperscript{125} Nor may a warrant issue based “solely on the conclusory assertions of the police officer without any inquiry by the [magistrate] into the factual basis for the officer’s conclusions.”\textsuperscript{126} Instead, a warrant must be “supported by affidavits setting forth specific facts in order that the issuing magistrate may focus searchingly on the question of obscenity.”\textsuperscript{127} This does not mean, however, that a higher standard of probable cause is required in order to obtain a warrant to seize materials protected by the First Amendment. “Our reference in Roaden to a ‘higher hurdle . . . of reasonableness’ was not intended to establish a ‘higher’ standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the ‘exigency’ exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate . . . .”\textsuperscript{128}

In Stanford v. Texas,\textsuperscript{129} a seizure of more than 2,000 books, pamphlets, and other documents pursuant to a warrant which merely authorized the seizure of books, pamphlets, and other written instruments “concerning the Communist Party of Texas” was voided. “[T]he constitutional requirement that warrants must particularly describe the ‘things to be seized’ is to be accorded the most scrupulous exactitude when the ‘things’ are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms.”\textsuperscript{130}

However, the First Amendment does not bar the issuance or execution of a warrant to search a newsroom to obtain photographs of demonstrators who had injured several policemen, although the

\textsuperscript{124}Id. at 492-93. But cf. New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986), rejecting the defendant’s assertion, based on Heller, that only a single copy rather than all copies of allegedly obscene movies should have been seized pursuant to warrant.


\textsuperscript{126}Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968) (per curiam).


\textsuperscript{129}379 U.S. 476 (1965).

\textsuperscript{130}Id. at 485-86. See also Marcus v. Search Warrant, 367 U.S. 717, 723 (1961).
Court appeared to suggest that a magistrate asked to issue such a warrant should guard against interference with press freedoms through limits on type, scope, and intrusiveness of the search.

Property Subject to Seizure.—There has never been any doubt that search warrants could be issued for the seizure of contraband and the fruits and instrumentalities of crime. But in Gouled v. United States, a unanimous Court limited the classes of property subject to seizures to these three and refused to permit a seizure of “mere evidence,” in this instance defendant’s papers which were to be used as evidence against him at trial. The Court recognized that there was “no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure,” but their character as evidence rendered them immune. This immunity “was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals.” More evaded than followed, the “mere evidence” rule was overturned in 1967. It is now settled that such evidentiary items as fingerprints, blood, urine

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131 Zurcher v. Stanford Daily, 436 U.S. 547 (1978). See id. at 566 (containing suggestion mentioned in text), and id. at 566 (Justice Powell concurring) (more expressly adopting that position). In the Privacy Protection Act, Pub. L. No. 96-440, 94 Stat. 1879 (1980), 42 U.S.C. § 2000aa, Congress provided extensive protection against searches and seizures not only of the news media and news people but also of others engaged in disseminating communications to the public, unless there is probable cause to believe the person protecting the materials has committed or is committing the crime to which the materials relate.

132 United States v. Lefkowitz, 285 U.S. 452, 465-66 (1932). Of course, evidence seizable under warrant is subject to seizure without a warrant in circumstances in which warrantless searches are justified.


136 Warden v. Hayden, 387 U.S. 294 (1967). Justice Douglas dissented, wishing to retain the rule, id. at 312, and Justice Fortas with Chief Justice Warren concurred in the result while apparently wishing to retain the rule in warrant cases. Id. at 310, 312.


samples, fingernail and skin scrapings, voice and handwriting exemplars, and other demonstrative evidence may be obtained through the warrant process or without a warrant if “special needs” of government are shown.

However, some medically assisted bodily intrusions have been held impermissible, e.g., forcible administration of an emetic to induce vomiting, and surgery under general anesthetic to remove a bullet lodged in a suspect’s chest. Factors to be weighed in determining which medical tests and procedures are reasonable include the extent to which the procedure threatens the individual’s safety or health, “the extent of the intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity,” and the importance of the evidence to the prosecution’s case.

In Warden v. Hayden, Justice Brennan for the Court cautioned that the items there seized were not “‘testimonial’ or ‘communicative’ in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.” This merging of Fourth and Fifth Amendment considerations derived from Boyd v. United States, the first case in which the Supreme Court considered at length the meaning of the

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140 Cupp v. Murphy, 412 U.S. 291 (1973) (sustaining warrantless taking of scrapings from defendant’s fingernails at the stationhouse, on the basis that it was a very limited intrusion and necessary to preserve evanescent evidence).
141 United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973) (both sustaining grand jury subpoenas to produce voice and handwriting exemplars; no reasonable expectation of privacy with respect to those items).
142 Berger v. New York, 388 U.S. 41, 44 n.2 (1967). See also id. at 97 n.4, 107-08 (Justices Harlan and White concurring), 67 (Justice Douglas concurring).
143 Another important result of Warden v. Hayden is that third parties not suspected of culpability in crime are subject to the issuance and execution of warrants for searches and seizures of evidence. Zurcher v. Stanford Daily, 436 U.S. 547, 553-60 (1978). Justice Stevens argued for a stiffer standard for issuance of warrants to nonsuspects, requiring in order to invade their privacy a showing that they would not comply with a less intrusive method, such as a subpoena. Id. at 577 (dissenting).
147 387 U.S. 294, 302-03 (1967). Seizure of a diary was at issue in Hill v. California, 401 U.S. 797, 805 (1971), but it had not been raised in the state courts and was deemed waived.
148 116 U.S. 616 (1886).
Fourth Amendment. Boyd was a quasi-criminal proceeding for the forfeiture of goods alleged to have been imported in violation of law, and concerned a statute which authorized court orders to require defendants to produce any document which “tend to prove any allegation made by the United States.” Boyd v. United States, 116 U.S. 616, 622 (1886).

Boyd v. United States, 116 U.S. 616, 630 (1886).


While the statute did not authorize a search but instead compulsory production, the Justice concluded that the law was well within the restrictions of the search and seizure clause. With this point established, the Justice relied on Lord Camden’s opinion in Entick v. Carrington for the proposition that seizure of items to be used as evidence only was impermissible. Justice Bradley announced that the “essence of the offence” committed by the Government against Boyd “is not the breaking of his doors, and the rummaging of his drawers . . . but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.”

While it may be doubtful that the equation of search warrants with subpoenas and other compulsory process ever really amounted to much of a limitation, the present analysis of the Court dispenses with any theory of “convergence” of the two Amendments. Thus, in Andresen v. Maryland, police executed a warrant to search defendant’s offices for specified documents pertaining to a fraudulent sale of land, and the Court sustained the admission of the papers discovered as evidence at his trial. The Fifth Amendment was inapplicable, the Court held, because there had been no compulsion of defendant to produce or to authenticate the documents. As for the Fourth Amendment, inasmuch as the “business records” seized were evidence of criminal acts, they were
properly seizable under the rule of *Warden v. Hayden*; the fact that they were “testimonial” in nature, records in the defendant’s handwriting, was irrelevant. 157 Acknowledging that “there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person’s papers,” the Court’s response was to observe that while some “innocuous documents” would have to be examined to ascertain which papers were to be seized, authorities, just as with electronic “seizures” of conversations, “must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.” 158

Although *Andresen* was concerned with business records, its discussion seemed equally applicable to “personal” papers, such as diaries and letters, as to which a much greater interest in privacy most certainly exists. The question of the propriety of seizure of such papers continues to be the subject of reservation in opinions,159 but it is far from clear that the Court would accept any such exception should the issue be presented.160

**Execution of Warrants.**—The Fourth Amendment’s “general touchstone of reasonableness . . . governs the method of execution of the warrant.”161 Until recently, however, most such issues have been dealt with by statute and rule.162 It was a rule at common law that before an officer could break and enter he must give notice of his office, authority, and purpose and must in effect be refused admittance,163 and until recently this has been a statutory requirement in the federal system164 and generally in the States. In *Ker v. California,*165 the Court considered the rule of announce-

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157 Id. at 478-84.
158 Id. at 482 n.11. Minimization, as required under federal law, has not proved to be a significant limitation. Scott v. United States, 425 U.S. 917 (1976).
160 See, Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments 90 Harv. L. Rev. 945 (1977).
162 Rule 41(c), Federal Rules of Criminal Procedure, provides, inter alia, that the warrant shall command its execution in the daytime, unless the magistrate “for reasonable cause shown” directs in the warrant that it be served at some other time. See Jones v. United States, 357 U.S. 493, 498-500 (1958); Gooding v. United States, 416 U.S. 430 (1974). A separate statutory rule applies to narcotics cases. 21 U.S.C. § 879(a).
165 374 U.S. 23 (1963). *Ker* was an arrest warrant case, but no reason appears for differentiating search warrants. Eight Justices agreed that federal standards should govern and that the rule of announcement was of constitutional stature, but they divided 4-to-4 whether entry in this case had been pursuant to a valid excep-
ment as a constitutional requirement, although a majority there found circumstances justifying entry without announcement. In Wilson v. Arkansas, 166 the Court determined that the common law “knock and announce” rule is an element of the Fourth Amendment reasonableness inquiry. The rule is merely a presumption, however, that yields under various circumstances, including those posing a threat of physical violence to officers, those in which a prisoner has escaped and taken refuge in his dwelling, and those in which officers have reason to believe that destruction of evidence is likely. The test, articulated two years later in Richards v. Wisconsin, 167 is whether police have “a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime.” In Richards, the Court held that there is no blanket exception to the rule whenever officers are executing a search warrant in a felony drug investigation; instead, a case-by-case analysis is required to determine whether no-knock entry is justified under the circumstances. 168 Recent federal laws providing for the issuance of warrants authorizing in certain circumstances “no-knock” entries to execute warrants will no doubt present the Court with opportunities to explore the configurations of the rule of announcement. 169 A statute regulating the expiration of a warrant and issuance of another “should be liberally construed in favor of the individual.” 170 Similarly, inasmuch as the existence of probable cause must be established by fresh facts, so the execution of the warrant should be done in timely fashion so as to ensure so far as possible the continued existence of probable cause. 171

Because police actions in execution of a warrant must be related to the objectives of the authorized intrusion, and because privacy of the home lies at the core of the Fourth Amendment, police officers violate the Amendment by bringing members of the media or other third parties into a home during execution of a warrant

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168 The fact that officers may have to destroy property in order to conduct a no-knock entry has no bearing on the reasonableness of their decision not to knock and announce. United States v. Ramirez, 523 U.S. 65 (1998).
169 In narcotics cases, magistrates are authorized to issue “no-knock” warrants if they find there is probable cause to believe (1) the property sought may, and if notice is given, will be easily and quickly destroyed or (2) giving notice will endanger the life or safety of the executing officer or another person. 21 U.S.C. § 879(b). See also D.C. Code, § 23-591.
171 Id.
if presence of those persons was not in aid of execution of the warrant.\footnote{Wilson v. Layne, 526 U.S. 603 (1999). Accord, Hanlon v. Berger, 526 U.S. 808 (1999) (media camera crew ’ride-along’ with Fish and Wildlife Service agents executing a warrant to search respondent’s ranch for evidence of illegal taking of wildlife).} In executing a warrant for a search of premises and of named persons on the premises, police officers may not automatically search someone else found on the premises.\footnote{Ybarra v. Illinois, 444 U.S. 85 (1979) (patron in a bar), relying on and reaffirming United States v. Di Re, 332 U.S. 581 (1948) (occupant of vehicle may not be searched merely because there are grounds to search the automobile).} If they can articulate some reasonable basis for fearing for their safety they may conduct a “patdown” of the person, but in order to search they must have probable cause particularized with respect to that person. However, in \textit{Michigan v. Summers},\footnote{Ybarra was distinguished on the basis of its greater intrusiveness and the lack of sufficient connection with the premises. Id. at 695 n.4. By the time Summers was searched, police had probable cause to do so. Id. at 695. The warrant here was for contraband, id. at 701, and a different rule may apply with respect to warrants for other evidence.} the Court held that officers arriving to execute a warrant for the search of a house could detain, without being required to articulate any reasonable basis and necessarily therefore without probable cause, the owner or occupant of the house, whom they encountered on the front porch leaving the premises. The Court determined that such a detention, which was “substantially less intrusive” than an arrest, was justified because of the law enforcement interests in minimizing the risk of harm to officers, facilitating entry and conduct of the search, and preventing flight in the event incriminating evidence is found.\footnote{Maryland v. Garrison, 480 U.S. 79 (1987) (officers reasonably believed there was only one “third floor apartment” in city row house when in fact there were two).} Also, under some circumstances officers may search premises on the mistaken but reasonable belief that the premises are described in an otherwise valid warrant.\footnote{Steagald v. United States, 451 U.S. 204 (1981). An arrest warrant is a necessary and sufficient authority to enter a suspect’s home to arrest him. Payton v. New York, 445 U.S. 573 (1980).}

Although for purposes of execution, as for many other matters, there is little difference between search warrants and arrest warrants, one notable difference is that the possession of a valid arrest warrant cannot authorize authorities to enter the home of a third party looking for the person named in the warrant; in order to do that, they need a search warrant signifying that a magistrate has determined that there is probable cause to believe the person named is on the premises.\footnote{id. at 701-06. Ybarra was distinguished on the basis of its greater intrusiveness and the lack of sufficient connection with the premises. Id. at 695 n.4. By the time Summers was searched, police had probable cause to do so. Id. at 695. The warrant here was for contraband, id. at 701, and a different rule may apply with respect to warrants for other evidence.}
Valid Searches and Seizures Without Warrants

While the Supreme Court stresses the importance of warrants and has repeatedly referred to searches without warrants as “exceptional,” it appears that the greater number of searches, as well as the vast number of arrests, take place without warrants. The Reporters of the American Law Institute Project on a Model Code of Pre-Arraignment Procedure have noted “their conviction that, as a practical matter, searches without warrant and incidental to arrest have been up to this time, and may remain, of greater practical importance” than searches pursuant to warrants. “[T]he evidence on hand . . . compel[s] the conclusion that searches under warrants have played a comparatively minor part in law enforcement, except in connection with narcotics and gambling laws.” Nevertheless, the Court frequently asserts that “the most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions.’” The exceptions are said to be “jealously and carefully drawn,” and there must be “a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.” While the record does indicate an effort to categorize the exceptions, the number and breadth of those exceptions have been growing.

Detention Short of Arrest: Stop-and-Frisk.—Arrests are subject to the requirements of the Fourth Amendment, but the courts have followed the common law in upholding the right of police officers to take a person into custody without a warrant if they have probable cause to believe that the person to be arrested has committed a felony or a misdemeanor in their presence. The probable cause is, of course, the same standard required to be met

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182 McDonald v. United States, 335 U.S. 451, 456 (1948). In general, with regard to exceptions to the warrant clause, conduct must be tested by the reasonableness standard enunciated by the first clause of the Amendment, Terry v. Ohio, 392 U.S. 1, 20 (1968). The Court’s development of its privacy expectation tests, discussed under “The Interest Protected,” supra, substantially changed the content of that standard.

in the issuance of an arrest warrant, and must be satisfied by conditions existing prior to the policeman’s stop, what is discovered thereafter not sufficing to establish retroactively reasonable cause. There are, however, instances when a policeman’s suspicions will have been aroused by someone’s conduct or manner, but probable cause for placing such a person under arrest will be lacking. In Terry v. Ohio, the Court almost unanimously approved an on-the-street investigation by a police officer which involved “patting down” the subject of the investigation for weapons.

The case arose when a police officer observed three individuals engaging in conduct which appeared to him, on the basis of training and experience, to be the “casing” of a store for a likely armed robbery; upon approaching the men, identifying himself, and not receiving prompt identification, the officer seized one of the men, patted the exterior of his clothes, and discovered a gun. Chief Justice Warren for the Court wrote that the Fourth Amendment was applicable to the situation, applicable “whenever a police officer accosts an individual and restrains his freedom to walk away.” Since the warrant clause is necessarily and practically of no application to the type of on-the-street encounter present in Terry, the Chief Justice continued, the question was whether the policeman’s actions were reasonable. The test of reasonableness in this sort of situation is whether the police officer can point to “specific and articulable facts which, taken together with rational inferences from those facts,” would lead a neutral magistrate on review to conclude that a man of reasonable caution would be warranted in believing that possible criminal behavior was at hand and that both an investigative stop and a “frisk” was required. Inasmuch as the conduct witnessed by the policeman reasonably led him to believe that an armed robbery was in prospect, he was as reasonably led to believe that the men were armed and probably dangerous and that his safety required a “frisk.” Because the object of the “frisk” is the discovery of dangerous weapons, “it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” In a later case, the Court held that

185 "The police may not arrest upon mere suspicion but only on 'probable cause.'” Mallory v. United States, 354 U.S. 449, 454 (1957).
186 392 U.S. 1 (1968). Only Justice Douglas dissented. Id. at 35.
187 Id. at 16. See id. at 16-20.
188 Id. at 20, 21, 22.
189 Id. at 23-27, 29. See also Sibron v. New York, 392 U.S. 40 (1968) (after policeman observed defendant speak with several known narcotics addicts, he approached him and placed his hand in defendant’s pocket, thus discovering narcotics;
an officer may seize an object if, in the course of a weapons frisk, “plain touch” reveals presence of an object that the officer has probable cause to believe is contraband, the officer may seize that object.\footnote{190} The Court viewed the situation as analogous to that covered by the “plain view” doctrine: obvious contraband may be seized, but a search may not be expanded to determine whether an object is contraband.\footnote{191} Also impermissible is physical manipulation, without reasonable suspicion, of a bus passenger’s carry-on luggage stored in an overhead compartment.\footnote{192}

\textit{Terry} did not pass on a host of problems, including the grounds that could permissibly lead an officer to momentarily stop a person on the street or elsewhere in order to ask questions rather than frisk for weapons, the right of the stopped individual to refuse to cooperate, and the permissible response of the police to that refusal. Following that decision, the standard for stops for investigative purposes evolved into one of “reasonable suspicion of criminal activity.” That test permits some stops and questioning without probable cause in order to allow police officers to explore the foundations of their suspicions.\footnote{193} While not elaborating a set of rules governing the application of the tests, the Court was initially restrictive in recognizing permissible bases for reasonable sus-

\footnote{190}Minnesota v. Dickerson, 508 U.S. 366 (1993).
\footnote{191}508 U.S. at 375, 378-79. In \textit{Dickerson} the Court held that seizure of a small plastic container that the officer felt in the suspect’s pocket was not justified; the officer should not have continued the search, manipulating the container with his fingers, after determining that no weapon was present.
\footnote{192}Bond v. United States, 529 U.S. 334 (2000) (bus passenger has reasonable expectation that, while other passengers might handle his bag in order to make room for their own, they will not “feel the bag in an exploratory manner”).
\footnote{193}In United States v. Cortez, 449 U.S. 411 (1981), a unanimous Court attempted to capture the “elusive concept” of the basis for permitting a stop. Officers must have “articulable reasons” or “founded suspicions,” derived from the totality of the circumstances. “Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.” Id. at 417-18. The inquiry is thus quite fact-specific. In the anonymous tip context, the same basic approach requiring some corroboration applies regardless of whether the standard is probable cause or reasonable suspicion; the difference is that less information, or less reliable information, can satisfy the lower standard. Alabama v. White, 496 U.S. 325 (1990).
Extensive intrusions on individual privacy, e.g., transportation to the stationhouse for interrogation and fingerprinting, were invalidated in the absence of probable cause, although the Court has held that an uncorroborated, anonymous tip is insufficient basis for a Terry stop, and that there is no “firearms” exception to the reasonable suspicion requirement. More recently, however, the Court has taken less restrictive approaches.

It took the Court some time to settle on a test for when a “seizure” has occurred, and the Court has recently modified its approach. The issue is of some importance, since it is at this point that Fourth Amendment protections take hold. The Terry Court recognized in dictum that “not all personal intercourse between policemen and citizens involves ‘seizures’ of persons,” and suggested that “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” Years later Justice Stewart proposed a similar standard, that a person has been seized “only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” This reasonable perception standard was subsequently endorsed by a majority of Justices, and was applied in several cases in which admissibility of evidence turned on whether a seizure of the person not justified by probable cause or reasonable suspicion had occurred prior to the uncovering of the evidence.

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197 See, e.g., United States v. Henley, 469 U.S. 221 (1985) (reasonable suspicion to stop a motorist may be based on a “wanted flyer” as long as issuance of the flyer has been based on reasonable suspicion); United States v. Sokolow, 490 U.S. 1, 9 (1989) (airport stop based on drug courier profile may rely on a combination of factors that individually may be “quite consistent with innocent travel”).

198 392 U.S. at 19, n.16.


200 See, e.g., Florida v. Royer, 460 U.S. 491 (1983), in which there was no opinion of the Court, but in which the test was used by the plurality of four, id. at 502, and also endorsed by dissenting Justice Blackmun, id. at 514.
No seizure occurred, for example, when INS agents seeking to identify illegal aliens conducted workforce surveys within a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees.\footnote{INS v. Delgado, 466 U.S. 210 (1984).} This brief questioning, even with blocked exits, amounted to “classic consensual encounters rather than Fourth Amendment seizures.”\footnote{Id. at 221.} The Court also ruled that no seizure had occurred when police in a squad car drove alongside a suspect who had turned and run down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, display of a weapon, or blocking of the suspect’s path), the Court concluded, the police conduct “would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [one’s] freedom of movement.”\footnote{Michigan v. Chesternut, 486 U.S. 567, 575 (1988) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975), quoted in INS v. Delgado, 466 U.S. 210, 215 (1984)).}

Soon thereafter, however, the Court departed from the Mendenhall reasonable perception standard and adopted a more formalistic approach, holding that an actual chase with evident intent to capture did not amount to a “seizure” because the suspect did not comply with the officer’s order to halt. Mendenhall, said the Court in California v. Hodari D., stated a “necessary” but not a “sufficient” condition for a seizure of the person through show of authority.\footnote{Florida v. Bostick, 501 U.S. 429 (1991).} A Fourth Amendment “seizure” of the person, the Court determined, is the same as a common law arrest; there must be either application of physical force (or the laying on of hands), or submission to the assertion of authority.\footnote{499 U.S. 621, 628 (1991).} Indications are, however, that Hodari D. does not signal the end of the reasonable perception standard, but merely carves an exception applicable to chases and perhaps other encounters between suspects and police.

Later in the same term the Court ruled that the Mendenhall “free-to-leave” inquiry was misplaced in the context of a police sweep of a bus, but that a modified reasonable perception approach still governed.\footnote{499 U.S. 621, 628 (1991).} In conducting a bus sweep, aimed at detecting illegal drugs and their couriers, police officers typically board a bus during a stopover at a terminal and ask to inspect tickets, identification, and sometimes luggage of selected passengers. The Court did not focus on whether an “arrest” had taken place,
as adherence to the Hodari D. approach would have required, but
instead suggested that the appropriate inquiry is “whether a rea-
sonable person would feel free to decline the officers’ requests or
otherwise terminate the encounter.” \textsuperscript{207} “When the person is seated
on a bus and has no desire to leave,” the Court explained, “the de-
gree to which a reasonable person would feel that he or she could
leave is not an accurate measure of the coercive effect of the en-
counter.” \textsuperscript{208}

A *Terry* search need not be limited to a stop and frisk of
the person, but may extend as well to a protective search of the pas-
senger compartment of a car if an officer possesses “a reasonable
belief, based on specific and articulable facts . . . that the suspect
is dangerous and . . . may gain immediate control of weapons.” \textsuperscript{209}

How lengthy a *Terry* detention may be varies with the cir-
cumstances. In approving a 20-minute detention of a driver made
necessary by the driver’s own evasion of drug agents and a state
police decision to hold the driver until the agents could arrive on
the scene, the Court indicated that it is “appropriate to examine
whether the police diligently pursued a means of investigation that
was likely to confirm or dispel their suspicions quickly, during
which time it was necessary to detain the defendant.” \textsuperscript{210}

Similar principles govern detention of luggage at airports in
order to detect the presence of drugs; *Terry* “limitations applicable
to investigative detentions of the person should define the per-
missible scope of an investigative detention of the person’s luggage on
less than probable cause.” \textsuperscript{211} The general rule is that “when an of-
"officer’s observations lead him reasonably to believe that a traveler
is carrying luggage that contains narcotics, the principles of
*Terry* . . . would permit the officer to detain the luggage briefly to
investigate the circumstances that aroused his suspicion, provided

\textsuperscript{207} Id. at 2387.
\textsuperscript{208} Id. The Court asserted that the case was “analytically indistinguishable from
Delgado. Like the workers in that case (subjected to the INS ‘survey’ at their work-
place), Bostick’s freedom of movement was restricted by a factor independent of po-
lice conduct—i.e., by his being a passenger on a bus.” Id.
\textsuperscript{209} Michigan v. Long, 463 U.S. 1032 (1983) (suspect appeared to be under the
influence of drugs, officer spied hunting knife exposed on floor of front seat and
searched remainder of passenger compartment). Similar reasoning has been applied
to uphold a “protective sweep” of a home in which an arrest is made if arresting
officers have a reasonable belief that the area swept may harbor another individual
has been applied to detention of travelers at the border, the Court testing the rea-
sonablenes in terms of “the period of time necessary to either verify or dispel the
suspicion.” United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (ap-
proving warrantless detention for more than 24 hours of traveler suspected of al-
imentary canal drug smuggling).
\textsuperscript{211} United States v. Place, 462 U.S. 696, 709 (1983).
that the investigative detention is properly limited in scope." 212 Seizure of luggage for an expeditious “canine sniff” by a dog trained to detect narcotics can satisfy this test even though seizure of luggage is in effect detention of the traveler, since the procedure results in “limited disclosure,” impinges only slightly on a traveler’s privacy interest in the contents of personal luggage, and does not constitute a search within the meaning of the Fourth Amendment. 213 By contrast, taking a suspect to an interrogation room on grounds short of probable cause, retaining his air ticket, and retrieving his luggage without his permission taints consent given under such circumstances to open the luggage, since by then the detention had exceeded the bounds of a permissible Terry investigatory stop and amounted to an invalid arrest. 214 But the same requirements for brevity of detention and limited scope of investigation are apparently inapplicable to border searches of international travelers, the Court having approved a 24-hour detention of a traveler suspected of smuggling drugs in her alimentary canal. 215

**Search Incident to Arrest.**—The common-law rule permitting searches of the person of an arrestee as an incident to the arrest has occasioned little controversy in the Court. 216 The dispute has centered around the scope of the search. Since it was the stated general rule that the scope of a warrantless search must be strictly tied to and justified by the circumstances which rendered its justification permissible, and since it was the rule that the justification of a search of the arrestee was to prevent destruction of evidence and to prevent access to a weapon, 217 it was argued to the court that a search of the person of the defendant arrested for a traffic offense, which discovered heroin in a crumpled cigarette package, was impermissible, inasmuch as there could have been no destructible evidence relating to the offense for which he was arrested and no weapon could have been concealed in the cigarette package. The Court rejected this argument, ruling that “no addi-

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212 Id. at 706.
213 462 U.S. at 707. However, the search in *Place* was not expeditious, and hence exceeded Fourth Amendment bounds, when agents took 90 minutes to transport luggage to another airport for administration of the canine sniff.
214 Florida v. Royer, 460 U.S. 491 (1983). On this much the plurality opinion of Justice White (id. at 503), joined by three other Justices, and the concurring opinion of Justice Brennan (id. at 509) were in agreement.
tional justification” is required for a custodial arrest of a suspect based on probable cause.218

However, the Justices have long found themselves embroiled in argument about the scope of the search incident to arrest as it extends beyond the person to the area in which the person is arrested, most commonly either his premises or his vehicle. Certain early cases went both ways on the basis of some fine distinctions,219 but in *Harris v. United States*,220 the Court approved a search of a four-room apartment pursuant to an arrest under warrant for one crime and in which the search turned up evidence of another crime. A year later, in *Trupiano v. United States*,221 a raid on a distillery resulted in the arrest of a man found on the premises and a seizure of the equipment; the Court reversed the conviction because the officers had had time to obtain a search warrant and had not done so. “A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.”222 This decision was overruled in *United States v. Rabinowitz*,223 in which officers arrested defendant in his one-room office pursuant to an arrest warrant and proceeded to search the room completely. The Court observed that the issue was not whether the officers had the time and opportunity to obtain a search warrant but whether the search incident to arrest was reasonable. Though *Rabinowitz* referred to searches of the area within the arrestee’s “immediate control,”224 it provided no standard by which this area was to be determined, and extensive searches were permitted under the rule.225

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218 United States v. Robinson, 414 U.S. 218, 235 (1973). See also id. at 237-38 (Justice Powell concurring). The Court applied the same rule in *Gustafson v. Florida*, 414 U.S. 260 (1973), involving a search of a motorist’s person following his custodial arrest for an offense for which a citation would normally have issued. Unlike the situation in *Robinson*, police regulations did not require the *Gustafson* officer to take the suspect into custody, nor did a departmental policy guide the officer as to when to conduct a full search. The Court found these differences inconsequential, and left for another day the problem of pretextual arrests in order to obtain basis to search. Soon thereafter, the Court upheld conduct of a similar search at the place of detention, even after a time lapse between the arrest and search. United States v. Edwards, 415 U.S. 800 (1974).


221 334 U.S. 699 (1948).

222 Id. at 708.


224 Id. at 64.

In *Chimel v. California*, 226 however, a narrower view was asserted, the primacy of warrants was again emphasized, and a standard by which the scope of searches pursuant to arrest could be ascertained was set out. “When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of someone who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”

“There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.” 227

Although the viability of *Chimel* had been in doubt for some time as the Court refined and applied its analysis of reasonable and justifiable expectations of privacy, 228 it has in some but not all contexts survived the changed rationale. Thus, in *Mincey v. Arizona*, 229 the Court rejected a state effort to create a “homicide-
scene" exception for a warrantless search of an entire apartment extending over four days. The occupant had been arrested and removed and it was true, the Court observed, that a person legally taken into custody has a lessened right of privacy in his person, but he does not have a lessened right of privacy in his entire house. And, in United States v. Chadwick, emphasizing a person’s reasonable expectation of privacy in his luggage or other baggage, the Court held that, once police have arrested and immobilized a suspect, validly seized bags are not subject to search without a warrant. Police may, however, in the course of jailing an arrested suspect conduct an inventory search of the individual’s personal effects, including the contents of a shoulder bag, since “the scope of a station-house search may in some circumstances be even greater than those supporting a search immediately following arrest.”

Still purporting to reaffirm Chimel, the Court in New York v. Belton held that police officers who had made a valid arrest of the occupant of a vehicle could make a contemporaneous search of the entire passenger compartment of the automobile, including containers found therein. Believing that a fairly simple rule understandable to authorities in the field was desirable, the Court ruled “that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary item.’”

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230 433 U.S. 1 (1977). Defendant and his luggage, a footlocker, had been removed to the police station, where the search took place.

231 If, on the other hand, a sealed shipping container had already been opened and resealed during a valid customs inspection, and officers had maintained surveillance through a “controlled delivery” to the suspect, there is no reasonable expectation of privacy in the contents of the container and officers may search it, upon the arrest of the suspect, without having obtained a warrant. Illinois v. Andreas, 463 U.S. 765 (1983).


234 Id. at 460 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)). In this particular instance, Belton had been removed from the automobile and handcuffed, but the Court wished to create a general rule removed from the fact-specific nature of any one case. “Container” here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.” Id. at 460-61 n.4.
Chimel has, however, been qualified by another consideration. Not only may officers search areas within the arrestee’s immediate control in order to alleviate any threat posed by the arrestee, but they may extend that search if there may be a threat posed by “unseen third parties in the house.” A “protective sweep” of the entire premises (including an arrestee’s home) may be undertaken on less than probable cause if officers have a “reasonable belief,” based on “articulable facts,” that the area to be swept may harbor an individual posing a danger to those on the arrest scene.235

Vehicular Searches.—In the early days of the automobile the Court created an exception for searches of vehicles, holding in Carroll v. United States236 that vehicles may be searched without warrants if the officer undertaking the search has probable cause to believe that the vehicle contains contraband. The Court explained that the mobility of vehicles would allow them to be quickly moved from the jurisdiction if time were taken to obtain a warrant.237

Initially the Court limited Carroll’s reach, holding impermissible the warrantless seizure of a parked automobile merely because it is movable, and indicating that vehicles may be stopped only while moving or reasonably contemporaneously with movement.238 Also, the Court ruled that the search must be reasonably contemporaneous with the stop, so that it was not permissible to remove the vehicle to the stationhouse for a warrantless search at the convenience of the police.239

The Court next developed a reduced privacy rationale to supplement the mobility rationale, explaining that “the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property.”240 “One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.

235 Maryland v. Buie, 494 U.S. 325, 334 (1990). This “sweep” is not to be a full-blown, “top-to-bottom” search, but only “a cursory inspection of those spaces where a person may be found.” Id. at 335-36.

236 267 U.S. 132 (1925). Carroll was a Prohibition-era liquor case, whereas a great number of modern automobile cases involve drugs.

237 Id. at 153. See also Husty v. United States, 282 U.S. 694 (1931); Scher v. United States, 305 U.S. 251 (1938); Brinegar v. United States, 338 U.S. 160 (1949).

All of these cases involved contraband, but in Chambers v. Maroney, 399 U.S. 42 (1970), the Court, without discussion, and over Justice Harlan’s dissent, id. at 55, 62, extended the rule to evidentiary searches.

238 Coolidge v. New Hampshire, 403 U.S. 443, 458-64 (1971). This portion of the opinion had the adherence of a plurality only, Justice Harlan concurring on other grounds, and there being four dissenters, id. at 493, 504, 510, 523.


California v. Carney, 471 U.S. 386, 393 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not "readily mobile").


Delaware v. Prouse, 440 U.S. 648, 663 (1979) (discretionary random stops of motorists to check driver’s license and registration papers and safety features of cars constitute Fourth Amendment violation); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (violation for roving patrols on lookout for illegal aliens to stop vehicles on highways near international borders when only ground for suspicion is that occupants appear to be of Mexican ancestry). In Prouse, the Court cautioned that it was not precluding the States from developing methods for spot checks, such as questioning all traffic at roadblocks, that involve less intrusion or that do not involve unconstrained exercise of discretion, 440 U.S. at 663.

An officer who observes a traffic violation may stop a vehicle even if his real motivation is to investigate for evidence of other crime. Whren v. United States, 517 U.S. 806 (1996). The existence of probable cause to believe that a traffic violation has occurred establishes the constitutional reasonableness of traffic stops regardless of the actual motivation of the officers involved, and regardless of whether it is customary police practice to stop motorists for the violation observed. Similarly, pretextual arrest of a motorist who has committed a traffic offense is permissible. Arkansas v. Sullivan, 121 S. Ct. 1876 (2001) (per curiam) (upholding search of the motorist’s car for crime not related to the traffic offense).

Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (upholding a sobriety checkpoint at which all motorists are briefly stopped for preliminary questioning and observation for signs of intoxication).
border, but not for more generalized law enforcement purposes. Once police have validly stopped a vehicle, they may also, based on articulable facts warranting a reasonable belief that weapons may be present, conduct a Terry-type protective search of those portions of the passenger compartment in which a weapon could be placed or hidden. And, in the absence of such reasonable suspicion as to weapons, police may seize contraband and suspicious items “in plain view” inside the passenger compartment.

Although officers who have stopped a car to issue a routine traffic citation may conduct a Terry-type search, even including a pat-down of driver and passengers if there is reasonable suspicion that they are armed and dangerous, they may not conduct a full-blown search of the car unless they exercise their discretion to arrest the driver instead of issuing a citation. And once police have probable cause to believe there is contraband in a vehicle, they may remove the vehicle from the scene to the station house in order to conduct a search, without thereby being required to obtain a warrant.

247 United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding border patrol checkpoint, over 60 miles from the border, for questioning designed to apprehend illegal aliens).

248 City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (vehicle checkpoint set up for the “primary purpose [of] detect[ing] evidence of ordinary criminal wrongdoing” (here interdicting illegal narcotics) does not fall within the highway safety or border patrol exception to the individualized suspicion requirement, and hence violates the Fourth Amendment).

249 Michigan v. Long, 463 U.S. 1032, 1049 (1983) (holding that contraband found in the course of such a search is admissible).

250 Texas v. Brown, 460 U.S. 730 (1983). Similarly, since there is no reasonable privacy interest in the vehicle identification number, required by law to be placed on the dashboard so as to be visible through the windshield, police may reach into the passenger compartment to remove items obscuring the number and may seize items in plain view while doing so. New York v. Class, 475 U.S. 106 (1986).

251 Knowles v. Iowa, 525 U.S. 113 (1998) (invalidating an Iowa statute permitting a full-blown search incident to a traffic citation).

252 See Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (police officers, in their discretion, may arrest a motorist for a minor traffic offense rather than issuing a citation); New York v. Belton, 453 U.S. 454 (1981) (officers who arrest an occupant of a vehicle may make a contemporaneous search of the entire passenger compartment, including closed containers); and Arkansas v. Sullivan, 532 U.S. 769 (2001) (pretextual arrest of motorist who has committed a traffic offense is permissible even if purpose is to search vehicle for evidence of other crime).

253 Michigan v. Thomas, 458 U.S. 259 (1982). The same rule applies if it is the vehicle itself that is forfeitable contraband; police, acting without a warrant, may seize the vehicle from a public place. Florida v. White, 526 U.S. 559 (1999).
during the period required for the police to obtain a warrant." Because of the lessened expectation of privacy, inventory searches of impounded automobiles are justifiable in order to protect public safety and the owner’s property, and any evidence of criminal activity discovered in the course of the inventories is admissible in court. The Justices were evenly divided, however, on the propriety of warrantless seizure of an arrestee’s automobile from a public parking lot several hours after his arrest, its transportation to a police impoundment lot, and the taking of tire casts and exterior paint scrapings.

Police in undertaking a warrantless search of an automobile may not extend the search to the persons of the passengers therein unless there is a reasonable suspicion that the passengers are armed and dangerous, in which case a Terry patdown is permissible. But because passengers in an automobile have no reasonable expectation of privacy in the interior area of the car, a warrantless search of the glove compartment and the spaces under the seats, which turned up evidence implicating the passengers, invaded no Fourth Amendment interest of the passengers.

Luggage and other closed containers found in automobiles may also be subjected to warrantless searches based on probable cause, regardless of whether the luggage or containers belong to the driver or to a passenger, and regardless of whether it is the driver or a passenger who is under suspicion. The same rule now applies whether the police have probable cause to search only the containers or whether they have probable cause to search the automobile for something capable of being held in the container.

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260 Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (“police officers with probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search”).
Vessel Searches.—Not only is the warrant requirement inapplicable to brief stops of vessels, but also none of the safeguards applicable to stops of automobiles on less than probable cause are necessary predicates to stops of vessels. In United States v. Villamonte-Marquez, 263 the Court upheld a random stop and boarding of a vessel by customs agents, lacking any suspicion of wrongdoing, for purpose of inspecting documentation. The boarding was authorized by statute derived from an act of the First Congress, 264 and hence had “an impressive historical pedigree” carrying with it a presumption of constitutionality. Moreover, “important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area” justify application of a less restrictive rule for vessel searches. The reason why random stops of vehicles have been held impermissible under the Fourth Amendment, the Court explained, is that stops at fixed checkpoints or roadblocks are both feasible and less subject to abuse of discretion by authorities. “But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established ‘avenues’ as automobiles must do.” 265 Because there is a “substantial” governmental interest in enforcing documentation laws, “especially in waters where the need to deter or apprehend smugglers is great,” the Court found the “limited” but not “minimal” intrusion occasioned by boarding for documentation inspection to be reasonable. 266 Dissenting Justice Brennan argued that the Court for the first time was approving “a completely random seizure and detention of persons and an entry onto private, non-commercial premises by police officers, without any limitations

263 462 U.S. 579 (1983). The opinion of the Court, written by Justice Rehnquist, was joined by Chief Justice Burger and by Justices White, Blackmun, Powell, and O’Connor. Justice Brennan’s dissent was joined by Justice Marshall and, on mootness but not on the merits, by Justice Stevens.


265 462 U.S. at 589. Justice Brennan’s dissent argued that a fixed checkpoint was feasible in this case, involving a ship channel in an inland waterway. Id. at 608 n.10. The fact that the Court’s rationale was geared to the difficulties of law enforcement in the open seas suggests a reluctance to make exceptions to the general rule. Note as well the Court’s later reference to this case as among those “reflect[ing] longstanding concern for the protection of the integrity of the border.” United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

266 462 U.S. at 593.
whatever on the officers’ discretion or any safeguards against abuse.”

**Consent Searches.**—Fourth Amendment rights, like other constitutional rights, may be waived, and one may consent to search of his person or premises by officers who have not complied with the Amendment. The Court, however, has insisted that the burden is on the prosecution to prove the voluntariness of the consent and awareness of the right of choice. Reviewing courts must determine on the basis of the totality of the circumstances whether consent has been freely given or has been coerced. Actual knowledge of the right to refuse consent is not essential to the issue of voluntariness, and therefore police are not required to acquaint a person with his rights, as through a Fourth Amendment version of _Miranda_ warnings. But consent will not be regarded as voluntary when the officer asserts his official status and claim of right and the occupant yields to these factors rather than makes his own determination to admit officers. When consent is obtained through the deception of an undercover officer or an informer gaining admission without, of course, advising a suspect who he is, the Court has held that the suspect has simply assumed the risk that an invitee would betray him, and evidence obtained through the deception is admissible.

Additional issues arise in determining the validity of consent to search when consent is given not by the suspect but by a third party. In the earlier cases, third party consent was deemed suffi-

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267 462 U.S. at 598. Justice Brennan contended that all previous cases had required some “discretion-limiting” feature such as a requirement of probable cause, reasonable suspicion, fixed checkpoints instead of roving patrols, and limitation of border searches to border areas, and that these principles set forth in _Delaware v. Prouse_, 440 U.S. 648 (1979) should govern. id. at 599, 601.


cident if that party “possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” Now, however, actual common authority over the premises is no longer required; it is enough if the searching officer had a reasonable but mistaken belief that the third party had common authority and could consent to the search.

Border Searches.—“That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.” Authorized by the First Congress, the customs search in these circumstances requires no warrant, no probable cause, not even the showing of some degree of suspicion that accompanies even investigatory stops. Moreover, while prolonged detention of travelers beyond the routine customs search and inspection must be justified by the Terry standard of reasonable suspicion having a particularized and objective basis, Terry protections as to the length and intrusiveness of the search do not apply.

Inland stoppings and searches in areas away from the borders are a different matter altogether. Thus, in Almeida-Sanchez v. United States, the Court held that a warrantless stop and search


275 Illinois v. Rodriguez, 497 U.S. 177 (1990). See also Florida v. Jimeno, 500 U.S. 248, 251 (1991) (it was “objectively reasonable” for officer to believe that suspect’s consent to search his car for narcotics included consent to search containers found within the car).


280 Id. A traveler suspected of alimentary canal drug smuggling was strip searched, and then given a choice between an abdominal x-ray or monitored bowel movements. Because the suspect chose the latter option, the court disavowed decision as to “what level of suspicion, if any, is required for . . . strip, body cavity, or involuntary x-ray searches.” Id. at 541 n.4.

281 413 U.S. 266 (1973). Justices White, Blackmun, Rehnquist, and Chief Justice Burger would have found the search reasonable upon the congressional determina-
of defendant’s automobile on a highway some 20 miles from the border by a roving patrol lacking probable cause to believe that the vehicle contained illegal aliens violated the Fourth Amendment. Similarly, the Court invalidated an automobile search at a fixed checkpoint well removed from the border; while agreeing that a fixed checkpoint probably gave motorists less cause for alarm than did roving patrols, the Court nonetheless held that the invasion of privacy entailed in a search was just as intrusive and must be justified by a showing of probable cause or consent. On the other hand, when motorists are briefly stopped, not for purposes of a search but in order that officers may inquire into their residence status, either by asking a few questions or by checking papers, different results are achieved, so long as the stops are not truly random. Roving patrols may stop vehicles for purposes of a brief inquiry, provided officers are “aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion” that an automobile contains illegal aliens; in such a case the interference with Fourth Amendment rights is “modest” and the law enforcement interests served are significant. Fixed checkpoints provide additional safeguards; here officers may halt all vehicles briefly in order to question occupants even in the absence of any reasonable suspicion that the particular vehicle contains illegal aliens.

“Open Fields”—In *Hester v. United States*, the Court held that the Fourth Amendment did not protect “open fields” and that,
therefore, police searches in such areas as pastures, wooded areas, open water, and vacant lots need not comply with the requirements of warrants and probable cause. The Court’s announcement in *Katz v. United States* \(^{286}\) that the Amendment protects “people not places” cast some doubt on the vitality of the open fields principle, but all such doubts were cast away in *Oliver v. United States*. \(^{287}\) Invoking *Hester’s* reliance on the literal wording of the Fourth Amendment (open fields are not “effects”) and distinguishing *Katz*, the Court ruled that the open fields exception applies to fields that are fenced and posted. “[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.” \(^{288}\) Nor may an individual demand privacy for activities conducted within outbuildings and visible by trespassers peering into the buildings from just outside. \(^{289}\) Even within the curtilage and notwithstanding that the owner has gone to the extreme of erecting a 10-foot high fence in order to screen the area from ground-level view, there is no reasonable expectation of privacy from naked-eye inspection from fixed-wing aircraft flying in navigable airspace. \(^{290}\) Similarly, naked-eye inspection from helicopters flying even lower contravenes no reasonable expectation of privacy. \(^{291}\) And aerial photography of commercial facilities secured from ground-level public view is permissible, the Court finding such spaces more analogous to open fields than to the curtilage of a dwelling. \(^{292}\)

*Plain View*—Somewhat similar in rationale is the rule that objects falling in the ‘plain view’ of an officer who has a right to


\(^{287}\) 466 U.S. 170 (1984) (approving warrantless intrusion past no trespassing signs and around locked gate, to view field not visible from outside property).

\(^{288}\) Id. at 178. *See also California v. Greenwood*, 486 U.S. 35 (1988) (approving warrantless search of garbage left curbside “readily accessible to animals, children, scavengers, snoops, and other members of the public”).

\(^{289}\) United States v. Dunn, 480 U.S. 294 (1987) (space immediately outside a barn, accessible only after crossing a series of “ranch-style” fences and situated one-half mile from the public road, constitutes unprotected “open field”).

\(^{290}\) California v. Ciraolo, 476 U.S. 207 (1986). Activities within the curtilage are nonetheless still entitled to some Fourth Amendment protection. The Court has described four considerations for determining whether an area falls within the curtilage: proximity to the home, whether the area is included within an enclosure also surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to shield the area from view of passersby. United States v. Dunn, 480 U.S. 294 (1987) (barn 50 yards outside fence surrounding home, used for processing chemicals, and separated from public access only by a series of livestock fences, by a chained and locked driveway, and by one-half mile's distance, is not within curtilage).


\(^{292}\) Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (suggesting that aerial photography of the curtilage would be impermissible).
be in the position to have that view are subject to seizure without a warrant or that if the officer needs a warrant or probable cause to search and seize his lawful observation will provide grounds therefor. The plain view doctrine is limited, however, by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them.

The Court has analogized from the plain view doctrine to hold that once officers have lawfully observed contraband, “the owner’s privacy interest in that item is lost,” and officers may reseal a container, trace its path through a controlled delivery, and seize and reopen the container without a warrant.

**Public Schools.**—In *New Jersey v. T.L.O.*, the Court set forth the principles governing searches by public school authorities. The Fourth Amendment applies to searches conducted by public school officials because “school officials act as representatives of the State, not merely as surrogates for the parents.” However, “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” Neither the warrant requirement nor the probable cause standard is appro-

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294 Steele v. United States, 267 U.S. 498 (1925) (officers observed contraband in view through open doorway; had probable cause to procure warrant). Cf. Taylor v. United States, 286 U.S. 1 (1932) (officers observed contraband in plain view in garage, warrantless entry to seize was unconstitutional).

295 Arizona v. Hicks, 480 U.S. 321 (1987) (police lawfully in apartment to investigate shooting lacked probable cause to inspect expensive stereo equipment to record serial numbers).


298 Id. at 336.

299 Id. at 340.
priate, the Court ruled. Instead, a simple reasonableness standard governs all searches of students’ persons and effects by school authorities. A search must be reasonable at its inception, i.e., there must be “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” School searches must also be reasonably related in scope to the circumstances justifying the interference, and “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” In applying these rules, the Court upheld as reasonable the search of a student’s purse to determine whether the student, accused of violating a school rule by smoking in the lavatory, possessed cigarettes. The search for cigarettes uncovered evidence of drug activity held admissible in a prosecution under the juvenile laws.

**Government Offices.**—Similar principles apply to a public employer’s work-related search of its employees’ offices, desks, or file cabinets, except that in this context the Court distinguished searches conducted for law enforcement purposes. In *O’Connor v. Ortega,* a majority of Justices agreed, albeit on somewhat differing rationales, that neither a warrant nor a probable cause requirement should apply to employer searches “for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct.” Four Justices would require a case-by-case inquiry into the reasonableness of such searches; one would hold that such searches “do not violate the Fourth Amendment.”

**Prisons and Regulation of Probation.**—Searches of prison cells by prison administrators are not limited even by a reasonableness standard, the Court having held that “the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.” Thus, prison administrators may conduct random “shakedown” searches of inmates’ cells without the need to adopt any established practice or plan, and inmates must

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300 This single rule, the Court explained, will permit school authorities “to regulate their conduct according to the dictates of reason and common sense.” 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was “unwilling to adopt a standard under which the legality of a search is dependent upon a judge’s evaluation of the relative importance of various school rules.” Id. at n.9.

301 469 U.S. at 342.

302 Id.


304 480 U.S. at 725. Not at issue was whether there must be individualized suspicion for investigations of work-related misconduct.

305 This position was stated in Justice O’Connor’s plurality opinion, joined by Chief Justice Rehnquist and by Justices White and Powell.

306 480 U.S. at 732 (Scalia, J., concurring in judgment).

look to the Eighth Amendment or to state tort law for redress against harassment, malicious property destruction, and the like.

Neither a warrant nor probable cause is needed for an administrative search of a probationer’s home. It is enough, the Court ruled in *Griffin v. Wisconsin*, that such a search was conducted pursuant to a valid regulation that itself satisfies the Fourth Amendment’s reasonableness standard (e.g., by requiring “reasonable grounds” for a search).\(^{308}\) “A State’s operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.”\(^{309}\) “Probation, like incarceration, is a form of criminal sanction,” the Court noted, and a warrant or probable cause requirement would interfere with the “ongoing [non-adversarial] supervisory relationship” required for proper functioning of the system.\(^{310}\)

**Drug Testing**.—In two 1989 decisions the Court held that no warrant, probable cause, or even individualized suspicion is required for mandatory drug testing of certain classes of railroad and public employees. In each case, “special needs beyond the normal need for law enforcement” were identified as justifying the drug testing. In *Skinner v. Railway Labor Executives’ Ass’n*,\(^ {311}\) the Court upheld regulations requiring railroads to administer blood, urine, and breath tests to employees involved in certain train accidents or violating certain safety rules; upheld in *National Treasury Employees Union v. Von Raab*\(^ {312}\) was a Customs Service screening program requiring urinalysis testing of employees seeking transfer or promotion to positions having direct involvement with drug interdiction, or to positions requiring the incumbent to carry firearms. The Court in *Skinner* found a “compelling” governmental interest in testing the railroad employees without any showing of individualized suspicion, since operation of trains by anyone impaired by drugs “can cause great human loss before any signs of impairment become noticeable.”\(^ {313}\) By contrast, the intrusions on privacy were termed “limited.” Blood and breath tests were passed off as routine; the urine test, while more intrusive, was deemed permissible because of the “diminished expectation of privacy” in employees having some responsibility for safety in a pervasively regulated indus-

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\(^{308}\) 483 U.S. 868 (1987) (search based on information from police detective that there was or might be contraband in probationer’s apartment).

\(^{309}\) 483 U.S. at 873-74.

\(^{310}\) Id. at 718, 721.

\(^{311}\) 489 U.S. 602 (1989).

\(^{312}\) 489 U.S. 656 (1989).

\(^{313}\) 489 U.S. at 628.
try.\textsuperscript{314} The lower court’s emphasis on the limited effectiveness of the urine test (it detects past drug use but not necessarily the level of impairment) was misplaced, the Court ruled. It is enough that the test may provide some useful information for an accident investigation; in addition, the test may promote deterrence as well as detection of drug use.\textsuperscript{315} In Von Raab the governmental interests underlying the Customs Service’s screening program were also termed “compelling”: to ensure that persons entrusted with a firearm and the possible use of deadly force not suffer from drug-induced impairment of perception and judgment, and that “front-line [drug] interdiction personnel [be] physically fit, and have unimpeachable integrity and judgment.”\textsuperscript{316} The possibly “substantial” interference with privacy interests of these Customs employees was justified, the Court concluded, because, “[u]nlike most private citizens or government employees generally, they have a diminished expectation of privacy.”\textsuperscript{317}

Emphasizing the “special needs” of the public school context, reflected in the “custodial and tutelary” power that schools exercise over students, and also noting schoolchildren’s diminished expectation of privacy, the Court in Vernonia School District v. Acton\textsuperscript{318} upheld a school district’s policy authorizing random urinalysis drug testing of students who participate in interscholastic athletics. The Court redefined the term “compelling” governmental interest. The phrase does not describe a “fixed, minimum quantum of governmental concern,” the Court explained, but rather “describes an interest which appears important enough to justify the particular search at hand.”\textsuperscript{319} Applying this standard, the Court concluded that “deterring drug use by our Nation’s schoolchildren is at least as important as enhancing efficient enforcement of the Nation’s laws against the importation of drugs . . . or deterring drug use by engineers and trainmen.”\textsuperscript{320} On the other hand, the interference with privacy interests was not great, the Court decided, since schoolchildren are routinely required to submit to various physical examinations and vaccinations. Moreover, “[l]egitimate privacy expectations are even less [for] student athletes, since they normally suit up, shower, and dress in locker rooms that afford no privacy,  

\textsuperscript{314} Id. at 628.  
\textsuperscript{315} Id. at 631-32.  
\textsuperscript{316} Von Raab, 489 U.S. at 670-71. Dissenting Justice Scalia discounted the “feeble justifications” relied upon by the Court, believing instead that the “only plausible explanation” for the drug testing program was the “symbolism” of a government agency setting an example for other employers to follow. 489 U.S. at 686-87.  
\textsuperscript{317} Id. at 672.  
\textsuperscript{318} 515 U.S. 646 (1995).  
\textsuperscript{319} Id. at 661.  
\textsuperscript{320} Id.
and since they voluntarily subject themselves to physical exams and other regulations above and beyond those imposed on non-athletes.” 321 The Court “caution[ed] against the assumption that suspicionless drug testing will readily pass muster in other contexts,” identifying as “the most significant element” in Vernonia the fact that the policy was implemented under the government’s responsibilities as guardian and tutor of schoolchildren. 322

In two more recent cases, the Court found that there were no “special needs” justifying random testing. Georgia’s requirement that candidates for state office certify that they had passed a drug test, the Court ruled in Chandler v. Miller 323 was “symbolic” rather than “special.” There was nothing in the record to indicate any actual fear or suspicion of drug use by state officials, the required certification was not well designed to detect illegal drug use, and candidates for state office, unlike the customs officers held subject to drug testing in Von Raab, are subject to “relentless” public scrutiny. In the second case, a city-run hospital’s program for drug screening of pregnant patients suspected of cocaine use was invalidated because its purpose was to collect evidence for law enforcement. 324 In the previous three cases in which random testing had been upheld, the Court pointed out, the “special needs” asserted as justification were “divorced from the general interest in law enforcement.” 325 By contrast, the screening program’s focus on law enforcement brought it squarely within the Fourth Amendment’s restrictions.

Electronic Surveillance and the Fourth Amendment

The Olmstead Case.—With the invention of the microphone, the telephone, and the dictograph recorder, it became possible to “eavesdrop” with much greater secrecy and expediency. Inevitably, the use of electronic devices in law enforcement was challenged, and in 1928 the Court reviewed convictions obtained on the basis of evidence gained through taps on telephone wires in violation of state law. On a five-to-four vote, the Court held that wiretapping was not within the confines of the Fourth Amendment. 326 Chief Justice Taft, writing the opinion of the Court, relied on two lines of argument for the conclusion. First, inasmuch as the Amendment was designed to protect one’s property interest in his premises, there was no search so long as there was no physical trespass on

321 Id. at 657.
322 Id. at 665.
323 520 U.S. 305 (1997).
325 532 U.S. at 79.
326 Olmstead v. United States, 277 U.S. 438 (1928).
premises owned or controlled by a defendant. Second, all the evidence obtained had been secured by hearing, and the interception of a conversation could not qualify as a seizure, for the Amendment referred only to the seizure of tangible items. Furthermore, the violation of state law did not render the evidence excludible, since the exclusionary rule operated only on evidence seized in violation of the Constitution.  

**Federal Communications Act.**—Six years after the decision in the *Olmstead* case, Congress enacted the Federal Communications Act and included in § 605 of the Act a broadly worded prescription on which the Court seized to place some limitation upon governmental wiretapping. Thus, in *Nardone v. United States*, the Court held that wiretapping by federal officers could violate § 605 if the officers both intercepted and divulged the contents of the conversation they overheard, and that testimony in court would constitute a form of prohibited divulgence. Such evidence was therefore excluded, although wiretapping was not illegal under the Court’s interpretation if the information was not used outside the governmental agency. Because § 605 applied to intrastate as well as interstate transmissions, there was no question

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327 Among the dissenters were Justice Holmes, who characterized “illegal” wiretapping as “dirty business,” id. at 470, and Justice Brandeis, who contributed to his opinion the famous peroration about government as “the potent, the omnipresent, teacher” which “breeds contempt for law” among the people by its example. Id. at 485. More relevant here was his lengthy argument rejecting the premises of the majority, an argument which later became the law of the land. (1) “To protect [the right to be left alone], every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” Id. at 478. (2) “There is, in essence, no difference between the sealed letter and the private telephone message. . . . The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject . . . may be overheard.” Id. at 475-76.

328 Ch. 652, 48 Stat. 1103 (1934), providing, inter alia, that “. . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, purport, effect, or meaning of such intercepted communication to any person.” Nothing in the legislative history indicated what Congress had in mind in including this language. The section, which appeared at 47 U.S.C. § 605, was rewritten by Title III of the Omnibus Crime Act of 1968, 82 Stat. 22, § 803, so that the “regulation of the interception of wire or oral communications in the future is to be governed by” the provisions of Title III. S. Rep. No. 1097, 90th Cong., 2d Sess. 107-08 (1968).


about the applicability of the ban to state police officers, but the Court declined to apply either the statute or the due process clause to require the exclusion of such evidence from state criminal trials.\footnote{Schwartz v. Texas, 344 U.S. 199 (1952). At this time, evidence obtained in violation of the Fourth Amendment could be admitted in state courts. Wolf v. Colorado, 338 U.S. 25 (1949). Although Wolf was overruled by Mapp v. Ohio, 367 U.S. 643 (1961), it was some seven years later and after wiretapping itself had been made subject to the Fourth Amendment that Schwartz was overruled in Lee v. Florida, 392 U.S. 378 (1968).} State efforts to legalize wiretapping pursuant to court orders were held by the Court to be precluded by the fact that Congress in § 605 had intended to occupy the field completely to the exclusion of the States.\footnote{Bananti v. United States, 355 U.S. 96 (1957).}

**Nontelephonic Electronic Surveillance.**—The trespass rationale of *Olmstead* was utilized in cases dealing with “bugging” of premises rather than with tapping of telephones. Thus, in *Goldman v. United States*,\footnote{316 U.S. 129 (1942).} the Court found no Fourth Amendment violation when a listening device was placed against a party wall so that conversations were overheard on the other side. But when officers drove a “spike mike” into a party wall until it came into contact with a heating duct and thus broadcast defendant’s conversations, the Court determined that the trespass brought the case within the Amendment.\footnote{Silverman v. United States, 365 U.S. 505 (1961). See also Clinton v. Virginia, 377 U.S. 158 (1964) (physical trespass found with regard to amplifying device stuck in a partition wall with a thumb tack).} In so holding, the Court, without alluding to the matter, overruled in effect the second rationale of *Olmstead*, the premise that conversations could not be seized.

**The Berger and Katz Cases.**—In *Berger v. New York*,\footnote{388 U.S. 41 (1967).} the Court confirmed the obsolescence of the alternative holding in *Olmstead* that conversations could not be seized in the Fourth Amendment sense.\footnote{Id. at 50-53.} *Berger* held unconstitutional on its face a state eavesdropping statute under which judges were authorized to issue warrants permitting police officers to trespass on private premises to install listening devices. The warrants were to be issued upon a showing of “reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded.” For the five-Justice majority, Justice Clark discerned several constitutional defects in the law. “First, . . . eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor
that the ‘property’ sought, the conversations, be particularly described.’”

“The purpose of the probable-cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed is thereby wholly aborted. Likewise the statute’s failure to describe with particularity the conversations sought gives the officer a roving commission to ‘seize’ any and all conversations. It is true that the statute requires the naming of ‘the person or persons whose communications, conversations or discussions are to be overheard or recorded. . . .’ But this does no more than identify the person whose constitutionally protected area is to be invaded rather than ‘particularly describing’ the communications, conversations, or discussions to be seized. . . . Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. Moreover, the statute permits . . . extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is ‘in the public interest.’ . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. . . . Finally, the statute’s procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute’s blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures.” 337

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337 Id. at 58-60. Justice Stewart concurred because he thought that the affidavits in this case had not been sufficient to show probable cause, but he thought the statute constitutional in compliance with the Fourth Amendment. Id. at 68. Justice Black dissented, arguing that the Fourth Amendment was not applicable to electronic eavesdropping but that in any event the “search” authorized by the statute was reasonable. Id. at 70. Justice Harlan dissented, arguing that the statute with its judicial gloss was in compliance with the Fourth Amendment. Id. at 89. Justice
Both Justices Black and White in dissent accused the Berger majority of so construing the Fourth Amendment that no wiretapping-eavesdropping statute could pass constitutional scrutiny, \textsuperscript{338} and in \textit{Katz v. United States}, \textsuperscript{339} the Court in an opinion by one of the Berger dissenters, Justice Stewart, modified some of its language and pointed to Court approval of some types of statutorily-authorized electronic surveillance. Just as Berger had confirmed that one rationale of the \textit{Olmstead} decision, the inapplicability of “search” to conversations, was no longer valid, \textit{Katz} disposed of the other rationale. In the latter case, officers had affixed a listening device to the outside wall of a telephone booth regularly used by Katz and activated it each time he entered; since there had been no physical trespass into the booth, the lower courts held the Fourth Amendment not relevant. The Court disagreed, saying that “once it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” \textsuperscript{340} Because the surveillance of Katz’s telephone calls had not been authorized by a magistrate, it was invalid; however, the Court thought that “it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.” \textsuperscript{341} The notice requirement, which had loomed in Berger as

\textsuperscript{338} Id. at 107.
\textsuperscript{339} 389 U.S. 347 (1967).
\textsuperscript{338} Id. at 71, 113.
\textsuperscript{340} Id. at 353. “We conclude that the underpinnings of \textit{Olmstead} and \textit{Goldman} have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling. The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.” Id. at 354. The “narrowly circumscribed” nature of the surveillance was made clear by the Court in the immediately preceding passage. “[The Government agents] did not begin their electronic surveillance until investigation of the petitioner’s activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner’s unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.” Id. For similar emphasis upon pre-
an obstacle to successful electronic surveillance, was summarily disposed of.\footnote{342} Finally, Justice Stewart observed that it was unlikely that electronic surveillance would ever come under any of the established exceptions so that it could be conducted without prior judicial approval.\footnote{343}

Following \textit{Katz}, Congress enacted in 1968 a comprehensive statute authorizing federal officers and permitting state officers pursuant to state legislation complying with the federal law to seek warrants for electronic surveillance to investigate violations of prescribed classes of criminal legislation.\footnote{344} The Court has not yet had occasion to pass on the federal statute and to determine whether its procedures and authorizations comport with the standards sketched in \textit{Osborn}, \textit{Berger}, and \textit{Katz} or whether those standards are somewhat more flexible than they appear to be on the faces of the opinions.\footnote{345}

\textbf{Warrantless “National Security” Electronic Surveillance.}—In \textit{Katz v. United States},\footnote{346} Justice White sought to pre-
serve for a future case the possibility that in “national security cases” electronic surveillance upon the authorization of the President or the Attorney General could be permissible without prior judicial approval. The Executive Branch then asserted the power to wiretap and to “bug” in two types of national security situations, against domestic subversion and against foreign intelligence operations, first basing its authority on a theory of “inherent” presidential power and then in the Supreme Court withdrawing to the argument that such surveillance was a “reasonable” search and seizure and therefore valid under the Fourth Amendment. Unanimously, the Court held that at least in cases of domestic subversive investigations, compliance with the warrant provisions of the Fourth Amendment was required.347 Whether or not a search was reasonable, wrote Justice Powell for the Court, was a question which derived much of its answer from the warrant clause; except in a few narrowly circumscribed classes of situations, only those searches conducted pursuant to warrants were reasonable. The Government’s duty to preserve the national security did not override the guarantee that before government could invade the privacy of its citizens it must present to a neutral magistrate evidence sufficient to support issuance of a warrant authorizing that invasion of privacy.348 This protection was even more needed in “national security cases” than in cases of “ordinary” crime, the Justice con-

347 United States v. United States District Court, 407 U.S. 297 (1972). Chief Justice Burger concurred in the result and Justice White concurred on the ground that the 1968 law required a warrant in this case, and therefore did not reach the constitutional issue. Id. at 340. Justice Rehnquist did not participate. Justice Powell carefully noted that the case required “no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.” Id. at 308.

348 The case contains a clear suggestion that the Court would approve a congressional provision for a different standard of probable cause in national security cases. “We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of ‘ordinary crime.’ The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crimes specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government’s preparedness for some future crisis or emergency. . . . Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen right deserving protection. . . .” It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases. . . .” Id. at 322-23.
tinued, inasmuch as the tendency of government so often is to re-
gard opponents of its policies as a threat and hence to tread in
areas protected by the First Amendment as well as by the
Fourth.\footnote{349} Rejected also was the argument that courts could not
appreciate the intricacies of investigations in the area of national
security or preserve the secrecy which is required.\footnote{350}

The question of the scope of the President’s constitutional pow-
ners, if any, remains judicially unsettled.\footnote{351} Congress has acted,
however, providing for a special court to hear requests for warrants
for electronic surveillance in foreign intelligence situations, and
permitting the President to authorize warrantless surveillance to
acquire foreign intelligence information provided that the commu-
nications to be monitored are exclusively between or among foreign
powers and there is no substantial likelihood any “United States
person” will be overheard.\footnote{352}

**Enforcing the Fourth Amendment: The Exclusionary Rule**

A right to be free from unreasonable searches and seizures is
declared by the Fourth Amendment, but how this right translates
into concrete terms is not specified. Several possible methods of en-
forcement have been suggested, but only one—the exclusionary
rule—has been applied with any frequency by the Supreme Court,
and the Court in recent years has limited its application.

**Alternatives to the Exclusionary Rule**—Theoretically,
there are several alternatives to the exclusionary rule. An illegal
search and seizure may be criminally actionable and officers under-
taking one thus subject to prosecution, but the examples when offi-
cers are criminally prosecuted for overzealous law enforcement are
extremely rare.\footnote{353} A policeman who makes an illegal search and
seizure is subject to internal departmental discipline which may be
backed up in the few jurisdictions which have adopted them by the

\footnote{349} Id. at 313-24.
\footnote{350} Id. at 320.


oversight of police review boards, but again the examples of disciplinary actions are exceedingly rare.\footnote{Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 Mich. L. Rev. 1123 (1967).}

Persons who have been illegally arrested or who have had their privacy invaded will usually have a tort action available under state statutory or common law. Moreover, police officers acting under color of state law who violate a person's Fourth Amendment rights are subject to a suit for damages and other remedies\footnote{If there are continuing and recurrent violations, federal injunctive relief would be available. Cf. Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); Wheeler v. Goodman, 298 F. Supp. 935 (preliminary injunction), 306 F. Supp. 58 (permanent injunction) (W.D.N.C. 1969), vacated on jurisdictional grounds, 401 U.S. 987 (1971).} under a civil rights statute in federal courts.\footnote{42 U.S.C. § 1983 (1964).} While federal officers and others acting under color of federal law are not subject to this statute, the Supreme Court has recently held that a right to damages for violation of Fourth Amendment rights arises by implication and that this right is enforceable in federal courts.\footnote{While a damage remedy might be made more effective, a number of legal and practical problems stand in the way.\footnote{Police officers have available to them the usual common-law defenses, most important of which is the claim of good faith.} Federal officers are entitled to qualified immunity based on an objectively reasonable belief that a warrantless search later determined to violate the Fourth Amendment was supported by probable cause or exigent circumstances.} And on the practical side, per-
sons subjected to illegal arrests and searches and seizures are often disreputable persons toward whom juries are unsympathetic, or they are indigent and unable to bring suit. The result, therefore, is that the Court has emphasized exclusion of unconstitutionally seized evidence in subsequent criminal trials as the only effective enforcement method.

Development of the Exclusionary Rule. —Exclusion of evidence as a remedy for Fourth Amendment violations found its beginning in Boyd v. United States, 362 which, as was noted above, involved not a search and seizure but a compulsory production of business papers, which the Court likened to a search and seizure. Further, the Court analogized the Fifth Amendment’s self-incrimination provision to the Fourth Amendment’s protections to derive a rule which required exclusion of the compelled evidence because the defendant had been compelled to incriminate himself by producing it. 363 The Boyd case was closely limited to its facts and an exclusionary rule based on Fourth Amendment violations was rejected by the Court a few years later, with the Justices adhering to the common-law rule that evidence was admissible however acquired. 364

Nevertheless, ten years later the common-law view was itself rejected and an exclusionary rule propounded in Weeks v. United States. 365 Weeks had been convicted on the basis of evidence seized from his home in the course of two warrantless searches; some of the evidence consisted of private papers like those sought to be

362 116 U.S. 616 (1886).
363 "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, throws light on the question as to what is an ‘unreasonable search and seizure’ within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." Id. at 633. It was this utilization of the Fifth Amendment’s clearly required exclusionary rule, rather than one implied from the Fourth, on which Justice Black relied, and absent a Fifth Amendment self-incrimination violation he did not apply such a rule. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Coolidge v. New Hampshire, 403 U.S. 443, 493, 496-500 (1971) (dissenting opinion). The theory of a “convergence” of the two Amendments has now been disavowed by the Court. See discussion, supra, under “Property Subject to Seizure.”
364 Adams v. New York, 192 U.S. 585 (1904). Since the case arose from a state court and concerned a search by state officers, it could have been decided simply by holding that the Fourth Amendment was inapplicable. See National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).
365 222 U.S. 383 (1914).
compelled in the Boyd case. Unanimously, the Court held that the evidence should have been excluded by the trial court. The Fourth Amendment, Justice Day said, placed on the courts as well as on law enforcement officers restraints on the exercise of power compatible with its guarantees. “The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.” 366 The ruling is ambiguously based but seems to have had as its foundation an assumption that admission of illegally-seized evidence would itself violate the Amendment. “If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secured against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.” 367

Because the Fourth Amendment does not restrict the actions of state officers, 368 there was originally no question about the application of an exclusionary rule in state courts 369 as a mandate of

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366 Id. at 392.
367 Id. at 393.
federal constitutional policy. But in *Wolf v. Colorado*, a unanimous Court held that freedom from unreasonable searches and seizures was such a fundamental right as to be protected against state violations by the due process clause of the Fourteenth Amendment. However, the Court held that the right thus guaranteed did not require that the exclusionary rule be applied in the state courts, since there were other means to observe and enforce the right. “Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State’s reliance upon other methods which, if consistently enforced, would be equally effective.”

It developed, however, that the Court had not vested in the States total discretion in regard to the admissibility of evidence, as the Court proceeded to evaluate under the due process clause the methods by which the evidence had been obtained. Thus, in *Rochin v. California*, evidence of narcotics possession had been obtained by forcible administration of an emetic to defendant at a hospital after officers had been unsuccessful in preventing him from swal-

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370 During the period in which the Constitution did not impose any restrictions on state searches and seizures, the Court permitted the introduction in evidence in federal courts of items seized by state officers which had they been seized by federal officers would have been inadmissible, Weeks v. United States, 232 U.S. 383, 398 (1914), so long as no federal officer participated in the search, Byars v. United States, 273 U.S. 28 (1927), or the search was not made on behalf of federal law enforcement purposes, Gambino v. United States, 275 U.S. 310 (1927). This rule became known as the “silver platter doctrine” after the phrase coined by Justice Frankfurter in *Lustig v. United States*, 338 U.S. 74, 78-79 (1949): “The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.” In *Elkins v. United States*, 364 U.S. 206 (1960), the doctrine was discarded by a five-to-four majority which held that inasmuch as Wolf v. Colorado, 338 U.S. 25 (1949), had made state searches and seizures subject to federal constitutional restrictions through the Fourteenth Amendment’s due process clause, the “silver platter doctrine” was no longer constitutionally viable. During this same period, since state courts were free to admit any evidence no matter how obtained, evidence illegally seized by federal officers could be used in state courts, Wilson v. Schnettler, 365 U.S. 381 (1961), although the Supreme Court ruled out such a course if the evidence had first been offered in a federal trial and had been suppressed. *Rea v. United States*, 350 U.S. 214 (1956).


372 The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause.” Id. at 27-28.

373 Id. at 31. Justices Douglas, Murphy, and Rutledge dissented with regard to the issue of the exclusionary rule and Justice Black concurred.

374 342 U.S. 165 (1952). The police had initially entered defendant’s house without a warrant. Justices Black and Douglas concurred in the result on self-incrimination grounds.
lowing certain capsules. The evidence, said Justice Frankfurter for the Court, should have been excluded because the police methods were too objectionable. “This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents . . . is bound to offend even hardened sensibilities. They are methods too close to the rack and screw.”

The *Rochin* standard was limited in *Irvine v. California*, in which defendant was convicted of bookmaking activities on the basis of evidence secured by police who repeatedly broke into his house and concealed electronic gear to broadcast every conversation in the house. Justice Jackson’s plurality opinion asserted that *Rochin* had been occasioned by the element of brutality, and that while the police conduct in *Irvine* was blatantly illegal the admissibility of the evidence was governed by *Wolf*, which should be consistently applied for purposes of guidance to state courts. The Justice also entertained considerable doubts about the efficacy of the exclusionary rule. *Rochin* emerged as the standard, however, in a later case in which the Court sustained the admissibility of the results of a blood test administered while defendant was unconscious in a hospital following a traffic accident, the Court observing the routine nature of the test and the minimal intrusion into bodily privacy.

Then, in *Mapp v. Ohio*, the Court held that the exclusionary rule should and did apply to the States. It was “logically and constitutionally necessary,” wrote Justice Clark for the majority, “that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right” to be secure from unreasonable searches and seizures. “To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.” Further, the Court then held that since ille-
Harlan advocated the overruling of *Mapp* down to the conclusion of his service on the Court. See *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (concurring opinion).


383 232 U.S. 383 (1914). Defendant’s room had been searched and papers seized by officers acting without a warrant. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id.* at 393.


ing that the rule was “an essential part of the right of privacy” protected by the Amendment.

“This Court has ever since [Weeks was decided in 1914] required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a ‘form of words.’”

It was a necessary step in the application of the rule to the States to find that the rule was of constitutional origin rather than a result of an exercise of the Court’s supervisory power over the lower federal courts, inasmuch as the latter could not constitutionally be extended to the state courts. In fact, Justice Frankfurter seemed to find the exclusionary rule to be based on the Court’s supervisory powers in Wolf v. Colorado in declining to extend the rule to the States. That the rule is of constitutional origin Mapp establishes, but this does not necessarily establish that it is immune to statutory revision.

Suggestions appear in a number of cases, including Weeks, to the effect that admission of illegally-seized evidence is itself unconstitutional. These were often combined with a rationale empha-

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387 An example of an exclusionary rule not based on constitutional grounds may be found in McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), in which the Court enforced a requirement that arrestees be promptly presented to a magistrate by holding that incriminating admissions obtained during the period beyond a reasonable time for presentation would be inadmissible. The rule was not extended to the States, cf. Culombe v. Connecticut, 367 U.S. 568, 598-602 (1961), but the Court’s resort to the self-incrimination clause in reviewing confessions made such application irrelevant in most cases in any event. For an example of a transmutation of a supervisory rule into a constitutional rule, see McCarthy v. United States, 394 U.S. 459 (1969), and Boykin v. Alabama, 395 U.S. 238 (1969).
388 Weeks “was not derived from the explicit requirements of the Fourth Amendment; . . . The decision was a matter of judicial implication.” 338 U.S. 25, 28 (1949). Justice Black was more explicit. “I agree with what appears to be a plain implication of the Court’s opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.” Id. at 39-40. He continued to adhere to the supervisory power basis in strictly search-and-seizure cases, Berger v. New York, 388 U.S. 41, 76 (1967) (dissenting), except where self-incrimination values were present. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring). And see id. at 678 (Justice Harlan dissenting); Elkins v. United States, 364 U.S. 206, 216 (1960) (Justice Stewart for the Court).
389 The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution . . . .” Weeks v. United States, 232 U.S. 383, 392 (1914). In Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961), Justice Clark maintained that “the Fourth Amendment include[s] the exclusion of the evidence seized in violation of its provisions” and that it, and the Fifth Amendment with regard to confessions “assures . . . that no man is to be convicted on unconstitutional evidence.” In Terry v. Ohio, 392 U.S. 1, 12, 13 (1968), Chief Justice Warren wrote: “Courts which
sizing “judicial integrity” as a reason to reject the proffer of such evidence. 390 Yet the Court permitted such evidence to be introduced into trial courts when the defendant lacked “standing” to object to the search and seizure which produced the evidence 391 or when the search took place before the announcement of the decision extending the exclusionary rule to the States. 392 At these times, the Court turned to the “basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” 393 “Mapp had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since Wolf requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action.” 394

Narrowing Application of the Exclusionary Rule.—For as long as we have had the exclusionary rule, critics have attacked it, challenged its premises, disputed its morality. 395 By the early 1980s a majority of Justices had stated a desire either to abolish the rule or to sharply curtail its operation, 396 and numerous opinions had rejected all doctrinal bases save that of deterrence. 397 At
the same time, these opinions voiced strong doubts about the efficacy of the rule as a deterrent, and advanced public interest values in effective law enforcement and public safety as reasons to discard the rule altogether or curtail its application. Thus, the Court emphasized the high costs of enforcing the rule to exclude reliable and trustworthy evidence, even when violations have been technical or in good faith, and suggested that such use of the rule may well "generat[e] disrespect for the law and administration of justice," as well as free guilty defendants. No longer does the Court declare that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

Although the exclusionary rule has not been completely repudiated, its utilization has been substantially curbed. Initial decisions chipped away at the rule's application. Defendants who themselves were not subjected to illegal searches and seizures may not object to the introduction of evidence illegally obtained from co-conspirators or codefendants, and even a defendant whose rights have


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Although the exclusionary rule has not been completely repudiated, its utilization has been substantially curbed. Initial decisions chipped away at the rule's application. Defendants who themselves were not subjected to illegal searches and seizures may not object to the introduction of evidence illegally obtained from co-conspirators or codefendants, and even a defendant whose rights have
been infringed may find the evidence coming in, not as proof of

403 guilt, but to impeach his testimony. Defendants who have been

convicted after trials in which they were given a full and fair op-

portunity to raise claims of Fourth Amendment violations may not

subsequently raise those claims on federal habeas corpus, because

the costs outweigh the minimal deterrent effect. Evidence ob-

tained through a wrongful search and seizure may sometimes be

used in the criminal trial, if the prosecution can show a sufficient

attenuation of the link between police misconduct and obtaining of

the evidence. If an arrest or a search which was valid at the time

it was effectuated becomes bad through the subsequent invalida-

tion of the statute under which the arrest or search was made,

evidence obtained thereby is nonetheless admissible. A grand

jury witness was not permitted to refuse to answer questions on

the ground that they were based on evidence obtained from an un-

lawful search and seizure, and federal tax authorities were per-

mitted to use in a civil proceeding evidence found to have been un-


403 United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347


Havens). The impeachment exception applies only to the defendant's own testimony,

and may not be extended to use illegally obtained evidence to impeach the testi-


405 Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); Alderman v. United


refused to exclude the testimony of a witness discovered through an illegal search.

Because a witness was freely willing to testify and therefore more likely to come

forward, the application of the exclusionary rule was not to be tested by the stand-

ard applied to exclusion of inanimate objects. Deterrence would be little served and

relevant and material evidence would be lost to the prosecution. In New York v.

Harris, 495 U.S. 14 (1990), the Court refused to exclude a station-house confession

made by a suspect whose arrest at his home had violated the Fourth Amendment

because, even though probable cause had existed, no warrant had been obtained.

And in Segura v. United States, 468 U.S. 796 (1984), evidence seized pursuant to

warrant obtained after an illegal entry was admitted because there had been an

independent basis for issuance of a warrant. This rule applies as well to evidence

observed in plain view during the initial illegal search. Murray v. United States,


consideration of tainted evidence, there was sufficient untainted evidence in affi-

davit to justify finding of probable cause and issuance of search warrant).

406 Michigan v. DeFillippo, 443 U.S. 31 (1979) (statute creating substantive

criminal offense). Statutes that authorize unconstitutional searches and seizures but

which have not yet been voided at the time of the search or seizure may not create

this effect, however, Torres v. Puerto Rico, 442 U.S. 465 (1979); Ybarra v. Illinois,

444 U.S. 85 (1979). This aspect of Torres and Ybarra was to a large degree nullified

by Illinois v. Krull, 480 U.S. 340 (1987), rejecting a distinction between substantive

and procedural statutes and holding the exclusionary rule inapplicable in the case

of a police officer's objectively reasonable reliance on a statute later held to violate

the Fourth Amendment. Similarly, the exclusionary rule does not require suppress-

sion of evidence that was seized incident to an arrest that was the result of a cler-


constitutionally seized from defendant by state authorities. The rule is inapplicable in parole revocation hearings.

The most severe curtailment of the rule came in 1984 with adoption of a “good faith” exception. In United States v. Leon, the Court created an exception for evidence obtained as a result of officers’ objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate. Justice White’s opinion for the Court could find little benefit in applying the exclusionary rule where there has been good-faith reliance on an invalid warrant. Thus, there was nothing to offset the “substantial social costs exacted by the [rule].” The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates,” and in any event the Court considered it unlikely that the rule could have much deterrent effect on the actions of truly neutral magistrates. Moreover, the Court thought that the rule should not be applied “to deter objectively reasonable law enforcement activity,” and that “[p]enalizing the officer for the magistrate’s error . . . cannot logically contribute to the deterrence of Fourth Amendment violations.” The Court also suggested some circumstances in which courts would be unable to find that officers’ reliance on a warrant was objectively reasonable: if the officers have been “dishonest or reckless in preparing their affidavit,” if it should have been obvious that the magistrate had “wholly abandoned” his neutral role, or if the warrant was obviously deficient on its face (e.g., lacking in particularity). The Court applied the Leon standard in Massachusetts v. Sheppard, holding that an officer possessed an objectively reasonable belief that he had a valid warrant after he had pointed out to the magistrate that he had not used the standard form, and the magistrate had indicated that the necessary changes had been incorporated in the issued warrant.

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411 The opinion was joined by Chief Justice Burger, and by Justices Blackmun, Powell, Rehnquist, and O’Connor. Justice Blackmun also added a separate concurring opinion. Dissents were filed by Justice Brennan, joined by Justice Marshall, and by Justice Stevens.

412 468 U.S. at 907.

413 468 U.S. at 916-17.

414 468 U.S. at 919, 921.

The Court then extended *Leon* to hold that the exclusionary rule is inapplicable to evidence obtained by an officer acting in objectively reasonable reliance on a statute later held violative of the Fourth Amendment. Justice Blackmun’s opinion for the Court reasoned that application of the exclusionary rule in such circumstances would have no more deterrent effect on officers than it would when officers reasonably rely on an invalid warrant, and no more deterrent effect on legislators who enact invalid statutes than on magistrates who issue invalid warrants.  

It is unclear from the Court’s analysis in *Leon* and its progeny whether a majority of the Justices would also support a good-faith exception for evidence seized without a warrant, although there is some language broad enough to apply to warrantless seizures. It is also unclear what a good-faith exception would mean in the context of a warrantless search, since the objective reasonableness of an officer’s action in proceeding without a warrant is already taken into account in determining whether there has been a Fourth Amendment violation. The Court’s increasing willingness to uphold warrantless searches as not “unreasonable” under the Fourth Amendment, however, may reduce the frequency with which the good-faith issue arises in the context of the exclusionary rule.

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416 Illinois v. Krull, 480 U.S. 340 (1987). The same difficult-to-establish qualifications apply: there can be no objectively reasonable reliance “if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws,” or if “a reasonable officer should have known that the statute was unconstitutional.” 480 U.S. at 355.

417 Dissenting Justice O'Connor disagreed with this second conclusion, suggesting that the grace period “during which the police may freely perform unreasonable searches . . . creates a positive incentive [for legislatures] to promulgate unconstitutional laws,” and that the Court’s ruling “destroys all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment rights” and thereby obtain a ruling on the validity of the statute. 480 U.S. at 366, 369.

418 The whole thrust of analysis in *Leon* dealt with reasonableness of reliance on a warrant. The Court several times, however, used language broad enough to apply to warrantless searches as well. See, e.g., 468 U.S. at 909 (quoting Justice White’s concurrence in *Illinois v. Gates*): “the balancing approach that has evolved . . . forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment”; and id. at 919: “[the rule] cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.”


420 See, e.g., Illinois v. Rodriguez, 497 U.S. 177 (1990) (upholding search premised on officer’s reasonable but mistaken belief that a third party had common authority over premises and could consent to search); Schmeckloth v. Bustamonte, 412 U.S. 218 (1973) (no requirement of knowing and intelligent waiver in consenting to warrantless search); New York v. Belton, 453 U.S. 454 (1981) (upholding warrantless search of entire interior of passenger car, including closed containers,
Operation of the Rule: Standing.—The Court for a long period followed a rule of “standing” by which it determined whether a party was the appropriate person to move to suppress allegedly illegal evidence. Akin to Article III justiciability principles, which emphasize that one may ordinarily contest only those government actions that harm him, the standing principle in Fourth Amendment cases “require[d] of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy.”

The Court recently has departed from the concept of “standing” to telescope the inquiry into one inquiry rather than two. Finding that “standing” served no useful analytical purpose, the Court has held that the issue of exclusion is to be determined solely upon a resolution of the substantive question whether the claimant’s Fourth Amendment rights have been violated. “We can think of no decided cases of this Court that would have come out differently had we concluded . . . that the type of standing requirement . . . reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of ‘standing,’ will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same.”

One must therefore show that “the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.”

The Katz reasonable expectation of privacy rationale has now displaced property-ownership concepts which previously might have supported either standing to suppress or the establishment of an interest that has been invaded. Thus, it is no longer sufficient to allege possession or ownership of seized goods to establish the interest, if a justifiable expectation of privacy of the defendant was not violated in the seizure.


421 Jones v. United States, 362 U.S. 257, 261 (1960). That is, the movant must show that he was “a victim of search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of search or seizure directed at someone else.” Id. See Alderman v. United States, 394 U.S. 165, 174 (1969).


423 Id. at 140.

424 Previously, when ownership or possession was the issue, such as a charge of possessing contraband, the Court accorded “automatic standing” to one on the basis, first, that to require him to assert ownership or possession at the suppression hearing would be to cause him to incriminate himself with testimony that could later be used against him, and, second, that the government could not simultaneously as-
one merely be lawfully on the premises in order to be able to object to an illegal search; rather, one must show some legitimate interest in the premises that the search invaded. The same illegal search might, therefore, invade the rights of one person and not of another. Again, the effect of the application of the privacy rationale has been to narrow considerably the number of people who can complain of an unconstitutional search.

\[425\] Rakas v. Illinois, 439 U.S. 128 (1978) (passengers in automobile had no privacy interest in interior of the car; could not object to illegal search). United States v. Padilla, 508 U.S. 77 (1993) (only persons whose privacy or property interests are violated may object to a search on Fourth Amendment grounds; exerting control and oversight over property by virtue of participation in a criminal conspiracy does not alone establish such interests). Jones v. United States, 362 U.S. 257 (1960), had established the rule that anyone legitimately on the premises could object; the rationale was discarded but the result in Jones was maintained because he was there with permission, he had his own key, his luggage was there, he had the right to exclude and therefore a legitimate expectation of privacy. Similarly maintained were the results in United States v. Jeffers, 342 U.S. 48 (1951) (hotel room rented by defendant's aunts to which he had a key and permission to store things); Mancusi v. DeForte, 392 U.S. 364 (1968) (defendant shared office with several others; though he had no reasonable expectation of absolute privacy, he could reasonably expect to be intruded on only by other occupants and not by police).

\[426\] E.g., Rawlings v. Kentucky, 448 U.S. 98 (1980) (fearing imminent police search, defendant deposited drugs in companion's purse where they were discovered in course of illegal search; defendant had no legitimate expectation of privacy in her purse, so that his Fourth Amendment rights were not violated, although hers were).
# FIFTH AMENDMENT
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RIGHTS OF PERSONS

FIFTH AMENDMENT

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

INDICTMENT BY GRAND JURY

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Clarendon promulgated by Henry II. ¹ The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York. ² Included from the first in Madison's introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments

² Bernard Schwartz, The Bill of Rights: A Documentary History 162, 166 (1971). The provision read: "That in all Cases Capital or Criminal there shall be a grand Inquest who shall first present the offence. . . ."
or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.”

The prescribed constitutional function of grand juries in federal courts is to return criminal indictments, but the juries serve a considerably broader series of purposes as well. Principal among these is the investigative function, which is served through the fact that grand juries may summon witnesses by process and compel testimony and the production of evidence generally. Operating in secret, under the direction but not control of a prosecutor, not bound by many evidentiary and constitutional restrictions, such juries may examine witnesses in the absence of their counsel and without informing them of the object of the investigation or the place of the witnesses in it. The exclusionary rule is inapplicable

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3 Costello v. United States, 350 U.S. 359, 362 (1956). “The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges... Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.” United States v. Mandujano, 425 U.S. 564, 571 (1976) (plurality opinion). See id. at 589–91 (Justice Brennan concurring).

4 This provision applies only in federal courts and is not applicable to the States, either as an element of due process or as a direct command of the Fourteenth Amendment. Hurtado v. California, 110 U.S. 516 (1884); Palko v. Connecticut, 302 U.S. 319, 323 (1937); Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

5 Witnesses are not entitled to have counsel present in the room. Fed. R. Civ. P. 6(d). The validity of this restriction was asserted in dictum in In re Groban, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. Id. at 346–47 (Justice Black, distinguishing grand juries from the investigative entity before the Court). The decision in Coleman v. Alabama, 399 U.S. 1 (1970), deeming the preliminary hearing a “critical stage of the prosecution” at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. See id. at 25 (Chief Justice Burger dissenting). In United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion), Chief Justice Burger wrote: “Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play.” By emphasizing the point of institution of criminal proceedings, relevant to the right
in grand jury proceedings, with the result that a witness called before a grand jury may be questioned on the basis of knowledge obtained through the use of illegally-seized evidence. In thus allowing the use of evidence obtained in violation of the Fourth Amendment, the Court nonetheless restated the principle that, while free of many rules of evidence that bind trial courts, grand juries are not unrestrained by constitutional consideration. A witness called before a grand jury is not entitled to be informed that he may be indicted for the offense under inquiry and the commission of per-


7 "Of course, the grand jury’s subpoena is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law . . . . Although, for example, an indictment based on evidence obtained in violation of a defendant’s Fifth Amendment privilege is nevertheless valid . . . . , the grand jury may not force a witness to answer questions in violation of that constitutional guarantee . . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him . . . . The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury’s subpoena ducès tecum will be disallowed if it is ‘far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment.’ Hale v. Henkel, 201 U.S. 43, 76 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." United States v. Calandra, 414 U.S. 338, 346 (1974). See also United States v. Dionisio, 410 U.S. 1, 11–12 (1973). Grand juries must operate within the limits of the First Amendment and may not harass the exercise of speech and press rights. Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972). Protection of Fourth Amendment interests is as extensive before the grand jury as before any investigative officers. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Hale v. Henkel, 201 U.S. 43, 76–77 (1906), but not more so either. United States v. Dionisio, 410 U.S. 1 (1973) (subpoena to give voice exemplars); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars). The Fifth Amendment’s self-incrimination clause must be respected. Blau v. United States, 340 U.S. 159 (1950); Hoffman v. United States, 341 U.S. 479 (1951). On common-law privileges, see Blau v. United States, 340 U.S. 332 (1951) (husband-wife privilege); Alexander v. United States, 138 U.S. 353 (1891) (attorney-client privilege). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. Compare Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), with Dennis v. United States, 384 U.S. 855 (1966). See Fed. R. Crim. P. 6(e) (secrecy requirements and exceptions).

8 United States v. Washington, 431 U.S. 181 (1977). Because defendant when he appeared before the grand jury was warned of his rights to decline to answer ques-
jury by a witness before the grand jury is punishable, irrespective of the nature of the warning given him when he appears and regardless of the fact that he may already be a putative defendant when he is called.\(^9\)

Of greater significance were two cases in which the Court held the Fourth Amendment to be inapplicable to grand jury subpoenas requiring named parties to give voice exemplars and handwriting samples to the grand jury for identification purposes.\(^{10}\) According to the Court, the issue turned upon a two-tiered analysis— "whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable 'seizure' within the meaning of the Fourth Amendment."\(^{11}\) First, a subpoena to appear was held not to be a seizure, because it entailed significantly less social and personal affront than did an arrest or an investigative stop, and because every citizen has an obligation, which may be onerous at times, to appear and give whatever aid he may to a grand jury.\(^{12}\) Second, the directive to make a voice recording or to produce handwriting samples did not bring the Fourth Amendment into play because no one has any expectation of privacy in the characteristics of either his voice or his handwriting.\(^{13}\) Inasmuch as the Fourth Amendment was inapplicable, there was no necessity for the government to make a preliminary showing of the reasonableness of the grand jury requests.

Besides indictments, grand juries may also issue reports which may indicate nonindictable misbehavior, mis- or malfeasance of

\(^{9}\) United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977). Mandujano had been told of his right to assert the privilege against self-incrimination, of the consequences of perjury, and of his right to counsel, but not to have counsel with him in the jury room. Chief Justice Burger and Justices White, Powell, and Rehnquist took the position that no Miranda warning was required because there was no police custodial interrogation and that in any event commission of perjury was not excusable on the basis of lack of any warning. Justices Brennan, Marshall, Stewart, and Blackmun agreed that whatever rights a grand jury witness had, perjury was punishable and not to be excused. Id. at 584, 609. Wong was assumed on appeal not to have understood the warnings given her and the opinion proceeds on the premise that absence of warnings altogether does not preclude a perjury prosecution.


\(^{11}\) Dionisio, 410 U.S. at 9.

\(^{12}\) 410 U.S. at 9–13.

public officers, or other objectionable conduct. Person. Despite the vast power of grand juries, there is little in the way of judicial or legislative response designed to impose some supervisory restrictions on them. 

Within the meaning of this article a crime is made “infamous” by the quality of the punishment which may be imposed. “What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another.” Imprisonment in a state prison or penitentiary, with or without hard labor, or imprisonment at hard labor in the workhouse of the District of Columbia, falls within this category. The pivotal question is whether the offense is one for which the court is authorized to award such punishment; the sentence actually imposed is immaterial. When an accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury. Thus, an act which authorized imprisonment at hard labor for one year, as well as deportation, of Chinese aliens found to be unlawfully within the United States, created an offense which could be tried only upon indictment. Counterfeiting, fraudulent alteration of poll books, fraudulent voting, and embezzlement, have been declared to be infamous crimes. It is immaterial how Congress has classified the offense. An act punishable by a fine of not more than $1,000 or imprisonment for not more than six years for an offense committed by an alien will be considered as “infamous” if the alien has been convicted of a narcotic offense.

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14The grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime.” Blair v. United States, 250 U.S. 273, 281 (1919). On the reports function of the grand jury, see In re Grand Jury January, 1969, 315 F. Supp. 662 (D. Md. 1970), and Report of the January 1970 Grand Jury (Black Panther Shooting) (N.D. Ill., released May 15, 1970). Congress has now specifically authorized issuance of reports in cases concerning public officers and organized crime. 18 U.S.C. § 333.

15Congress has required that in the selection of federal grand juries, as well as petit juries, random selection of a fair cross section of the community is to take place, and has provided a procedure for challenging discriminatory selection by moving to dismiss the indictment. 28 U.S.C. §§ 1861–68. Racial discrimination in selection of juries is constitutionally proscribed in both state and federal courts. See discussion under “Juries,” infra.

16Ex parte Wilson, 114 U.S. 417 (1885).
17114 U.S. at 427.
20Ex parte Wilson, 114 U.S. 417, 426 (1885).
21Wong Wing v. United States, 163 U.S. 228, 237 (1896).
22Ex parte Wilson, 114 U.S. 417 (1885).
24Parkinson v. United States, 121 U.S. 281 (1887).
26Ex parte Wilson, 114 U.S. 417, 426 (1885).
months is a misdemeanor, which can be tried without indictment, even though the punishment exceeds that specified in the statutory definition of "petty offenses." 27

A person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument. 28 A change in the indictment that does not narrow its scope deprives the court of the power to try the accused. 29 While additions to offenses alleged in an indictment are prohibited, the Court has now ruled that it is permissible "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it," as, e.g., a lesser included offense. 30 There being no constitutional requirement that an indictment be presented by a grand jury in a body, an indictment delivered by the foreman in the absence of other grand jurors is valid. 31 If valid on its face, an indictment returned by a legally constituted, non-biased grand jury satisfies the requirement of the Fifth Amendment and is enough to call for a trial on the merits; it is not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury. 32

The protection of indictment by grand jury extends to all persons except those serving in the armed forces. All persons in the regular armed forces are subject to court martial rather than grand jury indictment or trial by jury. 33 The exception's limiting words "when in actual service in time of war or public danger" apply only to members of the militia, not to members of the regular armed forces. In O'Callahan v. Parker, the Court in 1969 held that offenses that are not "service connected" may not be punished under

28 See Stirone v. United States, 361 U.S. 212 (1960), wherein a variation between pleading and proof was held to deprive petitioner of his right to be tried only upon charges presented in the indictment.
29 Ex parte Bain, 121 U.S. 1, 12 (1887). Ex parte Bain was overruled in United States v. Miller, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible. Ex parte Bain was also overruled to the extent that it held that a defective indictment was not just substantive error, but that it deprived a court of subject-matter jurisdiction over a case. United States v. Cotton, 122 S. Ct. 1781 (2002). While a defendant's failure to challenge an error of substantive law at trial level may result in waiver of such issue for purpose of appeal, challenges to subject-matter jurisdiction may be made at any time. Thus, where a defendant failed to assert his right to a non-defective grand jury indictment, appellate review of the matter would limited to a "plain error" analysis. 122 S. Ct. at 1784-85.
military law, but instead must be tried in the civil courts in the jurisdiction where the acts took place.\textsuperscript{34} This decision was overruled, however, in 1987, the Court emphasizing the “plain language” of Art. I, § 8, cl. 14,\textsuperscript{35} and not directly addressing any possible limitation stemming from the language of the Fifth Amendment.\textsuperscript{36} “The requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged.”\textsuperscript{37} Even under the service connection rule, it was held that offenses against the laws of war, whether committed by citizens or by alien enemy belligerents, could be tried by a military commission.\textsuperscript{38}

### DOUBLE JEOPARDY

#### Development and Scope

“The constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”\textsuperscript{39} The concept of double jeopardy goes far back in history, but its development was uneven and its

\textsuperscript{34}395 U.S. 258 (1969); see also Relford v. Commandant, 401 U.S. 355 (1971) (offense committed on military base against persons lawfully on base was service connected). But courts-martial of civilian dependents and discharged servicemen have been barred. Id. See “Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents” under Article I.

\textsuperscript{35}This clause confers power on Congress to “make rules for the government and regulation of the land and naval forces.”

\textsuperscript{36}Solorio v. United States, 483 U.S. 435 (1987). A 5–4 majority favored overruling O’Callahan: Chief Justice Rehnquist’s opinion for the Court was joined by Justices White, Powell, O’Connor, and Scalia. Justice Stevens concurred in the judgment but thought it unnecessary to reexamine O’Callahan. Dissenting Justice Marshall, joined by Justices Brennan and Blackmun, thought the service connection rule justified by the language of the Fifth Amendment’s exception, based on the nature of cases (those “arising in the land or naval forces”) rather than the status of defendants.

\textsuperscript{37}483 U.S. at 450–51.

\textsuperscript{38}Ex parte Quirin, 317 U.S. 1, 43, 44 (1942).

meaning has varied. The English development, under the influence of Coke and Blackstone, came gradually to mean that a defendant at trial could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution. In this country, the common-law rule was in some cases limited to this rule and in other cases extended to bar a new trial even though the former trial had not concluded in either an acquittal or a conviction. The rule's elevation to fundamental status by its inclusion in several state bills of rights following the Revolution continued the differing approaches. Madison's version of the guarantee as introduced in the House of Representatives read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." Opposition in the House proceeded on the proposition that the language could be construed to prohibit a second trial after a successful appeal by a defendant and would therefore either constitute a hazard to the public by freeing the guilty or, more likely, result in a detriment to defendants because appellate courts would be loath to reverse convictions if no new trial could follow, but a motion to strike "or trial" from the clause failed. As approved by the Senate, however, and accepted by the House for referral to the States, the present language of the clause was inserted.

Throughout most of its history, this clause was binding only against the Federal Government. In Palko v. Connecticut, the Court rejected an argument that the Fourteenth Amendment incorporated all the provisions of the first eight Amendments as limitations on the States and enunciated the due process theory under which most of those Amendments do now apply to the States. Some guarantees in the Bill of Rights, Justice Cardozo wrote, were so

41 J. SIGLER, DOUBLE JEOPARDY—THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 21–27 (1969). The first bill of rights which expressly adopted a double jeopardy clause was the New Hampshire Constitution of 1784. "No subject shall be liable, for the same crime or offence." Art. I, Sec. XCI, 4 F. Thorpe, The Federal and State Constitution, reprinted in H.R. Doc. No. 357, 59th Congress, 2d Sess. 2455 (1909). A more comprehensive protection was included in the Pennsylvania Declaration of Rights of 1790, which had language almost identical to the present Fifth Amendment provision. Id. at 3100.
42 1 ANNALS OF CONGRESS 434 (June 8, 1789).
43 Id. at 753.
44 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1149, 1165 (1971). In Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting), Justice Powell attributed to inadvertence the broadening of the "rubric" of double jeopardy to incorporate the common law rule against dismissal of the jury prior to verdict, a question the majority passed over as being "of academic interest only." Id. at 34 n.10.
fundamental that they are “of the very essence of the scheme of ordered liberty” and “neither liberty nor justice would exist if they were sacrificed.” But the double jeopardy clause, like many other procedural rights of defendants, was not so fundamental; it could be absent and fair trials could still be had. Of course, a defendant’s due process rights, absent double jeopardy consideration per se, might be violated if the State “creat[ed] a hardship so acute and shocking as to be unendurable,” but that was not the case in Palko. In Benton v. Maryland, however, the Court concluded “that the double jeopardy prohibition . . . represents a fundamental ideal in our constitutional heritage. . . . Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ . . . the same constitutional standards apply against both the State and Federal Governments.” Therefore, the double jeopardy limitation now applies to both federal and state governments and state rules on double jeopardy, with regard to such matters as when jeopardy attaches, must be considered in the light of federal standards.

In a federal system, different units of government may have different interests to serve in the definition of crimes and the enforcement of their laws, and where the different units have overlapping jurisdictions a person may engage in conduct that will violate the laws of more than one unit. Although the Court had long accepted in dictum the principle that prosecution by two governments of the same defendant for the same conduct would not constitute double jeopardy, it was not until United States v. Lanza that the conviction in federal court of a person previously convicted in a state court for performing the same acts was sustained. “We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory . . . . Each government in determining what shall be an offense against its peace and dignity is exercising

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46 302 U.S. at 325, 326.
47 302 U.S. at 328.
50 The problem was recognized as early as Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), and the rationale of the doctrine was confirmed within thirty years. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).
52 260 U.S. 377 (1922).
its own sovereignty, not that of the other.”

The “dual sovereignty” doctrine is not only tied into the existence of two sets of laws often serving different federal-state purposes and the now overruled principle that the double jeopardy clause restricts only the national government and not the States, but it also reflects practical considerations that undesirable consequences could follow an overruling of the doctrine. Thus, a State might preempt federal authority by first prosecuting and providing for a lenient sentence (as compared to the possible federal sentence) or acquitting defendants who had the sympathy of state authorities as against federal law enforcement. The application of the clause to the States has therefore worked no change in the “dual sovereign” doctrine. Of course, when in fact two different units of the government are subject to the same sovereign, the double jeopardy clause does bar separate prosecutions by them for the same offense. The dual sovereignty doctrine has also been applied to permit successive prosecutions by two states for the same conduct.

The clause speaks of being put in “jeopardy of life or limb,” which as derived from the common law, generally referred to the

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54 Benton v. Maryland, 395 U.S. 784 (1969), extended the clause to the States.
55 Reaffirmation of the doctrine against double jeopardy claims as to the Federal Government and against due process claims as to the States occurred in Abbate v. United States, 359 U.S. 187 (1959), and Bartkus v. Illinois, 359 U.S. 121 (1959), both cases containing extensive discussion and policy analyses. The Justice Department follows a policy of generally not duplicating a state prosecution brought and carried out in good faith, see Petite v. United States, 361 U.S. 529, 531 (1960); Rinaldi v. United States, 434 U.S. 22 (1977), and several provisions of federal law forbid a federal prosecution following a state prosecution. E.g., 18 U.S.C. §§ 659, 660, 1992, 2117. The Brown Commission recommended a general statute to this effect, preserving discretion in federal authorities to proceed upon certification by the Attorney General that a United States interest would be unduly harmed if there were no federal prosecution. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 707 (1971).
56 United States v. Wheeler, 435 U.S. 313 (1978) (dual sovereignty doctrine permits federal prosecution of an Indian for statutory rape following his plea of guilty in a tribal court to contributing to the delinquency of a minor, both charges involving the same conduct; tribal law stemmed from the retained sovereignty of the tribe and did not flow from the Federal Government).
57 Grafton v. United States, 206 U.S. 333 (1907) (trial by military court-martial precluded subsequent trial in territorial court); Waller v. Florida, 397 U.S. 387 (1970) (trial by municipal court precluded trial for same offense by state court). It was assumed in an early case that refusal to answer questions before one House of Congress could be punished as a contempt by that body and by prosecution by the United States under a misdemeanor statute, In re Chapman, 166 U.S. 661, 672 (1897), but there had been no dual proceedings in that case and it seems highly unlikely that the case would now be followed. Cf. Colombo v. New York, 405 U.S. 9 (1972).
58 Heath v. Alabama, 474 U.S. 82 (1985) (defendant crossed state line in course of kidnap murder, was prosecuted for murder in both states).
possibility of capital punishment upon conviction, but it is now settled that the clause protects with regard “to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute.”\(^{59}\) Despite the Clause’s literal language, it can apply as well to sanctions that are civil in form if they clearly are applied in a manner that constitutes “punishment.”\(^{60}\) Ordinarily, however, civil in rem forfeiture proceedings may not be considered punitive for purposes of double jeopardy analysis,\(^{61}\) and the same is true of civil commitment following expiration of a prison term.\(^{62}\)

Because one prime purpose of the clause is the protection against the burden of multiple trials, a defendant who raises and loses a double jeopardy claim during pretrial or trial may immediately appeal the ruling, a rare exception to the general rule prohibiting appeals from nonfinal orders.\(^{63}\)

During the 1970s especially, the Court decided an uncommonly large number of cases raising double jeopardy claims.\(^{64}\) Instead of the clarity that often emerges from intense consideration of a particular issue, however, double jeopardy doctrine has descended into

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\(^{60}\) The clause applies in juvenile court proceedings which are formally civil. Breed v. Jones, 421 U.S. 519 (1975). See also United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); United States v. Halper, 490 U.S. 435 (1989) (civil penalty under the False Claims Act constitutes punishment if it is overwhelmingly disproportionate to compensating the government for its loss, and if it can be explained only as serving retributive or deterrent purposes); Montana Dep’t of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (tax on possession of illegal drugs, “to be collected only after any state or federal fines or forfeitures have been satisfied,” constitutes punishment for purposes of double jeopardy). But see Seling v. Young, 531 U.S. 250 (2001) (a statute that has been held to be civil and not criminal in nature cannot be deemed punitive “as applied” to a single individual). The issue of whether a law is civil or punitive in nature is essentially the same for ex post facto and for double jeopardy analysis. 531 U.S. at 263.

\(^{61}\) United States v. Ursery, 518 U.S. 267 (1996) (forfeitures, pursuant to 19 U.S.C. § 981 and 21 U.S.C. § 881, of property used in drug and money laundering offenses, are not punitive). The Court in Ursery applied principles that had been set forth in Various Items of Personal Property v. United States, 282 U.S. 577 (1931) (forfeiture of distillery used in defrauding government of tax on spirits), and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (forfeiture, pursuant to 18 U.S.C. § 924(d), of firearms “used or intended to be used in” firearms offenses). A two-part inquiry is followed. First, the Court inquires whether Congress intended the forfeiture proceeding to be civil or criminal. Then, if Congress intended that the proceeding be civil, the court determines whether there is nonetheless the “clearest proof” that the sanction is “so punitive” as to transform it into a criminal penalty. 89 Firearms, 465 U.S. at 366.


a state of “confusion,” with the Court acknowledging that its decisions “can hardly be characterized as models of consistency and clarity.” In large part, the re-evaluation of doctrine and principle has not resulted in the development of clear and consistent guidelines because of the differing emphases of the Justices upon the purposes of the clause and the consequent shifting coalition of majorities based on highly technical distinctions and individualistic fact patterns. Thus, some Justices have expressed the belief that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction, and that English common law rules designed to protect the defendant’s right to go to the first jury picked had early in our jurisprudence become confused with the double jeopardy clause. While they accept the present understanding, they do so as part of the Court’s superintending of the federal courts and not because the understanding is part and parcel of the clause; in so doing, of course, they are likely to find more prosecutorial discretion in the trial process. Others have expressed the view that the clause not only protects the integrity of final judgments but, more important, that it protects the accused against the strain and burden of multiple trials, which would also enhance the ability of government to convict. Still other Justices have engaged in a form of balancing of defendants’ rights with society’s rights to determine when reprosecution should be permitted when a trial ends prior to a final judgment not hinged on the defendant’s culpability. Thus, the basic area of disagreement, though far from the only one, centers on the trial from the attachment of jeopardy to the final judgment.

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66 See Crast v. Bretz, 437 U.S. 28, 40 (1978) (dissenting opinion). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argued that with the double jeopardy clause so interpreted the due process clause could be relied on to prevent prosecutorial abuse during the trial designed to abort the trial and obtain a second one. Id. at 50. All three have joined, indeed, in some instances, have authored, opinions adverting to the role of the double jeopardy clause in protecting against such prosecutorial abuse. E.g., United States v. Scott, 437 U.S. 82, 92–94 (1978); Oregon v. Kennedy, 456 U.S. 667 (1982) (but narrowing scope of concept).


Reprosecution Following Mistrial

The common law generally required that the previous trial must have ended in a judgment, of conviction or acquittal, but the constitutional rule is that jeopardy attaches much earlier, in jury trials when the jury is sworn, and in trials before a judge without a jury, when the first evidence is presented. Therefore, if after jeopardy attaches the trial is terminated for some reason, it may be that a second trial, even if the termination was erroneous, is barred. The reasons the Court has given for fixing the attachment of jeopardy at a point prior to judgment and thus making some terminations of trials before judgment final insofar as the defendant is concerned is that a defendant has a “valued right to have his trial completed by a particular tribunal.” The reason the defendant’s right is so “valued” is that he has a legitimate interest in completing the trial “once and for all” and “conclud[ing] his confrontation with society,” so as to be spared the expense and ordeal of repeated trials, the anxiety and insecurity of having to live with the possibility of conviction, and the possibility that the prosecution may strengthen its case with each try as it learns more of the evidence and of the nature of the defense. These reasons both

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69 The rule traces back to United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). See also Kepner v. United States, 195 U.S. 100 (1904); Downum v. United States, 372 U.S. 734 (1963) (trial terminated just after jury sworn but before any testimony taken). In Crist v. Bretz, 437 U.S. 28 (1978), the Court held this standard of the attachment of jeopardy was “at the core” of the clause and it therefore binds the States. But see id. at 40 (Justice Powell dissenting). An accused is not put in jeopardy by preliminary examination and discharge by the examining magistrate, Collins v. Loisel, 262 U.S. 426 (1923), by an indictment which is quashed, Taylor v. United States, 207 U.S. 120, 127 (1907), or by arraignment and pleading to the indictment, Bassing v. Cady, 208 U.S. 386, 391–92 (1908). A defendant may be tried after preliminary proceedings that present no risk of final conviction. E.g., Ludwig v. Massachusetts, 427 U.S. 618, 630–32 (1976) (conviction in prior summary proceeding does not foreclose trial in a court of general jurisdiction, where defendant has absolute right to demand a trial de novo and thus set aside the first conviction); Swisher v. Brady, 438 U.S. 204 (1978) (double jeopardy not violated by procedure under which masters hear evidence and make preliminary recommendations to juvenile court judge, who may confirm, modify, or remand).

70 Cf. United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963). “Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” Arizona v. Washington, 434 U.S. 497, 503–05 (1978).


inform the determination when jeopardy attaches and the evaluation of the permissibility of retrial depending upon the reason for a trial’s premature termination.

A mistrial may be the result of “manifest necessity,” such as where, for example, the jury cannot reach a verdict or circumstances plainly prevent the continuation of the trial. Answers become more difficult, however, when the doctrine of “manifest necessity” has been called upon to justify a second trial following a mistrial granted by the trial judge because of some event within the prosecutor’s control or because of prosecutorial misconduct or because of error or abuse of discretion by the judge himself. There must ordinarily be a balancing of the defendant’s right in having the trial completed against the public interest in fair trials designed to end in just judgments. Thus, when, after jeopardy attached, a mistrial was granted because of a defective indictment, the Court held that retrial was not barred; a trial judge “properly exercises his discretion” in cases in which an impartial verdict cannot be reached or in which a verdict on conviction would have to be reversed on appeal because of an obvious error. “If an error could make reversal on appeal a certainty, it would not serve ‘the ends of public justice’ to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.” On the other hand, when, after jeopardy attached, a prosecutor successfully moved for a mistrial because a key witness had inadvertently not been served and could not be found, the Court held a retrial barred, because the prosecutor knew prior to the selection and swearing of the jury that the witness was unavailable. Although this case appeared to establish the principle that an error of the prosecutor or of the judge leading to a mistrial could not constitute a “manifest necessity” for terminating the trial, Somerville distinguished and limited Downum to situations in which the error lends itself to prosecutorial manipulation, in being the sort of instance which the prosecutor could use to abort a trial that was not pro-

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75 Id.; Logan v. United States, 144 U.S. 263 (1892).
76 Simmons v. United States, 142 U.S. 148 (1891) (juror’s impartiality became questionable during trial); Thompson v. United States, 155 U.S. 271 (1894) (discovery during trial that one of the jurors had served on the grand jury which indicted defendant and was therefore disqualified); Wade v. Hunter, 336 U.S. 684 (1949) (court-martial discharged because enemy advancing on site).
78 410 U.S. at 464.
ceeding successfully and to obtain a new trial in which his advantage would be increased. 80

Another kind of case arises when the prosecutor moves for mistrial because of prejudicial misconduct by the defense. In Arizona v. Washington, 81 defense counsel in his opening statement made prejudicial comments about the prosecutor’s past conduct, and the prosecutor’s motion for a mistrial was granted over defendant’s objections. The Court ruled that retrial was not barred by double jeopardy. Granting that in a strict, literal sense, mistrial was not “necessary” because the trial judge could have given limiting instructions to the jury, the Court held that the highest degree of respect should be given to the trial judge’s evaluation of the likelihood of the impairment of the impartiality of one or more jurors. As long as support for a mistrial order can be found in the trial record, no specific statement of “manifest necessity” need be made by the trial judge. 82

Emphasis upon the trial judge’s discretion has an impact upon the cases in which it is the judge’s error, in granting sua sponte a mistrial or granting the prosecutor’s motion. The cases are in doctrinal disarray. Thus, in Gori v. United States, 83 the Court permitted retrial of the defendant when the trial judge had, on his own motion and with no indication of the wishes of defense counsel, declared a mistrial because he thought the prosecutor’s line of questioning was intended to expose the defendant’s criminal record, which would have constituted prejudicial error. Although the Court thought the judge’s action was an abuse of discretion, it approved retrial on the conclusion that the judge’s decision had been taken for defendant’s benefit. This rationale was disapproved in the next case, in which the trial judge discharged the jury erroneously and in abuse of his discretion, because he disbelieved the prosecutor’s assurance that certain witnesses had been properly apprised of

82 “Manifest necessity” characterizes the burden the prosecutor must shoulder in justifying retrial. 434 U.S. at 505–06. But “necessity” cannot be interpreted literally; it means rather a “high degree” of necessity, and some instances, such as hung juries, easily meet that standard. Id. at 506–07. In a situation like that presented in this case, great deference must be paid to the trial judge’s decision because he was in the best position to determine the extent of the possible bias, having observed the jury’s response, and to respond by the course he deems best suited to deal with it. Id. at 510–14. Here, “the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent’s interest in having the trial concluded in a single proceeding. [H]e exercised ‘sound discretion.’ . . .” Id. at 516.
83 367 U.S. 364 (1961). See also United States v. Tateo, 377 U.S. 463 (1964) (reprosecution permitted after the setting aside of a guilty plea found to be involuntary because of coercion by the trial judge).
their constitutional rights. Refusing to permit retrial, the Court observed that the “doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant’s option [to go to the first jury and perhaps obtain an acquittal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.” The later cases appear to accept Jorn as an example of a case where the trial judge “acts irrationally or irresponsibly.” But if the trial judge acts deliberately, giving prosecution and defense the opportunity to explain their positions, and according respect to defendant’s interest in concluding the matter before the one jury, then he is entitled to deference. This approach perhaps rehabilitates the result if not the reasoning in Gori and maintains the result and much of the reasoning of Jorn.

Of course, “a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant’s motion is necessitated by a prosecutorial or judicial error.” “Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact.” In United States v. Dinitz, the trial judge had excluded defendant’s principal attorney for misbehavior and had then given defendant the option of recess while he appealed the exclusion, a mistrial, or continuation with an assistant defense counsel. Holding that the defendant could be retried after he chose a mistrial, the Court reasoned that, while the exclusion might have been in error, it was not done in bad faith to goad the defendant into requesting a mistrial or to prejudice his prospects for acquittal. The defendant’s choice, even though difficult, to terminate the trial and go on to a new trial should be respected and a new trial not barred. To hold otherwise would necessitate requiring the defendant to shoulder the burden and anxiety of proceeding to a probable conviction followed by an appeal, which if successful would lead to a new trial, and neither

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85 460 U.S. at 485. The opinion of the Court was by a plurality of four, but two other Justices joined it after first arguing that jurisdiction was lacking to hear the Government’s appeal.
89 424 U.S. 600 (1976). See also Lee v. United States, 432 U.S. 23 (1977) (defendant’s motion to dismiss because the information was improperly drawn made after opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial, Court emphasizing that defendant by his timing brought about foreclosure of opportunity to stay before the same trial).
the public interest nor defendant's interests would thereby be served.

But the Court has also reserved the possibility that the defendant's motion might be necessitated by prosecutorial or judicial overreaching motivated by bad faith or undertaken to harass or prejudice, and in those cases retrial would be barred. It was unclear what prosecutorial or judicial misconduct would constitute such overreaching, but in Oregon v. Kennedy, the Court adopted a narrow “intent” test, so that “[o]nly where the governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.” Therefore, ordinarily, a defendant who moves for or acquiesces in a mistrial is bound by his decision and may be required to stand for retrial.

Reprosecution Following Acquittal

That a defendant may not be retried following an acquittal is “the most fundamental rule in the history of double jeopardy jurisprudence.” The law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that ‘even though innocent he may be found guilty.’” While in other areas of double jeopardy doctrine consideration is given to the public-safety interest in having a criminal trial proceed to an error-free conclusion, no such balancing of interests is permitted with respect to acquittals, “no matter how erroneous,” no matter even if they were “egregiously erroneous.”
The acquittal being final, there is no governmental appeal constitutionally possible from such a judgment. This was firmly established in *Kepner v. United States*, which arose under a Philippines appeals system in which the appellate court could make an independent review of the record, set aside the trial judge’s decision, and enter a judgment of conviction. Previously, under the due process clause, there was no barrier to state provision for prosecutorial appeals from acquittals. But there are instances in which the trial judge will dismiss the indictment or information without intending to acquit or in circumstances in which retrial would not be barred, and the prosecution, of course, has an interest in seeking on appeal to have errors corrected. Until 1971, however, the law providing for federal appeals was extremely difficult to apply and insulated from review many purportedly erroneous legal rulings, but in that year Congress enacted a new statute permitting appeals in all criminal cases in which indictments are dismissed, except in those cases in which the double jeopardy clause prohibits further prosecution. In part because of the new law, the Court has dealt in recent years with a large number of problems in this area.

**Acquittal by Jury.**—Little or no controversy accompanies the rule that once a jury has acquitted a defendant, government may not, through appeal of the verdict or institution of a new prosecu-

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95. *195 U.S. 100 (1904)*. The case interpreted not the constitutional provision but a statutory provision extending double jeopardy protection to the Philippines. The Court has described the case, however, as correctly stating constitutional principles. See, e.g., *United States v. Wilson*, 420 U.S. 332, 346 n.15 (1975); *United States v. DiFrancesco*, 449 U.S. 117, 113 n.13 (1980).

96. In dissent, Justice Holmes, joined by three other Justices, propounded a theory of “continuing jeopardy,” so that until the case was finally concluded one way or another, through judgment of conviction or acquittal, and final appeal, there was no second jeopardy no matter how many times a defendant was tried. *195 U.S. at 134*. The Court has numerous times rejected any concept of “continuing jeopardy.” *E.g.*, *Green v. United States*, 355 U.S. 184, 192 (1957); *United States v. Wilson*, 420 U.S. 332, 351–53 (1975); *Breed v. Jones*, 421 U.S. 519, 533–35 (1975).


tion, place the defendant on trial again. Thus, the Court early held that, when the results of a trial are set aside because the first indictment was invalid or for some reason the trial’s results were voidable, a judgment of acquittal must nevertheless remain undisturbed.

**Acquittal by the Trial Judge.** Similarly, when a trial judge acquits a defendant, that action concludes the matter. There is no possibility of retrial for the same offense. But it may be difficult at times to determine whether the trial judge’s action was in fact an acquittal or was a dismissall or some other action which the prosecution may be able to appeal. The question is “whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” Thus, an appeal by the Government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant’s motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the Government had not proved facts constituting the offense. Even if, as happened in Sanabria v. United States, the trial judge erroneously excludes evidence and
then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.

Some limited exceptions do exist with respect to the finality of trial judge acquittal. First, because a primary purpose of the due process clause is the prevention of successive trials and not of prosecution appeals per se, it is apparently the case that if the trial judge permits the case to go to the jury, which convicts, and the judge thereafter enters a judgment of acquittal, even one founded upon his belief that the evidence does not establish guilt, the prosecution may appeal, because the effect of a reversal would be not a new trial but reinstatement of the jury’s verdict and judgment thereon. Second, if the trial judge enters or grants a motion of acquittal, even one based on the conclusion that the evidence is insufficient to convict, the prosecution may appeal if jeopardy had not yet attached in accordance with the federal standard.

**Trial Court Rulings Terminating Trial Before Verdict.**—

If, after jeopardy attaches, a trial judge grants a motion for mistrial, ordinarily the defendant is subject to retrial; if, after jeopardy attaches, but before a jury conviction occurs, the trial judge acquits, perhaps on the basis that the prosecution has presented insufficient evidence or that the defendant has proved a requisite defense such as insanity or entrapment, the defendant is not subject to retrial. However, it may be that the trial judge will grant a motion to dismiss that is neither a mistrial nor an acquittal, but instead a termination of the trial in defendant’s favor based on some decision not relating to his factual guilt or innocence, such as

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107 In United States v. Wilson, 420 U.S. 332 (1975), following a jury verdict to convict, the trial judge granted defendant’s motion to dismiss on the ground of prejudicial delay, not a judgment of acquittal; the Court permitted a government appeal because reversal would have resulted in reinstatement of the jury’s verdict, not in a retrial. In United States v. Jenkins, 420 U.S. 358, 365 (1975), the Court assumed, on the basis of Wilson, that a trial judge’s acquittal of a defendant following a jury conviction could be appealed by the government because, again, if the judge’s decision were set aside there would be no further proceedings at trial. In overruling Jenkins in United States v. Scott, 437 U.S. 82 (1978), the Court noted the assumption and itself assumed that a judgment of acquittal bars appeal only when a second trial would be necessitated by reversal. Id. at 91 n.7.

108 Serfass v. United States, 420 U.S. 377 (1975) (after request for jury trial but before attachment of jeopardy judge dismissed indictment because of evidentiary insufficiency; appeal allowed); United States v. Sanford, 429 U.S. 14 (1976) (judge granted mistrial after jury deadlock, then four months later dismissed indictment for insufficient evidence; appeal allowed, because granting mistrial had returned case to pretrial status).

109 See “Reprosecution After Reversal on Defendant’s Appeal,” supra.

110 See “Acquittal by the Trial Judge,” supra.
prejudicial preindictment delay. The prosecution may not simply begin a new trial but must seek first to appeal and overturn the dismissal, a course that was not open to federal prosecutors until enactment of the Omnibus Crime Control Act in 1971. That law has resulted in tentative and uncertain rulings with respect to when such dismissals may be appealed and further proceedings directed. In the first place, it is unclear in many instances whether a judge’s ruling is a mistrial, a dismissal, or an acquittal. In the second place, because the Justices have such differing views about the policies underlying the double jeopardy clause, determinations of which dismissals preclude appeals and further proceedings may result from shifting coalitions and from revised perspectives. Thus, the Court first fixed the line between permissible and impermissible appeals at the point at which further proceedings would have had to take place in the trial court if the dismissal were reversed. If the only thing that had to be done was to enter a judgment on a guilty verdict after reversal, appeal was constitutional and permitted under the statute; if further proceedings, such as continuation of the trial or some further factfinding, was necessary, appeal was not permitted. Now, but by a close division of the Court, the determining factor is not whether further proceedings must be had but whether the action of the trial judge, whatever its label, correct or not, resolved some or all of the factual elements of the offense charged in defendant’s favor, whether, that is, the court made some determination related to the defendant’s factual guilt or innocence. Such dismissals relating to guilt or innocence

111 United States v. Wilson, 420 U.S. 332 (1975) (preindictment delay); United States v. Jenkins, 420 U.S. 358 (1975) (determination of law based on facts adduced at trial; ambiguous whether judge’s action was acquittal or dismissal); United States v. Scott, 437 U.S. 82 (1978) (preindictment delay).


114 United States v. Wilson, 420 U.S. 332 (1975) (after jury guilty verdict, trial judge dismissed indictment on grounds of preindictment delay; appeal permissible because upon reversal all trial judge had to do was enter judgment on the jury’s verdict).

115 United States v. Jenkins, 420 U.S. 358 (1975) (after presentation of evidence in bench trial, judge dismissed indictment; appeal impermissible because if dismissal was reversed there would have to be further proceedings in the trial court devoted to resolving factual issues going to elements of offense charged and resulting in supplemental findings).

116 United States v. Scott, 437 U.S. 82 (1978) (at close of evidence, court dismissed indictment for preindictment delay; ruling did not go to determination of guilt or innocence, but, like a mistrial, permitted further proceedings that would go to factual resolution of guilt or innocence). The Court thought that double jeopardy policies were resolvable by balancing the defendant’s interest in having the trial concluded in one proceeding against the government’s right to one complete opportunity to convict those who have violated the law. The defendant chose to move to
are functional equivalents of acquittals, whereas all other dismissals are functional equivalents of mistrials.

Reprosecution Following Conviction

A basic purpose of the double jeopardy clause is to protect a defendant “against a second prosecution for the same offense after conviction.” 117 It is “settled” that “no man can be twice lawfully punished for the same offense.” 118 Of course, the defendant’s interest in finality, which informs much of double jeopardy jurisprudence, is quite attenuated following conviction, and he will most likely appeal, whereas the prosecution will ordinarily be content with its judgment. 119 The situation involving reprosecution ordinarily arises, therefore, only in the context of successful defense appeals and controversies over punishment.

Reprosecution After Reversal on Defendant’s Appeal.— Generally, a defendant who is successful in having his conviction set aside on appeal may be tried again for the same offense, the assumption being made in the first case on the subject that, by appealing, a defendant has “waived” his objection to further prosecution by challenging the original conviction. 120 Although it has characterized the “waiver” theory as “totally unsound and indefensible,” 121 the Court has been hesitant in formulating a new theory in maintaining the practice. 122
An exception to full application of the retrial rule exists, however, when defendant on trial for an offense is convicted of a lesser offense and succeeds in having that conviction set aside. Thus, in *Green v. United States*, the defendant had been placed on trial for first degree murder but convicted of second degree murder; the Court held that, following reversal of that conviction, he could not be tried again for first degree murder, although he certainly could be for second degree murder, on the theory that the first verdict was an implicit acquittal of the first degree murder charge. Even though the Court thought the jury’s action in the first trial was clearly erroneous, the double jeopardy clause required that the jury’s implicit acquittal be respected.

Still another exception arises out of appellate reversals grounded on evidentiary insufficiency. Thus, in *Burks v. United States*, the appellate court set aside the defendant’s conviction on the basis that the prosecution had failed to rebut defendant’s proof of insanity. In directing that the defendant could not be retried, the Court observed that if the trial court “had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense...” Further, the Court stated, “a judgment of acquittal should make no difference that the reviewing court, rather than the trial court, determined...”

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123 See also *Morris v. Mathews*, 475 U.S. 1 (1986) (inadequate showing of prejudice resulting from reducing jeopardy-barred conviction for aggravated murder to non-jeopardy-barred conviction for first degree murder). “To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different.” Id. at 247.

the evidence to be insufficient." The policy underlying the clause of not allowing the prosecution to make repeated efforts to convict forecloses giving the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. On the other hand, if a reviewing court reverses a jury conviction because of its disagreement on the weight rather than the sufficiency of the evidence, retrial is permitted; the appellate court’s decision does not mean that acquittal was the only proper course, hence the deference required for acquittals is not merited. Also, the Burks rule does not bar reprosecution following a reversal based on erroneous admission of evidence, even if the remaining properly admitted evidence would be insufficient to convict.

Sentence Increases.—The double jeopardy clause protects against imposition of multiple punishment for the same offense. The application of the principle leads, however, to a number of complexities. In a simple case, it was held that where a court inadvertently imposed both a fine and imprisonment for a crime for which the law authorized one or the other but not both, it could not, after the fine had been paid and the defendant had entered his short term of confinement, recall the defendant and change its judgment by sentencing him to imprisonment only. But the Court has held that the imposition of a sentence does not from the moment of imposition have the finality that a judgment of acquittal has. Thus, it has long been recognized that in the same term of court and before the defendant has begun serving the sentence the

127 Id. at 10–11. See also Greene v. Massey, 437 U.S. 19 (1978) (remanding for determination whether appellate majority had reversed for insufficient evidence or whether some of the majority had based decision on trial error); Hudson v. Louisiana, 450 U.S. 40 (1981) (Burks applies where appellate court finds some but insufficient evidence adduced, not only where it finds no evidence). Burks was distinguished in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), holding that a defendant who had elected to undergo a bench trial with no appellate review but with right of trial de novo before a jury (and with appellate review available) could not bar trial de novo and reverse his bench trial conviction by asserting that the conviction had been based on insufficient evidence. The two-tiered system in effect gave the defendant two chances at acquittal; under those circumstances jeopardy was not terminated by completion of the first entirely optional stage.

128 Tibbs v. Florida, 457 U.S. 31 (1982). The decision was 5-to-4, the dissent arguing that weight and insufficiency determinations should be given identical double jeopardy clause treatment. Id. at 47 (Justices White, Brennan, Marshall, and Blackmun).

129 Lockhart v. Nelson, 488 U.S. 33 (1988) (state may re prosecute under habitual offender statute even though evidence of a prior conviction was improperly admitted; at retrial, state may attempt to establish other prior convictions as to which no proof was offered at prior trial).


131 Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874).
court may recall him and increase his sentence.\textsuperscript{132} Moreover, a defendant who is retried after he is successful in overturning his first conviction is not protected by the double jeopardy clause against receiving a greater sentence upon his second conviction.\textsuperscript{133} An exception exists with respect to capital punishment, the Court having held that government may not again seek the death penalty on retrial when on the first trial the jury had declined to impose a death sentence.\textsuperscript{134} Applying and modifying these principles, the Court narrowly approved the constitutionality of a statutory provision for sentencing of “dangerous special offenders,” which authorized prosecution appeals of sentences and permitted the appellate court to affirm, reduce, or increase the sentence.\textsuperscript{135} The Court held that the provision did not offend the double jeopardy clause. Sentences had never carried the finality that attached to acquittal, and its precedents indicated to the Court that imposition of a sentence less than the maximum was in no sense an “acquittal” of the higher sentence. Appeal resulted in no further trial or other proceedings to which a defendant might be subjected, only the imposition of a new sentence. An increase in a sentence would not constitute multiple punishment, the Court continued, inasmuch as it would be within the allowable sentence and the defendant could have no legitimate expectation of finality in the sentence as first given because the statutory scheme alerted him to the possibility of increase. Similar principles were applied in a case involving a separate sentencing proceeding in which a life imprisonment sentence amounted to an acquittal on imposition of the death penalty. The Court continued, inasmuch as it would be within the allowable sentence and the defendant could have no legitimate expectation of finality in the sentence as first given because the statutory scheme alerted him to the possibility of increase.


\textsuperscript{134}Bullington v. Missouri, 451 U.S. 430 (1981). Four Justices dissented. Id. at 447 (Justices Powell, White, Rehnquist, and Chief Justice Burger). The Court disapproved Stroud v. United States, 251 U.S. 15 (1919), although formally distinguishing it. Bullington was followed in Arizona v. Rumsey, 467 U.S. 203 (1984), also involving a separate sentencing proceeding in which a life imprisonment sentence amounted to an acquittal on imposition of the death penalty. Rumsey was decided by 7–2 vote, with only Justices White and Rehnquist dissenting. In Monge v. California, 524 U.S. 721 (1998), the Court refused to extend the “narrow” Bullington exception outside the area of capital punishment.

larly upheld as within the allowable range of punishment contemplated by the legislature was a remedy for invalid multiple punishments under consecutive sentences: a shorter felony conviction was vacated, and time served was credited to the life sentence imposed for felony-murder. Even though the first sentence had been commuted and hence fully satisfied at the time the trial court revised the second sentence, the resulting punishment was “no greater than the legislature intended,” hence there was no double jeopardy violation. 136

The Court is also quite deferential to legislative classification of recidivism sentencing enhancement factors as relating only to sentencing and as not constituting elements of an “offense” that must be proved beyond a reasonable doubt. Ordinarily, therefore, sentence enhancements cannot be construed as additional punishment for the previous offense, and the Double Jeopardy Clause is not implicated. “Sentencing enhancements do not punish a defendant for crimes for which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime of conviction.” 137

“For the Same Offence”

Sometimes as difficult as determining when a defendant has been placed in jeopardy is determining whether he was placed in jeopardy for the same offense. As noted previously, the same conduct may violate the laws of two different sovereigns, and a defendant may be proceeded against by both because each may have different interests to serve. 138 The same conduct may transgress two or more different statutes, because laws reach lesser and greater parts of one item of conduct, or may violate the same statute more than once, as when one robs several people in a group at the same time.

Legislative Discretion as to Multiple Sentences.—It frequently happens that one activity of a criminal nature will violate

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137 United States v. Watts, 519 U.S. 148, 154 (1997) (relying on Witte v. United States, 515 U.S. 389 (1995), and holding that a sentencing court may consider earlier conduct of which the defendant was acquitted, so long as that conduct is proved by a preponderance of the evidence). See also Almendarez-Torres v. United States, 523 U.S. 224 (1998) (Congress’ decision to treat recidivism as a sentencing factor does not violate due process); Monge v. California, 524 U.S. 721 (1998) (retrial is permissible following appellate holding of failure of proof relating to sentence enhancement). Justice Scalia, whose dissent in Almendarez-Torres argued that there was constitutional doubt over whether recidivism factors that increase a maximum sentence must be treated as a separate offense for double jeopardy purposes (523 U.S. at 248), answered that question affirmatively in his dissent in Monge. 524 U.S. 740-41.
138 See discussion supra under “Development and Scope.”
one or more laws or that one or more violations may be charged.139 Although the question is not totally free of doubt, it appears that the double jeopardy clause does not limit the legislative power to split a single transaction into separate crimes so as to give the prosecution a choice of charges that may be tried in one proceeding, thereby making multiple punishments possible for essentially one transaction.140 “Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct under Blockburger, a court’s task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial.”141

The clause does, however, create a rule of construction, a presumption against the judiciary imposing multiple punishments for the same transaction unless Congress has “spoken in language that is clear and definite”142 to pronounce its intent that multiple punishments indeed be imposed. The commonly used test in determining whether Congress would have wanted to punish as separate offenses conduct occurring in the same transaction, absent otherwise clearly expressed intent, is the “same evidence” rule. The rule,

139 There are essentially two kinds of situations here. There are “double-description” cases in which criminal law contains more than one prohibition for conduct arising out of a single transaction. E.g., Gore v. United States, 357 U.S. 386, 392–93 (1958) (one sale of narcotics resulted in three separate counts: (1) sale of drugs not in pursuance of a written order, (2) sale of drugs not in the original stamped package, and (3) sale of drugs with knowledge that they had been unlawfully imported). And there are “unit-of-prosecution” cases in which the same conduct may violate the same statutory prohibition more than once. E.g., Bell v. United States, 349 U.S. 81 (1955) (defendant who transported two women across state lines for an immoral purpose in one trip in same car indicted on two counts of violating Mann Act). See Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 SUP. CT. REV. 81, 111–22.

140 Albernaz v. United States, 450 U.S. 333, 343–44 (1981) (defendants convicted on separate counts of conspiracy to import marijuana and conspiracy to distribute marijuana, both charges relating to the same marijuana.) The concurrence objected that the clause does preclude multiple punishments for separate statutory offenses unless each requires proof of a fact that the others do not. Id. at 344. Inasmuch as the case involved separate offenses which met this test, Albernaz strictly speaking is not a square holding and previous dicta is otherwise, but Albernaz is well-considered dicta in view of the positions of at least four of its Justices who have objected to the dicta in other cases suggesting a constitutional restraint by the clause. Whalen v. United States, 445 U.S. 684, 695, 696, 699 (1980) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger).

141 Missouri v. Hunter, 459 U.S. 359 (1983) (separate offenses of “first degree robbery,” defined to include robbery under threat of violence, and “armed criminal action”). Only Justices Marshall and Stevens dissented, arguing that the legislature should not be totally free to prescribe multiple punishment for the same conduct, and that the same rules should govern multiple prosecutions and multiple punishments.

announced in *Blockburger v. United States*, 143 “is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Thus, in *Gore v. United States*, 144 the Court held that defendant’s one act of selling narcotics had violated three distinct criminal statutes, each of which required proof of a fact not required by the others; prosecuting him on all three counts in the same proceeding was therefore permissible. 145 So too, the same evidence rule does not upset the “established doctrine” that, for double jeopardy purposes, “a conspiracy to commit a crime is a separate offense from the crime itself,” 146 or the related principle that Congress may prescribe that predicate offenses and “continuing criminal enterprise” are separate offenses. 147 On the other hand, in *Whalen v. United States*, 148 the Court determined that a defendant could not be separately punished for rape and for killing the same victim in the perpetration of the rape, because it is not the case that each statute requires proof of a fact that the other does not, and no indication existed in the statutes and the legislative history that Congress wanted

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143 284 U.S. 299, 304 (1932). This case itself was not a double jeopardy case, but it derived the rule from Gavieres v. United States, 220 U.S. 338, 342 (1911), which was a double jeopardy case. See also Carter v. McLaughry, 183 U.S. 365 (1902); Morgan v. Devine, 227 U.S. 632 (1915); Albrecht v. United States, 273 U.S. 1 (1927); Pinkerton v. United States, 328 U.S. 640 (1946); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Michener, 331 U.S. 789 (1947); Pereira v. United States, 347 U.S. 1 (1954); Callanan v. United States, 364 U.S. 587 (1961).

144 357 U.S. 386 (1958).

145 See also Albernaz v. United States, 450 U.S. 333 (1981); Iannelli v. United States, 420 U.S. 770 (1975) (defendant convicted on two counts, one of the substantive offense, one of conspiracy to commit the substantive offense; defense raised variation of Blockburger test, Wharton’s Rule requiring that one may not be punished for conspiracy to commit a crime when the nature of the crime necessitates participation of two or more persons for its commission; Court recognized Wharton’s Rule as a double-jeopardy inspired presumption of legislative intent but held that congressional intent in this case was “clear and unmistakable” that both offenses be punished separately).


the separate offenses punished. In this as in other areas, a guilty plea ordinarily precludes collateral attack.

**Successive Prosecutions for “the Same Offense”**—Successive prosecutions raise fundamental double jeopardy concerns extending beyond those raised by enhanced and multiple punishments. It is more burdensome for a defendant to face charges in separate proceedings, and if those proceedings are strung out over a lengthy period the defendant is forced to live in a continuing state of uncertainty. At the same time, multiple prosecutions allow the state to hone its trial strategies through successive attempts at conviction. In *Brown v. Ohio*, the Court, apparently for the first time, applied the same evidence test to bar successive prosecutions in state court for different statutory offenses involving the same conduct. The defendant had been convicted of “joyriding,” defined as operating a motor vehicle without the owner’s consent, and was then prosecuted and convicted of stealing the same automobile. Because the state courts had conceded that joyriding was a lesser included offense of auto theft, the Court observed that each offense required the same proof and for double jeopardy purposes met the *Blockburger* test. The second conviction was overturned. Application of the same principles resulted in a holding that a prior conviction of failing to reduce speed to avoid an accident did not preclude a second trial for involuntary manslaughter, inasmuch as failing to reduce speed was not a necessary element of the statutory offense of manslaughter, unless the prosecution in the second trial had to prove failing to reduce speed to establish this particular offense. In 1990, the Court modified the *Brown* approach, stating that the

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149 The Court reasoned that a conviction for killing in the course of rape could not be had without providing all of the elements of the offense of rape. See also Jeffers v. United States, 432 U.S. 137 (1977) (no indication in legislative history Congress intended defendant to be prosecuted both for conspiring to distribute drugs and for distributing drugs in concert with five or more persons); Simpson v. United States, 435 U.S. 6 (1978) (defendant improperly prosecuted both for committing bank robbery with a firearm and for using a firearm to commit a felony); Bell v. United States, 349 U.S. 81 (1955) (simultaneous transportation of two women across state lines for immoral purposes one violation of Mann Act rather than two).

150 United States v. Broce, 488 U.S. 563 (1989) (defendant who pled guilty to two separate conspiracy counts is barred from collateral attack alleging that in fact there was only one conspiracy and that double jeopardy applied).


152 432 U.S. 161 (1977). Cf. In re Nielson, 131 U.S. 176 (1889) (prosecution of Mormon for adultery held impermissible following his conviction for cohabiting with more than one woman, even though second prosecution required proof of an additional fact—that he was married to another woman).

153 See also Harris v. Oklahoma, 433 U.S. 682 (1977) (defendant who had been convicted of felony murder for participating in a store robbery with another person who shot a store clerk could not be prosecuted for robbing the store, since store robbery was a lesser-included crime in the offense of felony murder).

appropriate focus is on same conduct rather than same evidence.\textsuperscript{155} That interpretation held sway only three years, however, before being repudiated as “wrong in principle [and] unstable in application.”\textsuperscript{156} The \textit{Brown} Court had noted some limitations applicable to its holding,\textsuperscript{157} and more have emerged subsequently. Principles appropriate in the “classically simple” lesser-included-offense and related situations are not readily transposable to “multilayered conduct” governed by the law of conspiracy and continuing criminal enterprise, and it remains the law that “a substantive crime and a conspiracy to commit that crime are not the ‘same offense’ for double jeopardy purposes.”\textsuperscript{158} For double jeopardy purposes, a defendant is “punished . . . only for the offense of which [he] is convicted”; a later prosecution or later punishment is not barred simply because the underlying criminal activity has been considered at sentencing for a different offense.\textsuperscript{159} Similarly, recidivism-based sentence enhancement does not constitute multiple punishment for the “same” prior offense, but instead is a stiffened penalty for the later crime.\textsuperscript{160}

\textbf{The “Same Transaction” Problem}.—The same conduct may also give rise to multiple offenses in a way that would satisfy the

\textsuperscript{155}Grady v. Corbin, 495 U.S. 508 (1990) (holding that the state could not prosecute a traffic offender for negligent homicide because it would attempt to prove conduct for which the defendant had already been prosecuted—driving while intoxicated and failure to keep to the right of the median). A subsequent prosecution is barred, the Court explained, if the government, to establish an essential element of an offense, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Id. at 521.

\textsuperscript{156}United States v. Dixon, 509 U.S. 688, 709 (1993) (applying \textit{Blockburger} test to determine whether prosecution for a crime, following conviction for criminal contempt for violation of a court order prohibiting that crime, constitutes double jeopardy).

\textsuperscript{157}The Court suggested that if the legislature had provided that joyriding is a separate offense for each day the vehicle is operated without the owner’s consent, so that the two indictments each specifying a different date on which the offense occurred would have required different proof, the result might have been different, but this, of course, met the Blockburger problem. Brown v. Ohio, 432 U.S. 161, 169 n.8 (1977). The Court also suggested that an exception might be permitted where the State is unable to proceed on the more serious charge at the outset because the facts necessary to sustain that charge had not occurred or had not been discovered. Id. at 169 n.7. \textit{See also} Jeffers v. United States, 432 U.S. 137, 150-54 (1977) (plurality opinion) (exception where defendant elects separate trials); Ohio v. Johnson, 467 U.S. 493 (1984) (trial court’s acceptance of guilty plea to lesser included offense and dismissal of remaining charges over prosecution’s objections does not bar subsequent prosecution on those “remaining” counts).


\textsuperscript{159}Witte v. United States, 515 U.S. 389 (1995) (consideration of defendant’s alleged cocaine dealings in determining sentence for marijuana offenses does not bar subsequent prosecution on cocaine charges).

\textsuperscript{160}Monge v. California, 524 U.S. 721, 728 (1998).
Blockburger test if that conduct victimizes two or more individuals, and therefore constitutes a separate offense as to each of them. In Hoag v. New Jersey, before the double jeopardy clause was applied to the States, the Court found no due process problem in successive trials arising out of a tavern hold-up in which five customers were robbed. Ashe v. Swenson, however, presented the Court with the Hoag fact situation directly under the double jeopardy clause. The defendant had been acquitted at trial of robbing one player in a poker game; the defense offered no testimony and did not contest evidence that a robbery had taken place and that each of the players had lost money. A second trial was held on a charge that the defendant had robbed a second of the seven poker players, and on the basis of stronger identification testimony the defendant was convicted. Reversing the conviction, the Court held that the doctrine of collateral estoppel was a constitutional rule made applicable to the States through the double jeopardy clause. Because the only basis upon which the jury could have acquitted the defendant at his first trial was a finding that he was not present at the robbery, hence was not one of the robbers, the State could not relitigate that issue; with that issue settled, there could be no conviction. Several Justices would have gone further and required a compulsory joinder of all charges against a defendant growing out of a single criminal act, occurrence, episode, or transaction, except where a crime is not discovered until prosecution arising from the same transaction has begun or where the same jurisdiction does not have cognizance of all the crimes. But the Court has “steadfastly refused to adopt the ‘single transaction’ view of the Double Jeopardy Clause.”

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163 “Collateral estoppel” is an awkward phrase . . . [which] means simply that when an issue of ultimate fact has once been determined by a final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Id. at 443. First developed in civil litigation, the doctrine was applied in a criminal case in United States v. Oppenheimer, 242 U.S. 85 (1916). See also Sealfon v. United States, 332 U.S. 575 (1948).
164 Ashe v. Swenson, 397 U.S. 436, 466 (1970). See also Harris v. Washington, 404 U.S. 55 (1971); Turner v. Arkansas, 407 U.S. 366 (1972). Cf. Dowling v. United States, 493 U.S. 342 (1990), in which the Court concluded that the defendant’s presence at an earlier crime for which he had been acquitted had not necessarily been decided in his acquittal. Dowling is distinguishable from Ashe, however, because in Dowling the evidence relating to the first conviction was not a necessary element of the second offense.
SELF-INCRIMINATION

Development and Scope

The source of the self-incrimination clause was the maxim "nemo tenetur se ipsum accusare," that "no man is bound to accuse himself." The maxim is but one aspect of two different systems of law enforcement which competed in England for acceptance; the accusatorial and the inquisitorial. In the accusatorial system, which predated the reign of Henry II but was expanded and extended by him, first the community and then the state by grand and petit juries proceeded against alleged wrongdoers through the examination of others, and in the early years through examination of the defendant as well. The inquisitorial system, which developed in the ecclesiastical courts, compelled the alleged wrongdoer to affirm his culpability through the use of the oath ex officio. Under the oath, an official had the power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all matters about which he would be questioned; before administration of the oath the person was not advised of the nature of the charges against him, or whether he was accused of crime, and was also not informed of the nature of the questions to be asked.\(^{167}\)

The use of this oath in Star Chamber proceedings, especially to root out political heresies, combined with opposition to the ecclesiastical oath ex officio, led over a long period of time to general acceptance of the principle that a person could not be required to accuse himself under oath in any proceeding before an official tribunal seeking information looking to a criminal prosecution, or before a magistrate investigating an accusation against him with or without oath, or under oath in a court of equity or a court of common law.\(^{168}\) The precedents in the colonies are few in number, but following the Revolution six states had embodied the privilege against self-incrimination in their constitutions,\(^{169}\) and the privi-


\(^{168}\) The traditional historical account is 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 2250 (J. McNaughton rev. 1961), but more recent historical studies have indicated that Dean Wigmore was too grudging of the privilege. Leonid Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1 (1949).

\(^{169}\) 3 F. Thorpe, The Federal and State Constitutions, reprinted in H. Doc. No. 357, 59th Congress, 2d Sess. 1891 (1909) (Massachusetts); 4 id. at 2455 (New Hamp-
lege was one of those recommended by several state ratifying conventions for inclusion in a federal bill of rights. Amendments were recommended by an "Address" of a minority of the Pennsylvania convention after they had been voted down as a part of the ratification action, 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 628, 658, 664 (1971), and then the ratifying conventions of Massachusetts, South Carolina, New Hampshire, Virginia, and New York formally took this step.

The historical studies cited demonstrate that in England and the colonies the privilege was narrower than the interpretation now prevailing, a common situation reflecting the gradual expansion, or occasional contracting, of constitutional guarantees based on the judicial application of the policies underlying the guarantees in the context of new factual patterns and practices. The difficulty is that the Court has generally failed to articulate the policy objectives underlying the privilege, usually citing a "complex of values" when it has attempted to state the interests served by it. Commonly mentioned in numerous cases was the assertion that the privilege was designed to protect the innocent and to further the search for truth. It appears now, however, that the Court has rejected both of these as inapplicable and has settled upon the principle that the clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion. In

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170 Amendments were recommended by an "Address" of a minority of the Pennsylvania convention after they had been voted down as a part of the ratification action, 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 628, 658, 664 (1971), and then the ratifying conventions of Massachusetts, South Carolina, New Hampshire, Virginia, and New York formally took this step.

171 Id. at 753 (August 17, 1789).

172 "It reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load, . . .'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' . . ., our distrust of self-deprecatory statement; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1954). A dozen justifications have been suggested for the privilege. 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE 2251 (J. McNaughton rev. 1961).


174 "The basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the
order to protect these interests and to preserve these values, the privilege "is not to be interpreted literally." Rather, the "sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts." 175

"The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . . [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 176 Thus, a judge who would deny a claim of the privilege must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency to incriminate." 177 The witness must have reasonable cause to apprehend danger from an answer, but he may not be the sole judge of the validity of his claim. While the trial judge may not require a witness to disclose so much of the danger as to render the privilege nugatory, he must determine whether there is a reasonable apprehension of incrimi-
nation by considering the circumstances of the case, his knowledge of matters surrounding the inquiry, and the nature of the evidence which is demanded from the witness. The fact that a witness has previously asserted her innocence of any wrongdoing does not obviate the right, as truthful responses of an innocent witness may provide the government with incriminating evidence. The witness must explicitly claim her privilege, however, or she will be deemed to have waived it, and waiver may be found where the witness has answered some preliminary questions but desires to stop at a certain point.

The privilege against self-incrimination is a personal one and cannot be utilized by or on behalf of any organization, such as a corporation. Thus, a corporation cannot object on self-incrimination grounds to a subpoena of its records and books or to the compelled testimony of those corporate agents who have been given personal immunity from criminal prosecution. Neither may a corporate official with custody of corporate documents which incriminate him personally resist their compelled production on the assertion of his personal privilege.

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to

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178 Hoffman v. United States, 341 U.S. 479 (1951); Mason v. United States, 244 U.S. 362 (1917).
180 Rogers v. United States, 340 U.S. 367 (1951); United States v. Monia, 317 U.S. 424 (1943). The “waiver” concept here as in other recent cases has been pronounced “analytically [un]sound,” with the Court preferring to reserve the term “waiver” for the process by which one affirmatively renounces the protection of the privilege.” Garner v. United States, 424 U.S. 648, 654, n.9 (1976). Thus, the Court has settled upon the concept of “compulsion” as applied to “cases where disclosures are required in the face of claim of privilege.” Id. “In the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not ‘compelled’ him to incriminate himself.” Id. at 654. Similarly, the Court has enunciated the concept of “voluntariness” to be applied in situations where it is claimed that a particular factor denied the individual a “free choice to admit, to deny, or to refuse to answer.” Id. at 654 n.9, 656–65.
uncover other evidence against him.\textsuperscript{183} Incrimination is not complete once guilt has been adjudicated, and hence the privilege may be asserted during the sentencing phase of trial.\textsuperscript{184} Conversely, there is no valid claim on the ground that the information sought can be used in proceedings which are not criminal in nature.\textsuperscript{185} The Court in recent years has also applied the privilege to situations, such as police interrogation of suspects, in which there is no legal compulsion to speak.\textsuperscript{186}

What the privilege protects against is compulsion of “testimonial” disclosures. Thus, the clause is not offended by such non-testimonial compulsions as requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to model particular clothing, or to give samples of handwriting, fingerprints, or blood.\textsuperscript{187} A person may be compelled to produce specific

\textsuperscript{183}Thus, not only may a defendant or a witness in a criminal trial, including a juvenile proceeding, In re Gault, 387 U.S. 1, 42–57 (1967), claim the privilege but so may a party or a witness in a civil court proceeding, McCarthy v. Arndstein, 266 U.S. 34 (1924), a potential defendant or any other witness before a grand jury, Reina v. United States, 364 U.S. 507 (1960); Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), or a witness before a legislative inquiry, Watkins v. United States, 354 U.S. 178, 195–96 (1957); Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955), or before an administrative body. In re Groban, 352 U.S. 330, 333, 336–37, 345–46 (1957); ICC v. Brimson, 154 U.S. 447, 478–80 (1894).

\textsuperscript{184}Estelle v. Smith, 451 U.S. 454, 462–63 (1981) (‘‘We can discern no basis to distinguish between the guilt and penalty phases of respondent’s capital murder trial so far as the protection of the Fifth Amendment privilege is concerned’’); Mitchell v. United States, 526 U.S. 314 (1999) (non-capital sentencing).

\textsuperscript{185}Allen v. Illinois, 478 U.S. 364 (1986) (declaration that person is ‘‘sexually dangerous’’ under Illinois law is not a criminal proceeding); Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984) (revocation of probation is not a criminal proceeding, hence ‘‘there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings’’). In Murphy, the Court went on to explain that ‘‘a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer’s ‘right to immunity as a result of his compelled testimony would not be at stake’ . . . and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer . . . .’’ Id.


\textsuperscript{187}Schmerber v. California, 384 U.S. 757, 764 (1966); United States v. Wade, 388 U.S. 218, 221–23 (1967); Holt v. United States, 218 U.S. 245, 252 (1910). In California v. Byers, 402 U.S. 424 (1971), four Justices believed that requiring any person involved in a traffic accident to stop and give his name and address did not involve testimonial compulsion and therefore the privilege was inapplicable, id. at 431–34 (Chief Justice Burger and Justices Stewart, White, and Blackmun), but Justice Harlan, id. at 434 (concurring), and Justices Black, Douglas, Brennan, and Marshall, id. at 459, 464 (dissenting), disagreed. In South Dakota v. Neville, 459 U.S. 553 (1983), the Court indicated as well that a State may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and may also give the suspect a choice about whether to submit, but use his refusal to submit to the test as evidence against him. The Court rested its evidentiary ruling on absence of coercion,
documents even though they contain incriminating information.\textsuperscript{188} If, however, the existence of specific documents is not known to the government, and the act of production informs the government about the existence, custody, or authenticity of the documents, then the privilege is implicated.\textsuperscript{189} Application of these principles resulted in a holding that the Independent Counsel could not base a prosecution on incriminating evidence identified and produced as the result of compliance with a broad subpoena for all information relating to the individual’s income, employment, and professional relationships.\textsuperscript{190}

The protection is against “compulsory” incrimination, and traditionally the Court has treated within the clause only those compulsions which arise from legally enforceable obligations, culminating in imprisonment for refusal to testify or to produce documents.\textsuperscript{191} The compulsion need not be imprisonment, but can also

\textsuperscript{188}Fisher v. United States, 425 U.S. 391 (1976). Compelling a taxpayer by subpoena to produce documents produced by his accountants from his own papers does not involve testimonial self-incrimination and is not barred by the privilege. “[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.” Id. at 408 (emphasis by Court). Even further removed from the protection of the privilege is seizure pursuant to a search warrant of business records in the handwriting of the defendant. Andresen v. Maryland, 427 U.S. 463 (1976). A court order compelling a target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal is not testimonial in nature, since the factual assertions are required of the banks and not of the target. Doe v. United States, 487 U.S. 201 (1988).

\textsuperscript{189}In United States v. Doe, 465 U.S. 605 (1984), the Court distinguished Fisher, upholding lower courts’ findings that the act of producing tax records implicates the privilege because it would compel admission that the records exist, that they were in the taxpayer’s possession, and that they are authentic. Similarly, a juvenile court’s order to produce a child implicates the privilege, because the act of compliance “would amount to testimony regarding [the subject’s] control over and possession of [the child].” Baltimore Dep’t of Social Services v. Bouknight, 493 U.S. 549, 555 (1990).

\textsuperscript{190}United States v. Hubbell, 530 U.S. 27 (2000).

\textsuperscript{191}E.g., Marchetti v. United States, 390 U.S. 39 (1968) (criminal penalties attached to failure to register and make incriminating admissions); Malloy v. Hogan, 378 U.S. 1 (1964) (contempt citation on refusal to testify). See also South Dakota v. Neville, 459 U.S. 553 (1983) (no compulsion in introducing evidence of suspect’s
be termination of public employment\textsuperscript{192} or disbarment of a lawyer\textsuperscript{193} as a legal consequence of a refusal to make incriminating admissions. The degree of coercion may also prove decisive, the Court having ruled that moving a prisoner from a medium security unit to a maximum security unit was insufficient to compel him to incriminate himself in spite of the attendant loss of privileges and the harsher living conditions.\textsuperscript{194} However, while it appears that prisoners\textsuperscript{195} and probationers\textsuperscript{196} have less protection than others, the Court has not yet developed a clear doctrinal explanation to identify the differences between permissible and impermissible coercion.\textsuperscript{197}

It has long been the rule that a defendant who takes the stand in his own behalf does so voluntarily, and cannot then claim the privilege to defeat cross-examination on matters reasonably related to the subject matter of his direct examination,\textsuperscript{198} and that such refusal to submit to blood alcohol test, since state could have forced suspect to take test and need not have offered him a choice); Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) (no coercion in requirement that applicants for federal financial assistance for higher education reveal whether they have registered for draft).

\textsuperscript{192}Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968). \textit{See also} Lefkowitz v. Turley, 414 U.S. 70 (1973), holding unconstitutional state statutes requiring the disqualification for five years of contractors doing business with the State if at any time they refused to waive immunity and answer questions respecting their transactions with the State. The State can require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant the privilege against self-incrimination. \textit{See also} Lefkowitz v. Cunningham, 431 U.S. 801 (1977).


\textsuperscript{194}McKune v. Lile, 122 S. Ct. 2017 (2002). The transfer was mandated for refusal to participate in a sexual abuse treatment program that required revelation of sexual history and admission of responsibility. The plurality declared that rehabilitation programs are permissible if the adverse consequences for non-participation are “related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.” 122 S. Ct. at 2027 (opinion of Justice Kennedy). Concurring Justice O’Connor stated her belief that the “minor” change in living conditions seemed “very unlikely to actually compel [the prisoner] to participate.” Id. at 2034.


\textsuperscript{196}Minnesota v. Murphy, 465 U.S. 420 (1984) (the possibility of revocation of probation was not so coercive as to compel a probationer to provide incriminating answers to probation officer’s questions ).

\textsuperscript{197}The Court in McKune v. Lile was split 5–4, with no opinion of the Court.

a defendant may be impeached by proof of prior convictions. But in Griffin v. California, the Court refused to permit prosecutorial or judicial comment to the jury upon a defendant’s refusal to take the stand in his own behalf, because such comment was a “penalty imposed by courts for exercising a constitutional privilege” and “[i]t cuts down on the privilege by making its assertion costly.” Prosecutors’ comments violating the Griffin rule can nonetheless constitute harmless error. Neither may a prosecutor impeach a defendant’s trial testimony through use of the fact that upon his arrest and receipt of a Miranda warning he remained silent and did not give the police the exculpatory story he told at trial. But where the defendant took the stand and testified, the Court permitted the impeachment use of his pre-arrest silence when that silence had in no way been officially encouraged, through a Miranda warning or otherwise.

200 380 U.S. 609, 614 (1965). The result had been achieved in federal court through statutory enactment. 18 U.S.C. § 3481. See Wilson v. United States, 149 U.S. 60 (1893). In Carter v. Kentucky, 450 U.S. 288 (1981), the Court held that the self-incrimination clause required a State, upon defendant’s request, to give a cautionary instruction to the jurors that they must disregard defendant’s failure to testify and not draw any adverse inferences from it. This result, too, had been accomplished in the federal courts through statutory construction. Bruno v. United States, 308 U.S. 287 (1939). In Lakeside v. Oregon, 435 U.S. 333 (1978), the Court held that a court may give such an instruction, even over defendant’s objection. Carter v. Kentucky was applied in James v. Kentucky, 466 U.S. 341 (1983) (request for jury “admonition” sufficient to invoke right to “instruction”).
201 While the Griffin rule continues to apply when the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant’s silence, it does not apply to a prosecutor’s “fair response” to a defense counsel’s allegation that the government had denied his client the opportunity to explain his actions. United States v. Robinson, 485 U.S. 25, 32 (1988).
203 Doyle v. Ohio, 426 U.S. 610 (1976). Post-arrest silence, the Court stated, is inherently ambiguous, and to permit use of the silence would be unfair since the Miranda warning told the defendant he could be silent. The same result had earlier been achieved under the Court’s supervisory power over federal trials in United States v. Hale, 422 U.S. 171 (1975). The same principles apply to bar a prosecutor’s use of Miranda silence as evidence of an arrestee’s sanity. Wainwright v. Greenfield, 474 U.S. 284 (1986). In determining whether a state prisoner is entitled to federal habeas corpus relief because the prosecution violated due process by using his post-Miranda silence for impeachment purposes at trial, the proper standard for harmless-error review is that announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946)—whether the due process error had substantial and injurious effect or influence in determining the jury’s verdict—not the stricter “harmless beyond a reasonable doubt” standard of Chapman v. California, 386 U.S. 18, 24 (1967), applicable on direct review. Brecht v. Abrahamson, 507 U.S. 619 (1993).
Further, the Court held inadmissible at the subsequent trial a defendant’s testimony at a hearing to suppress evidence wrongfully seized, since use of the testimony would put the defendant to an impermissible choice between asserting his right to remain silent and invoking his right to be free of illegal searches and seizures.\(^{205}\) The Court also proscribed the introduction at a second trial of the defendant’s testimony at his first trial, given to rebut a confession which was subsequently held inadmissible, since the testimony was in effect “fruit of the poisonous tree,” and had been “coerced” from the defendant through use of the confession.\(^{206}\) Most potentially far-reaching was a holding that invalidated the penalty structure of a statute under which defendants could escape a possible death sentence by entering a guilty plea; the statute “needlessly encourage[d]” waivers of defendant’s Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.\(^{207}\)

While this “needless encouragement” test assessed the nature of the choice required to be made by defendants against the strength of the governmental interest in the system requiring the choice, the Court soon devolved another test stressing the voluntariness of the choice. A guilty plea entered by a defendant who correctly understands the consequences of the plea is voluntary unless coerced or obtained under false pretenses; moreover, there is no impermissible coercion where the defendant has the effective assistance of counsel.\(^{208}\) The Court in an opinion by Justice Harlan then formulated still another test in holding that a defendant in a capital case in which the jury in one process decides both guilt and sentence could be put to a choice between remaining silent on guilt or admitting guilt and being able to put on evidence designed to mitigate the possible sentence. The pressure to take the stand in response to the sentencing issue, said the Court, was not so great as to impair the policies underlying the self-incrimination clause, policies described in this instance as proscription of coercion and of cruelty in putting the defendant to an undeniably “hard” choice.\(^{209}\)


\(^{207}\) Jackson v. United States, 390 U.S. 570, 583 (1968).

\(^{208}\) Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970). Parker and Brady entered guilty pleas to avoid the death penalty when it became clear that the prosecution had solid evidence of their guilt; Richardson pled guilty because of his fear that an allegedly coerced confession would be introduced into evidence.

\(^{209}\) McGautha v. California, 402 U.S. 183, 210–20 (1971). When the Court subsequently required bifurcated trials in capital cases, it was on the basis of the Eighth Amendment, and represented no withdrawal from the position described here.
Similarly, it has been held that requiring a defendant to give notice to the prosecution before trial of his intention to rely on an alibi defense and to give the names and addresses of witnesses who will support it does not violate the clause. Neither does it violate a defendant’s self-incrimination privilege to create a presumption upon the establishment of certain basic facts which the jury may utilize to infer defendant’s guilt unless he rebuts the presumption.

The obligation to testify is not relieved by this clause, if, regardless of whether incriminating answers are given, a prosecution is precluded, or if the result of the answers is not incrimination, but rather harm to reputation or exposure to infamy or disgrace. The clause does not prevent a public employer from discharging an employee who, in an investigation specifically and narrowly di-


210 Williams v. Florida, 389 U.S. 78, 80–86 (1970). The compulsion of choice, Justice White argued for the Court, proceeded from the strength of the State’s case and not from the disclosure requirement. That is, the rule did not affect whether or not the defendant chose to make an alibi defense and to call witnesses, but merely required him to accelerate the timing. It appears, however, that in Brooks v. Tennessee, 406 U.S. 605 (1972), the Court utilized the “needless encouragement” test in striking down a state rule requiring the defendant to testify before any other defense witness or to forfeit the right to testify at all. In the Court’s view, this impermissibly burdened the defendant’s choice whether to testify or not. Another prosecution discovery effort was approved in United States v. Nobles, 422 U.S. 233 (1975), in which a defense investigator’s notes of interviews with prosecution witnesses were ordered disclosed to the prosecutor for use in cross-examination of the investigator. The Court discerned no compulsion upon defendant to incriminate himself.

211 The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.” Yee Hem v. United States, 268 U.S. 178, 185 (1925), quoted with approval in Turner v. United States, 396 U.S. 398, 418 n.35 (1970). Justices Black and Douglas dissented on self-incrimination grounds. Id. at 425. And see United States v. Gainey, 380 U.S. 63, 71, 74 (1965) (dissenting opinions). For due process limitations on such presumptions, see discussion under the Fourteenth Amendment, “Proof, Burden of Proof, and Presumptions,” infra.

212 Prosecution may be precluded by tender of immunity, (see next topic for discussion of immunity) infra, or by pardon, Brown v. Walker, 161 U.S. 591, 598–99 (1896). The effect of a mere tender of pardon by the President remains uncertain. Cf. Burdick v. United States, 236 U.S. 79 (1915) (acceptance necessary, and self-incrimination is possible in absence of acceptance); Biddle v. Perovich, 274 U.S. 480 (1927) (acceptance not necessary to validate commutation of death sentence to life imprisonment).

rected at the performance of the employee's official duties, refuses to cooperate and to provide the employer with the desired information on grounds of self-incrimination. But it is unclear under what other circumstances a public employer may discharge an employee who has claimed his privilege before another investigating agency.

Finally, the rules established by the clause and the judicial interpretations are applicable against the States to the same degree that they apply to the Federal Government, and neither sovereign can compel discriminatory admissions which would incriminate the person in the other jurisdiction. There is no “cooperative internationalism” that parallels the cooperative federalism and cooperative prosecution on which application against states is premised, and consequently concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.


217 Murphy v. Waterfront Comm’n, 378 U.S. 52 (1964), (overruling United States v. Murdock, 284 U.S. 141 (1931) (Federal Government could compel a witness to give testimony which might incriminate him under state law), Knapp v. Schweitzer, 357 U.S. 371 (1958) (State may compel a witness to give testimony which might incriminate him under federal law), and Feldman v. United States, 322 U.S. 487 (1944) (testimony compelled by a State may be introduced into evidence in the federal courts)). Murphy held that a State could compel testimony under a grant of immunity but that since the State could not extend the immunity to federal courts the Supreme Court would not permit the introduction of evidence into federal courts which had been compelled by a State or which had been discovered because of state compelled testimony. The result was apparently a constitutionally compelled one arising from the Fifth Amendment itself, 378 U.S. at 75–80, rather than one taken pursuant to the Court’s supervisory power as Justice Harlan would have preferred. Id. at 80 (concurring). Congress has power to confer immunity in state courts as well as in federal in order to elicit information, Adams v. Maryland, 347 U.S. 179 (1954), but whether Congress must do so or whether the immunity would be conferred simply through the act of compelling the testimony Murphy did not say.

Whether testimony could be compelled by either the Federal Government or a State that could incriminate a witness in a foreign jurisdiction is unsettled, see Zicarelli v. New Jersey State Comm’n of Investigation, 406 U.S. 472, 480, 481 (1972) (reserving question), but an affirmative answer seems unlikely. Cf. Murphy, 378 U.S. at 58–63, 77.

The Power To Compel Testimony and Disclosure

Immunity.—"Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible [with the values of the self-incrimination clause]. Rather they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." 219 Apparently the first immunity statute was enacted by Parliament in 1710 220 and it was widely copied in the colonies. The first federal immunity statute was enacted in 1857, and immunized any person who testified before a congressional committee from prosecution for any matter "touching which" he had testified. 221

Revised in 1862 so as merely to prevent the use of the congressional testimony at a subsequent prosecution of any congressional witness, 222 the statute was soon rendered unenforceable by the ruling in Counselman v. Hitchcock 223 that an analogous limited immunity statute was unconstitutional because it did not confer an immunity coextensive with the privilege it replaced. Counselman was ambiguous with regard to its grounds because it identified two faults in the statute: it did not proscribe "derivative" evidence 224 and it prohibited only future use of the compelled testimony. 225 The latter language accentuated a division between adherents of "transactional" immunity and of "use" immunity which has continued to the present. 226 In any event, following Counselman, Congress enacted a statute which conferred transactional immunity as

219 Kastigar v. United States, 406 U.S. 441, 445–46 (1972). It has been held that the Fifth Amendment itself precludes the use as criminal evidence of compelled admissions, Garrity v. New Jersey, 385 U.S. 493 (1967), but this case and dicta in others is unreconciled with the cases that find that one may "waive" though inadvertently the privilege and be required to testify and incriminate oneself. Rogers v. United States, 340 U.S. 367 (1951).


221 Ch. 19, 11 Stat. 155 (1857). There was an exception for perjury committed while testifying before Congress.

222 Ch. 11, 12 Stat. 333 (1862).

223 142 U.S. 547 (1892). The statute struck down was ch. 13, 15 Stat. 37 (1868).

224 Counselman v. Hitchcock, 142 U.S. 547, 564 (1892). And see id. at 586.

225 142 U.S. at 585–86.

226 "Transactional" immunity means that once a witness has been compelled to testify about an offense, he may never be prosecuted for that offense, no matter how much independent evidence might come to light; "use" immunity means that no testimony compelled to be given and no evidence derived from or obtained because of the compelled testimony may be used if the person is subsequently prosecuted on independent evidence for the offense.
the price for being able to compel testimony, and the Court sustained this law in a five-to-four decision.

“The 1893 statute has become part of our constitutional fabric and has been included ‘in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government.’ So spoke Justice Frankfurter in 1956, broadly reaffirming Brown v. Walker and upholding the constitutionality of a federal immunity statute. Because all but one of the immunity acts passed after Brown v. Walker were transactional immunity statutes, the question of the constitutional sufficiency of use immunity did not arise, although dicta in cases dealing with immunity continued to assert the necessity of the former type of grant. But beginning in 1964, when it applied the self-incrimination clause to the States, the Court was faced with the problem which arose because a State could grant immunity only in its own courts and not in the courts of another State or of the United States.

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227 Ch. 83, 27 Stat. 443 (1893).
228 Brown v. Walker, 161 U.S. 591 (1896). The majority reasoned that one was excused from testifying only if there could be legal detriment flowing from his act of testifying. If a statute of limitations had run or if a pardon had been issued with regard to a particular offense, a witness could not claim the privilege and refuse to testify, no matter how much other detriment, such as loss of reputation, would attach to his admissions. Therefore, since the statute acted as a pardon or amnesty and relieved the witness of all legal detriment, he must testify. The four dissenters contended essentially that the privilege protected against being compelled to incriminate oneself regardless of any subsequent prosecutorial effort, id. at 610, and that a witness was protected against infamy and disparagement as much as prosecution.

229 Ullmann v. United States, 350 U.S. 422, 438 (1956), (quoting Shapiro v. United States, 335 U.S. 1, 6 (1948)).
230 "[T]he sole concern [of the privilege] is . . . with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts'. . . . Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases." 350 U.S. at 438–39. The internal quotation is from Boyd v. United States, 116 U.S. 616, 634 (1886).


233 Malloy v. Hogan, 378 U.S. 1 (1964), extended the clause to the States. That Congress could immunize a federal witness from state prosecution and, of course, extend use immunity to state courts, was held in Adams v. Maryland, 347 U.S. 179 (1954), and had been recognized in Brown v. Walker, 161 U.S. 591 (1896).
other hand, to foreclose the States from compelling testimony because they could not immunize a witness in a subsequent “foreign” prosecution would severely limit state law enforcement efforts. Therefore, the Court emphasized the “use” restriction rationale of Counselman and announced that as a “constitutional rule, a state witness could not be compelled to incriminate himself under federal law unless federal authorities were precluded from using either his testimony or evidence derived from it,” and thus formulated a use restriction to that effect. Then, while refusing to adopt the course because of statutory interpretation reasons, the Court indicated that use restriction in a federal regulatory scheme requiring the reporting of incriminating information was “in principle an attractive and apparently practical resolution of the difficult problem before us,” citing Murphy with apparent approval.

Congress thereupon enacted a statute replacing all prior immunity statutes and adopting a use-immunity restriction only. Soon tested, this statute was sustained in Kastigar v. United States. “Protection coextensive with the privilege is the degree of protection which the Constitution requires,” wrote Justice Powell for the Court, “and is all that the Constitution requires. . . .” “Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being ‘forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.’ Immunity from the use of compelled testimony and evidence derived directly and indirectly therefrom affords this protection.”

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238 Kastigar v. United States, 406 U.S. 441, 459 (1972). See also United States v. Hubbell, 530 U.S. 27 (2000) (because the statute protects against derivative use of compelled testimony, a prosecution cannot be based on incriminating evidence revealed only as the result of compliance with an extremely broad subpoena).
protection. It prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.” 239

Required Records Doctrine.—While the privilege is applicable to an individual’s papers and effects, 240 it does not extend to corporate persons, hence corporate records, as has been noted, are subject to compelled production. 241 In fact, however, the Court has greatly narrowed the protection afforded in this area to natural persons by developing the “required records” doctrine. That is, it has held “that the privilege which exists as to private papers cannot be maintained in relation to ‘records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.’” 242 This exception developed out of, as Justice Frankfurter showed in dissent, the rule that documents which are part of the official records of government are wholly outside the scope of the privilege; public records are the property of government and are always accessible to inspection. Because government requires certain records to be kept to facilitate the regulation of the business being conducted, so the reasoning goes, the records become public at least to the degree that

239 406 U.S. at 453. Joining Justice Powell in the opinion were Justices Stewart, White, and Blackmun, and Chief Justice Burger. Justices Douglas and Marshall dissented, contending that a ban on use could not be enforced even if a use ban was constitutionally adequate. Id. at 462, 467. Justices Brennan and Rehnquist did not participate but Justice Brennan’s views that transactional immunity was required had been previously stated. Piccirillo v. New York, 400 U.S. 548, 552 (1971) (dissenting). See also New Jersey v. Portash, 440 U.S. 451 (1979) (prosecution use of defendant’s immunized testimony to impeach him at trial violates self-incrimination clause). Neither the clause nor the statute prevents the perjury prosecution of an immunized witness or the use of all his testimony to prove the commission of perjury. United States v. Apfelbaum, 445 U.S. 115 (1980). See also United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564 (1976). Because use immunity is limited, a witness granted use immunity for grand jury testimony may validly invoke his Fifth Amendment privilege in a civil deposition proceeding when asked whether he had “so testified” previously, the deposition testimony not being covered by the earlier immunity. Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).


241 See discussion supra under “Development and Scope.”

242 Shapiro v. United States, 335 U.S. 1, 33 (1948), (quoting Davis v. United States, 328 U.S. 582, 589–90 (1946), (quoting in turn Wilson v. United States, 221 U.S. 361, 380 (1911))). Wilson is the source of the required-records doctrine in its dicta, the holding in the case being the familiar one that a corporate officer cannot claim the privilege against self-incrimination to refuse to surrender corporate records in his custody. Cf. Heike v. United States, 227 U.S. 131 (1913). Davis was a search and seizure case and dealt with gasoline ration coupons which were government property even though in private possession. See Shapiro, 335 U.S. at 36, 56–70 (Justice Frankfurter dissenting).
government could always scrutinize them without hindrance from the record-keeper. “If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume.”

“It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the recordkeeper himself.” But the only limit which the Court suggested in *Shapiro* was that there must be “a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator.”

That there are limits established by the self-incrimination clause itself rather than by a subject matter jurisdiction test is evident in the Court’s consideration of reporting and disclosure requirements implicating but not directly involving the required-records doctrine.

**Reporting and Disclosure**—The line of cases begins with *United States v. Sullivan* in which a unanimous Court held that the Fifth Amendment did not privilege a bootlegger in not filing an income tax return because the filing would have disclosed the illegality in which he was engaged. “It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime.” Justice Holmes stated for the Court.

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243 335 U.S. at 51.
244 335 U.S. at 32.
245 335 U.S. at 32.
246 274 U.S. 259, 263, 264 (1927). *Sullivan* was reaffirmed in *Garner v. United States*, 424 U.S. 648 (1976), holding that a taxpayer’s privilege against self-incrimination was not violated when he failed to claim his privilege on his tax returns, and instead gave incriminating information leading to conviction. One must assert one’s privilege to alert the Government to the possibility that it is seeking to obtain incriminating material. It is not coercion forbidden by the clause that upon a claim of the privilege the Government could seek an indictment for failure to file, since a valid claim of privilege cannot be the basis of a conviction. The taxpayer was not entitled to a judicial ruling on the validity of his claim and an opportunity to reconsider if the ruling went against him, irrespective of whether a good-faith erroneous assertion of the privilege could subject him to prosecution, a question not resolved.
However, “[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return . . . .” Utilizing its taxing power to reach gambling activities over which it might not have had jurisdiction otherwise, Congress enacted a complicated statute imposing an annual occupational tax on gamblers and an excise tax on all their wages, and coupled the tax with an annual registration requirement under which each gambler must file with the IRS a declaration of his business with identification of his place of business and his employees and agents, filings which were made available to state and local law enforcement agencies. These requirements were upheld by the Court against self-incrimination challenges on the three grounds that (1) the privilege did not excuse a complete failure to file, (2) since the threshold decision to gamble was voluntary, the required disclosures were not compulsory, and (3) since registration required disclosure only of prospective conduct, the privilege, limited to past or present acts, did not apply.

Constitutional limitations appeared, however, in Albertson v. SACL, which struck down under the self-incrimination clause an order pursuant to statute requiring registration by individual members of the Communist Party or associated organizations. “In Sullivan the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners’ claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form’s questions in context might involve the petitioners in the admission of a crucial element of a crime.”

The gambling tax reporting scheme was next struck down by the Court. Because of the pervasiveness of state laws prohibiting

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247 The expansion of the commerce power would now obviate reliance on the taxing power.
249 382 U.S. 70 (1965).
250 382 U.S. at 79. The decision was unanimous, Justice White not participating.
251 Marchetti v. United States, 390 U.S. 39 (1968) (occupational tax); Grosso v. United States, 390 U.S. 62 (1968) (wagering excise tax). In Haynes v. United States, 390 U.S. 85 (1968), the Court struck down a requirement that one register a firearm that it was illegal to possess. The following Term on the same grounds the Court voided a statute prohibiting the possession of marijuana without having paid a transfer tax and registering. Leary v. United States, 395 U.S. 6 (1969); United States v. Covington, 395 U.S. 57 (1969). However, a statute was upheld which prohibited the sale of narcotics to a person who did not have a written order on a pre-
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gambling, said Justice Harlan for the Court, “the obligations to register and to pay the occupational tax created for petitioner ‘real and appreciable,’ and not merely ‘imaginary and unsubstantial,’ hazards of self-incrimination.” 252 Overruling Kahriger and Lewis, the Court rejected its earlier rationales. Registering per se would have exposed a gambler to dangers of state prosecution, so Sullivan did not apply. 253 Any contention that the voluntary engagement in gambling “waived” the self-incrimination claim, because there is “no constitutional right to gamble,” would nullify the privilege. 254 And the privilege was not governed by a “rigid chronological distinction” so that it protected only past or present conduct, but also reached future self-incrimination the danger of which is not speculative and insubstantial. 255 Significantly, then, Justice Harlan turned to distinguishing the statutory requirements here from the “required records” doctrine of Shapiro. “First, petitioner . . . was not . . . obliged to keep and preserve records ‘of the same kind as he has customarily kept’; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony . . . . Second, whatever ‘public aspects’ there were to the records at issue in Shapiro, there are none to the information demanded from Marchetti. The Government’s anxiety to obtain information

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253 “Every element of these requirements would have served to incriminate petitioners; to have required him to present his claim to Treasury officers would have obliged him “to prove guilt to avoid admitting it.” 390 U.S. at 50.

254 “The question is not whether petitioner holds a ‘right’ to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege’s protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it.” 390 U.S. at 51. But cf. California v. Byers, 402 U.S. 424, 434 (1971) (plurality opinion), in which it is suggested that because there is no “right” to leave the scene of an accident a requirement that a person involved in an accident stop and identify himself does not violate the self-incrimination clause.

255 Marchetti v. United States, 390 U.S. 39, 52–54 (1968). “The central standard for the privilege’s application has been whether the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination . . . . This principle does not permit the rigid chronological distinctions adopted in Kahriger and Lewis. We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence.” Id. at 53–54. Cf. United States v. Freed, 401 U.S. 601, 605–07 (1971).
known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in Shapiro were imposed in ‘an essentially non-criminal and regulatory area of inquiry’ while those here are directed to a ‘selective group inherently suspect of criminal activities.’ The United States’ principal interest is evidently the collection of revenue, and not the punishment of gamblers, . . . but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in Shapiro.”

Most recent of this line of cases is California v. Byers, which indicates that the Court has yet to settle on an ascertainable standard for judging self-incrimination claims in cases where government is asserting an interest other than criminal law enforcement. Byers sustained the constitutionality of a statute which required the driver of any automobile involved in an accident to stop and give his name and address. The state court had held that a driver who reasonably believed that compliance with the statute would result in self-incrimination could refuse to comply. A plurality of the Court, however, determined that Sullivan and Shapiro applied and not the Albertson-Marchetti line of cases, because the purpose of the statute was to promote the satisfaction of civil liabilities resulting from automobile accidents and not criminal prosecutions, and because the statute was directed to all drivers and not to a group which was either “highly selective” or “inherently suspect of criminal activities.” The combination of a non-criminal motive with the general character of the requirement made too slight for reliance the possibility of incrimination. Justice Harlan concurred to make up the majority on the disposition of the case, disagreeing with the plurality’s conclusion that the stop and identification requirement did not compel incrimination.

258 402 U.S. at 427–31 (Chief Justice Burger and Justices Stewart, White, and Blackmun).
259 The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer . . . . [It must be recognized that a reading of our more recent cases . . . suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual’s point of view, there are ‘real’ and not ‘imagi-
However, the Justice thought that where there is no governmental purpose to enforce a criminal law and instead government is pursuing other legitimate regulatory interests, it is permissible to apply a balancing test between the government’s interest and the individual’s interest. When he balanced the interests protected by the Amendment—protection of privacy and maintenance of an accusatorial system—with the noncriminal purpose, the necessity for self-reporting as a means of securing information, and the nature of the disclosures required, Justice Harlan voted to sustain the statute.\footnote{Byers was applied in \textit{Baltimore Dep’t of Social Services v. Bouknight} to uphold a juvenile court’s order that the mother of a child under the court’s supervision produce the child. Although in this case the mother was suspected of having abused or murdered her child, the order was justified for “compelling reasons unrelated to criminal law enforcement”: concern for the child’s safety.\footnote{493 U.S. at 561. Moreover, because the mother had custody of her previously abused child only as a result of the juvenile court’s order, the Court analogized to the required records cases to conclude that the mother had submitted to the requirements of the civil regulatory regime as the child’s “custodian.”} A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the ‘inherently-suspect-class’ factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual’s point of view.” \cite{60} 402 U.S. at 437–38.

\footnote{402 U.S. at 448–58. The four dissenters argued that it was unquestionable that Byers would have faced real risks of self-incrimination by compliance with the statute and that this risk was sufficient to invoke the privilege. \cite{61} Id. at 459, 464 (Justices Black, Douglas, Brennan, and Marshall).} This language in an 1897 case marked a

\textbf{Confessions: Police Interrogation, Due Process, and Self-Incrimination}

“In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’”\footnote{Bram v. United States, 168 U.S. 532, 542 (1897).}
sharp if unacknowledged break with the doctrine of previous cases in which the Court had applied the common-law test of voluntariness to determine the admissibility of confessions, and, while the language was never expressly disavowed in subsequent cases, the Court seems nevertheless to have proceeded along due process standards rather than self-incrimination analysis. Because the self-incrimination clause for most of this period was not applicable to the States, the admissibility of confessions in state courts was determined under due process standards developed from common-law voluntariness principles. It was only after the Court extended the self-incrimination clause to the States that a divided Court reaffirmed and extended the 1897 ruling and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation. Though recent research tends to treat as oversimplified Wigmore’s conclusion that “there never was any historical connection . . . between the constitutional clause and the confession-doctrine,” the fact is that the contention, coupled with the inapplicability of the self-incrimination clause to the States, was apparently the basis until recently for the Supreme Court’s adjudication of confession cases.

The Common Law Rule.—Not until the latter part of the eighteenth century did courts develop a rule excluding coerced confessions from admission at trial; prior to that time, even confessions obtained by torture were admissible. As the rule developed in England and in early United States jurisprudence, the rationale was the unreliability of the confession’s contents when induced by a promise of benefit or a threat of harm. In its first decision on the admissibility of confessions, the Court adopted the common-law rule, stressing that while a “voluntary confession of guilt is among the most effectual proofs in the law, from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution.”

265 3 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 823, at 250 n.5 (3d ed. 1940); see also vol. 8 id. at § 2266 (McNaughton rev. 1961). It appears that while the two rules did develop separately, they did stem from some of the same considerations, and, in fact, the confession rule may be considered in important respects to be an off-shoot of the privilege against self-incrimination. See L. Levy, Origins of the Fifth Amendment—The Right Against Self-Incrimination 325–32, 495 n.43 (1968). See also Culombe v. Connecticut, 367 U.S. 568, 581–84, especially 583 n.25 (1961) (Justice Frankfurter announcing judgment of the Court).
such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.”

Subsequent cases followed essentially the same line of thought. Then, in *Bram v. United States*, the Court assimilated the common-law rule thus mentioned as a command of the Fifth Amendment and indicated that henceforth a broader standard for judging admissibility was to be applied. Though this rule and the case itself were subsequently approved in several cases, the Court could hold within a few years that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent, and more than once later Courts could doubt “whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment’s protection against self-incrimination, or from a rule that forced confessions are untrustworthy...”

**McNabb-Mallory Doctrine.**—Perhaps one reason the Court did not squarely confront the application of the self-incrimination clause to police interrogation and the admissibility of confessions in federal courts was that in *McNabb v. United States* it promulgated a rule excluding confessions obtained after an “unnecessary...”

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267 Hopt v. Utah, 110 U.S. 574, 584–85 (1884). Utah at this time was a territory and subject to direct federal judicial supervision.

268 Pierce v. United States, 160 U.S. 335 (1896); Sparf v. United States, 156 U.S. 51 (1895). In Wilson v. United States, 162 U.S. 613 (1896), failure to provide counsel or to warn the suspect of his right to remain silent was held to have no effect on the admissibility of a confession but was only to be considered in assessing its credibility.

269 168 U.S. 532 (1897). “The generic language of the [Fifth] Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted...” Id. at 543.

270 168 U.S. at 549.

271 Ziang Sun Wan v. United States, 266 U.S. 1, 14–15 (1924). This case first held that the circumstances of detention and interrogation were relevant and perhaps controlling on the question of admissibility of a confession.


delay” in presenting a suspect for arraignment after arrest. This rule, developed pursuant to the Court’s supervisory power over the lower federal courts and hence not applicable to the States as a constitutional rule would have been, was designed to implement the guarantees assured to a defendant by the Federal Rules of Criminal Procedure, and was clearly informed with concern over incommunicado interrogation and coerced confessions. While the Court never attempted to specify a minimum time after which delay in presenting a suspect for arraignment would invalidate confessions, Congress in 1968 legislated to set a six-hour period for interrogation following arrest before the suspect must be presented.

**State Confession Cases.**—In its first encounter with a confession case arising from a state court, the Supreme Court set aside a conviction based solely on confessions of the defendants which had been extorted from them through repeated whippings with ropes and studded belts. For some thirty years thereafter the Court attempted through a consideration of the “totality of the cir-

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276 In Upshaw v. United States, 335 U.S. 410 (1948), the Court rejected lower court interpretations that delay in arraignment was but one factor in determining the voluntariness of a confession, and held that a confession obtained after a thirty-hour delay was inadmissible per se. Mallory v. United States, 354 U.S. 449 (1957), held that any confession obtained during an unnecessary delay in arraignment was inadmissible. A confession obtained during a lawful delay before arraignment was admissible. United States v. Mitchell, 322 U.S. 65 (1944).

277 McNabb v. United States, 318 U.S. 332, 334 (1943); Upshaw v. United States, 335 U.S. 410, 414 n.2 (1948). Burns v. Wilson, 346 U.S. 137, 145 n.12 (1953), indicated that because the Court had no supervisory power over courts-martial, the rule did not apply in military courts.


279 Rule 5(a) requiring prompt arraignment was promulgated in 1946, but the Court in McNabb relied on predecessor statutes, some of which required prompt arraignment. Cf. Mallory v. United States, 354 U.S. 449, 451–54 (1957). Rule 5(b) requires that the magistrate at arraignment must inform the suspect of the charge against him, must warn him that what he says may be used against him, must tell him of his right to counsel and his right to remain silent, and must also provide for the terms of bail.


282 Brown v. Mississippi, 297 U.S. 278 (1936). “[T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter. . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.” Id. at 285, 286.
circumstances” surrounding interrogation to determine whether a confession was “voluntary” and admissible or “coerced” and inadmissible. During this time, the Court was balancing, in Justice Frankfurter’s explication, a view that police questioning of suspects was indispensable in solving many crimes, on the one hand, with the conviction that the interrogation process is not to be used to overreach persons who stand helpless before it. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overcome and his capacity for self-determination critically impaired, the use of his confession Offends due process.

Obviously, a court seeking to determine whether the making of a confession was voluntary operated under a severe handicap, inasmuch as the interrogation process was in secret with only police and the suspect witness to it, and inasmuch as the concept of voluntariness referred to the defendant’s mental condition. Despite, then, a bountiful number of cases, binding precedents were few.

On the one hand, many of the early cases disclosed rather clear instances of coercion of a nature that the Court could little doubt produced involuntary confessions. Not only physical torture, but other overtly coercive tactics as well have been condemned. Chambers v. Florida held that five days of prolonged questioning following arrests without warrants and incommunicado detention made the subsequent confessions involuntary. Ashcraft v. Tennessee held inadmissible a confession obtained near the end

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284 367 U.S. at 602.
285 “The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external ‘phenomenological’ occurrences and events surrounding the confession. Second, because the concept of ‘voluntariness’ is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, ‘psychological’ fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.” 367 U.S. at 603. See Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 973–82 (1966).
287 309 U.S. 227 (1940).
288 322 U.S. 143 (1944). Dissenting, Justices Jackson, Frankfurter, and Roberts protested that “interrogation per se is not, while violence per se is, an outlaw.” A confession made after interrogation was not truly “voluntary” because all questioning is “inherently coercive,” because it puts pressure upon a suspect to talk. Thus, in evaluating a confession made after interrogation, the Court must, they insisted, determine whether the suspect was in possession of his own will and self-
of a 36-hour period of practically continuous questioning, under powerful electric lights, by relays of officers, experienced investigators, and highly trained lawyers. Similarly, Ward v. Texas, 289 voided a conviction based on a confession obtained from a suspect who had been arrested illegally in one county and brought some 100 miles away to a county where questioning began, and who had then been questioned continuously over the course of three days while being driven from county to county and being told falsely of a danger of lynching. “Since Chambers v. State of Florida, . . . this Court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstrations were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of ‘persuasion.’ A prolonged interrogation of the accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror.” 290

While the Court would not hold that prolonged questioning by itself made a resultant confession involuntary, 291 it did increasingly find coercion present even in intermittent questioning over a period of days of incommunicado detention. 292 In Stein v. New York, 293 however, the Court affirmed convictions of experienced control and not look alone to the length or intensity of the interrogation. They accused the majority of “read[ing] an indiscriminating hostility to mere interrogation into the Constitution” and preparing to bar all confessions made after questioning. Id. at 156. A possible result of the dissent was the decision in Lyons v. Oklahoma, 322 U.S. 596 (1944), which stressed deference to state-court factfinding in assessing the voluntariness of confessions.

292 Watts v. Indiana, 338 U.S. 49 (1949) (Suspect held incommunicado without arraignment for seven days without being advised of his rights. He was held in solitary confinement in a cell with no place to sleep but the floor and questioned each day except Sunday by relays of police officers for periods ranging in duration from three to nine-and-one-half hours); Turner v. Pennsylvania, 338 U.S. 62 (1949) (suspect held on suspicion for five days without arraignment and without being advised of his rights. He was questioned by relays of officers for periods briefer than in Watts during both days and nights); Harris v. South Carolina, 338 U.S. 60 (1949) (Suspect in murder case arrested in Tennessee on theft warrant, taken to South Carolina, and held incommunicado. He was questioned for three days for periods as long as 12 hours, not advised of his rights, not told of the murder charge, and denied access to friends and family while being told his mother might be arrested for theft). Justice Jackson dissented in the latter two cases, willing to hold that a confession obtained under lengthy and intensive interrogation should be admitted short of a showing of violence or threats of it and especially if the truthfulness of the confession may be corroborated by independent means. 338 U.S. at 57.
293 346 U.S. 156 (1953).
criminals who had confessed after twelve hours of intermittent questioning over a period of thirty-two hours of incommunicado detention. While the questioning was less intensive than in the prior cases, Justice Jackson for the majority stressed that the correct approach was to balance “the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.”

But by the time *Haynes v. Washington* was decided, holding inadmissible a confession made by an experienced criminal because of the “unfair and inherently coercive context” in which the statement was made, it was clear that the Court was adhering to a rule which found coercion in the fact of prolonged interrogation without regard to the individual characteristics of the suspect. However, the age and intelligence of suspects have been repeatedly cited by the Court in appropriate cases as demonstrating the particular susceptibility of the suspects to even mild coercion. But a suspect’s mental state alone—even insanity—is insufficient to establish involuntariness absent some coercive police activity.

Where, however, interrogation was not so prolonged that the Court would deem it “inherently coercive,” the “totality of the circumstances” was looked to in determining admissibility. Although in some of the cases a single factor may well be thought to stand out as indicating the involuntariness of the confession, generally
the recitation of factors, including not only the age and intelligence of the suspect but also such things as the illegality of the arrest, the incommunicado detention, the denial of requested counsel, the denial of access to friends, the employment of trickery, and other things, seemed not to rank any factor above the others. Of course, confessions may be induced through the exploitation of some illegal action, such as an illegal arrest or an unlawful search and seizure, and when that occurs the confession is inadmissible. Where police obtain a subsequent confession after obtaining one that is inadmissible as involuntary, the Court will not assume that the subsequent confession was similarly involuntary, but will independently evaluate whether the coercive actions which produced the first continued to produce the later confession.

From the Voluntariness Standard to Miranda.—Invocation by the Court of a self-incrimination standard for judging the fruits of police interrogation was no unheralded novelty in Miranda v. Arizona. The rationale of the confession cases changed over time to one closely approximating the foundation purposes the Court has attributed to the self-incrimination clause. Historically, the basis of the rule excluding coerced and involuntary confessions was their untrustworthiness, their unreliability. It appears that this basis informed the Court's judgment in the early state confession cases as it had in earlier cases from the lower federal courts. But in Lisenba v. California, Justice Roberts drew a distinction between the confession rule and the standard of due process. “[T]he fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim

303 314 U.S. 219, 236 (1941).
of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.” Over the next several years, while the Justices continued to use the terminology of voluntariness, the Court accepted at different times the different rationales of trustworthiness and constitutional fairness. 309

Ultimately, however, those Justices who chose to ground the exclusionary rule on the latter consideration predominated, so that in Rogers v. Richmond 310 Justice Frankfurter spoke for six other Justices in writing: “Our decisions under that [Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth.” Nevertheless, the Justice said in another case, “[n]o single litmus-paper test for constitutionally impermissible interrogation has been evolved.” 311 Three years later, however, in Malloy v. Hogan, 312 in the process of applying the self-incrimination clause to the States, Justice Brennan for the Court reinterpreted the line

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309 Compare Ashcraft v. Tennessee, 322 U.S. 143 (1944), with Lyons v. Oklahoma, 322 U.S. 596 (1944), and Malinski v. New York, 324 U.S. 401 (1945). In Watts v. Indiana, 338 U.S. 49 (1949), Harris v. South Carolina, 338 U.S. 68 (1949), and Turner v. Pennsylvania, 338 U.S. 62 (1949), five Justices followed the due process-fairness standard while four adhered to a trustworthiness rationale. See 338 U.S. at 57 (Justice Jackson concurring and dissenting). In Stein v. New York, 346 U.S. 156, 192 (1953), the trustworthiness rationale had secured the adherence of six Justices. The primary difference between the two standards is the admissibility under the trustworthiness standard of a coerced confession if its trustworthiness can be established, if, that is, it can be corroborated.


of cases since Brown v. Mississippi\textsuperscript{313} to conclude that the Court had initially based its rulings on the common-law confession rationale, but that beginning with Lisenba v. California,\textsuperscript{314} a “federal standard” had been developed. The Court had engaged in a “shift [which] reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay.” Today, continued Justice Brennan, “the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897,” when Bram v. United States had announced that the self-incrimination clause furnished the basis for admitting or excluding evidence in federal courts.\textsuperscript{315}

One week after the decision in Malloy v. Hogan, the Court defined the rules of admissibility of confessions in different terms; while it continued to emphasize voluntariness, it did so in self-incrimination terms rather than in due process terms. In Escobedo v. Illinois,\textsuperscript{316} it held inadmissible the confession obtained from a suspect in custody who had repeatedly requested and had repeatedly been refused an opportunity to consult with his retained counsel, who was present at the police station seeking to gain access to Escobedo.\textsuperscript{317} While Escobedo appeared in the main to be a Sixth Amendment right-to-counsel case, the Court at several points emphasized, in terms that clearly implicated self-incrimination considerations, that the suspect had not been warned of his constitutional rights.\textsuperscript{318}

**Miranda v. Arizona.**—The Sixth Amendment holding of Escobedo was deemphasized and the Fifth Amendment self-incrimi-
nation rule made preeminent in *Miranda v. Arizona*,\(^{319}\) in which the Court summarized its holding as follows: “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right of refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.”

The basis for the Court’s conclusions was the determination that police interrogation as conceived and practiced was inherently coercive and that this compulsion, though informal and legally sanctionless, was contrary to the protection assured by the self-incrimination clause, the protection afforded in a system of criminal justice which convicted a defendant on the basis of evidence independently secured and not out of his own mouth. In the Court’s view, this had been the law in the federal courts since 1897, and the application of the clause to the States in 1964 necessitated the application of the principle in state courts as well. Therefore, the clause requires that police interrogation practices be so structured as to secure to suspects that they not be stripped of the ability to

\(^{319}\)384 U.S. 436, 444–45 (1966). In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court held that neither *Escobedo* nor *Miranda* was to be applied retroactively. In cases where trials commenced after the decisions were announced, the due process “totality of circumstances” test was to be the key. Cf. *Davis v. North Carolina*, 384 U.S. 737 (1966).
make a free and rational choice between speaking and not speaking. The warnings and the provision of counsel were essential, the Court said, to this type of system. 320 “In these cases,” said Chief Justice Warren, “we might not find the defendants’ statements to have been involuntary in traditional terms.” 321 The acknowledgment that the decision considerably expanded upon previous doctrine, even if the assimilation of self-incrimination values by the confession-exclusion rule be considered complete, was more clearly made a week after Miranda when, in denying retroactivity to that case and to Escobedo, the Court asserted that law enforcement officers had relied justifiably upon prior cases, “now no longer binding,” which treated the failure to warn a suspect of his rights or the failure to grant access to counsel as one of the factors to be considered. 322 It was thus not the application of the self-incrimination clause to police interrogation in Miranda that constituted a major change from precedent but rather the series of warnings and guarantees which the Court imposed as security for the observance of the privilege.

While the Court’s decision rapidly became highly controversial and the source of much political agitation, including a prominent role in the 1968 presidential election, the Court has continued to adhere to it, 323 albeit not without considerable qualification. For years, the constitutional status of the Miranda warnings was clouded in uncertainty. Had the Court announced a constitutional rule, or merely set forth supervisory rules that could be superseded by statutory rules? The fact that Miranda itself applied the rules to a state court proceeding, and that the Court in subsequent cases consistently applied the warnings to state proceedings, was strong evidence of constitutional moorings. In 1968, however, Congress en-

320 Justices Clark, Harlan, Stewart, and White dissented, finding no historical support for the application of the clause to police interrogation and rejecting the policy considerations for the extension put forward by the majority. Miranda v. Arizona, 384 U.S. 436, 499, 504, 526 (1966). Justice White argued that while the Court’s decision was not compelled or even strongly suggested by the Fifth Amendment, its history, and the judicial precedents, this did not preclude the Court from making new law and new public policy grounded in reason and experience, but he contended that the change made in Miranda was ill-conceived because it arose from a view of interrogation as inherently coercive and because the decision did not adequately protect society’s interest in detecting and punishing criminal behavior. Id. at 531–45.


323 See, e.g., Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Chief Justice Burger concurring) (“The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule Miranda, disparage it, nor extend it at this late date.”)
acted a statute designed to set aside Miranda in the federal courts and to reinstate the traditional voluntariness test. The statute lay unimplemented, for the most part, due to constitutional doubts about it. The Court also created exceptions to the Miranda warnings over the years, and referred to the warnings as “prophylactic” and “not themselves rights protected by the Constitution.” There were even hints that some Justices might be willing to overrule the decision.

In Dickerson v. United States, the Court resolved the basic issue, holding that Miranda was a constitutional decision that could not be overturned by statute, and consequently that 18 U.S.C. § 3501 was unconstitutional. Application of Miranda warnings to state proceedings necessarily implied a constitutional base, the Court explained, since federal courts “hold no supervisory authority over state judicial proceedings.” Moreover, Miranda itself had purported to “give concrete constitutional guidance to law enforcement agencies and courts to follow.” That the Miranda rules are constitution-based does not mean that they are “immutable,” however. The Court repeated its invitation for legislative action that would be “at least as effective” in protecting a suspect’s right to remain silent during custodial interrogation. Section 3501, however, merely reinstated the “totality-of-the-circumstances” rule held inadequate in Miranda, so that provision could not be considered as effective as the Miranda warnings.

The Dickerson Court also rejected a request to overrule Miranda. “Whether or not we would agree with Miranda’s reasoning and its resulting rule, were we addressing the issue in the first instance,” Chief Justice Rehnquist wrote for a seven-Justice majority, “the principles of stare decisis weigh heavily against overruling it now.” There was no special justification for overruling the decision; subsequent cases had not undermined the decision’s doctrinal underpinnings, but rather had “reaffirm[ed]” its “core ruling.” Moreover, Miranda warnings had “become so embedded in routine police practice [that they] have become part of our national culture.”

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328 530 U.S. at 438.

329 530 U.S. at 439 (quoting from Miranda, 384 U.S. at 441-42).

330 530 U.S. at 443.
Although the Court had suggested in 1974 that most *Miranda* claims could be disallowed in federal *habeas corpus* cases, such a course was squarely rejected in 1993. The *Stone v. Powell* rule, precluding federal *habeas corpus* review of a state prisoner’s claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal *habeas* review of a state prisoner’s *Miranda* claim, the Court ruled in *Withrow v. Williams*. The *Miranda* rule differs from the *Mapp v. Ohio* exclusionary rule denied enforcement in *Stone*, the Court explained. While both are prophylactic rules, *Miranda* unlike *Mapp*, safeguards a fundamental trial right, the privilege against self-incrimination. *Miranda* also protects against the use at trial of unreliable statements, hence, unlike *Mapp*, relates to the correct ascertainment of guilt. A further consideration was that eliminating review of *Miranda* claims would not significantly reduce federal *habeas* review of state convictions, since most *Miranda* claims could be recast in terms of due process denials resulting from admission of involuntary confessions.

In any event, the Court has established several lines of decisions interpreting *Miranda*.

First, persons who are questioned while they are in custody must be given the *Miranda* warnings. *Miranda* applies to “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Clearly, a suspect detained in jail is in custody, even if the detention is for some offense other than the one about which he is questioned. If he is placed under arrest, even if he is in his own home, the questioning is custodial.

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331 In Michigan v. Tucker, 417 U.S. 433, 439 (1974), the Court had suggested a distinction between a constitutional violation and a violation of “the prophylactic rules developed to protect that right.” The actual holding in *Tucker*, however, had turned on the fact that the interrogation had preceded the *Miranda* decision and that warnings—albeit not full *Miranda* warnings—had been given.

335 507 U.S. at 691–92.
336 507 U.S. at 693.
339 Orozco v. Texas, 394 U.S. 324 (1969) (four policemen entered suspect’s bedroom at 4 a.m. and questioned him; though not formally arrested, he was in custody).
But the fact that a suspect may be present in a police station does not, in the absence of indicia that he was in custody, mean that the questioning is custodial, and the fact that he is in his home or other familiar surroundings will ordinarily lead to a conclusion that the inquiry was noncustodial. As with investigative stops under the Fourth Amendment, there is a wide variety of police-citizen contacts, and the Supreme Court has not explored at any length the application of *Miranda* to questioning on the street and elsewhere in situations in which the police have not asserted authority sufficient to place the citizen in custody. Whether a person is “in custody” is an objective test assessed in terms of how a reasonable person in the suspect’s shoes would perceive his or her freedom to leave; a police officer’s subjective and undisclosed view that a person being interrogated is a suspect is not relevant for *Miranda* purposes.

Second, persons who are interrogated while they are in custody must be given the *Miranda* warnings. It is not necessary under *Miranda* that the police squarely ask a question. The breadth of the interrogation concept is demonstrated in *Rhode Island v. Innis*.

There, police had apprehended the defendant as a murder suspect but had not found the weapon used. While he was being transported to police headquarters in a squad car, the defendant, who had been given the *Miranda* warnings and had asserted he wished to consult a lawyer before submitting to questioning, was not asked questions by the officers. However, the officers engaged in conversation among themselves, in which they indicated that a school for handicapped children was near the crime scene and that they

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340 Oregon v. Mathiason, 429 U.S. 492 (1977) (suspect came voluntarily to police station to be questioned, he was not placed under arrest while there, and he was allowed to leave at end of interview, even though he was named by victim as culprit, questioning took place behind closed doors, and he was falsely informed his fingerprints had been found at scene of crime). See also Minnesota v. Murphy, 465 U.S. 420 (1984) (required reporting to probationary officer is not custodial situation).

341 Beckwith v. United States, 425 U.S. 341 (1976) (IRS agents’ interview with taxpayer in private residence was not a custodial situation).


344 446 U.S. 291 (1980). A remarkably similar factual situation was presented in Brewer v. Williams, 430 U.S. 387 (1977), which was decided under the Sixth Amendment. In Brewer, and also in Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), the Court has had difficulty in expounding on what constitutes interrogation for Sixth Amendment counsel purposes. The *Innis* Court indicated that the definitions are not the same for each Amendment. 446 U.S. at 300 n.4.
hoped the weapon was found before a child discovered it and was injured. The defendant then took them to the weapon’s hiding place.

Unanimously rejecting a contention that *Miranda* would have been violated only by express questioning, the Court said: “We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.”345 A divided Court then concluded that the officers’ conversation did not amount to a functional equivalent of questioning and that the evidence was admissible.346

In *Estelle v. Smith*,347 the Court held that a court-ordered jailhouse interview with the defendant by a psychiatrist seeking to determine his competency to stand trial, when the defense had raised no issue of insanity or incompetency, constituted interrogation for *Miranda* purposes; the psychiatrist’s conclusions about the defendant’s dangerousness were inadmissible at the capital sentencing phase of the trial because the defendant had not been given his *Miranda* warnings prior to the interview. That the defendant had been questioned by a psychiatrist designated to conduct a neutral competency examination, rather than by a police officer, was “immaterial,” the Court concluded, since the psychiatrist’s testimony at the penalty phase changed his role from one of neutrality to that of an agent of the prosecution.348 Other instances of questioning in less formal contexts in which the issues of custody and interrogations...
tion intertwine, e.g., in on-the-street encounters, await explication by the Court.

Third, before a suspect in custody is interrogated, he must be given full warnings, or the equivalent, of his rights. Miranda, of course, required express warnings to be given to an in-custody suspect of his right to remain silent, that anything he said may be used as evidence against him, that he has a right to counsel, and that if he cannot afford counsel he is entitled to an appointed attorney. The Court recognized that “other fully effective means” could be devised to convey the right to remain silent, but it was firm that the prosecution was not permitted to show that an unwarned suspect knew of his rights in some manner. But it is not necessary that the police give the warnings as a verbatim recital of the words in the Miranda opinion itself, so long as the words used “fully conveyed” to a defendant his rights.

Fourth, once a warned suspect asserts his right to silence and requests counsel, the police must scrupulously respect his assertion of right. The Miranda Court strongly stated that once a warned suspect “indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” Further, if the suspect indicates he wishes the assistance of counsel before interrogation, the questioning must cease until he has counsel. At least with respect to counsel, the Court has created practically a per se rule barring the police from continuing or from reinitiating interrogation with a suspect requesting counsel until counsel is present, save only that the suspect himself may initiate further proceedings. Thus, in Edwards v. Arizona, the Court ruled that Miranda had been violated when police reinitiated questioning after the suspect had requested counsel. Questioning had ceased as soon as the suspect had requested counsel, and the suspect had been returned to his cell. Questioning had resumed the following day only after different police officers had confronted the suspect and again warned him of his rights; the suspect agreed to talk and thereafter incriminated himself. Nonetheless, the Court held, “when an accused has invoked his right to

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350 384 U.S. at 444.
351 384 U.S. at 469.
352 California v. Prysock, 453 U.S. 355 (1981). Rephrased, the test is whether the warnings “reasonably conveyed” a suspect’s rights, the Court adding that reviewing courts “need not examine Miranda warnings as if construing a will or defining the terms of an easement.” Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (upholding warning that included possibly misleading statement that a lawyer would be appointed “if and when you go to court”).
have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of this rights. We further hold that an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."355 The Edwards rule bars police-initiated questioning stemming from a separate investigation as well as questioning relating to the crime for which the suspect was arrested.356

However, the suspect must specifically ask for counsel; if he requests the assistance of someone else he thinks may be helpful to him, that is not a valid assertion of Miranda rights.357 Moreover, the rigid Edwards rule is not applicable to other aspects of the warnings. That is, if the suspect asserts his right to remain silent, the questioning must cease, but officers are not precluded from subsequently initiating a new round of interrogation, provided only that they again give the Miranda warnings.358

Fifth, a properly warned suspect may waive his Miranda rights and submit to custodial interrogation. Miranda recognized that a suspect may voluntarily and knowingly give up his rights and re-

355 451 U.S. at 484–85. The decision was unanimous, but three concurrences objected to a special rule limiting waivers with respect to counsel to suspect-initiated further exchanges. Id. at 487, 488 (Chief Justice Burger and Justices Powell and Rehnquist). In Oregon v. Bradshaw, 462 U.S. 1039 (1983), the Court held, albeit without a majority of Justices in complete agreement as to rationale, that an accused who had initiated further conversations with police had knowingly and intelligently waived his right to have counsel present. So too, an accused who expressed a willingness to talk to police, but who refused to make a written statement without presence of counsel, was held to have waived his rights with respect to his oral statements. Connecticut v. Barrett, 479 U.S. 523 (1987). The Court has held that Edwards should not be applied retroactively to a conviction that had become final, Solem v. Stumes, 465 U.S. 638 (1984), but that Edwards does apply to cases pending on appeal at the time it was decided. Shea v. Louisiana, 470 U.S. 51 (1985).

356 Arizona v. Roberson, 486 U.S. 675 (1988). By contrast, the Sixth Amendment right to counsel is offense-specific, and does not bar questioning about a crime unrelated to the crime for which the suspect has been charged. See McNeil v. Wisconsin, 501 U.S. 171 (1991).

357 Fare v. Michael C., 442 U.S. 707 (1979) (juvenile requested to see his parole officer, rather than counsel). Also, waivers signed by the accused following Miranda warnings are not vitiated by police having kept from the accused information that an attorney had been retained for him by a relative. Moran v. Burbine, 475 U.S. 412 (1986).

358 Michigan v. Mosley, 423 U.S. 96 (1975) (suspect given Miranda warnings at questioning for robbery, requested cessation of interrogation, and police complied; some two hours later, a different policeman interrogated suspect about a murder, gave him a new Miranda warning, and suspect made incriminating admission; since police “scrupulously honored” suspect’s request, admission valid).
spond to questioning, but the Court cautioned that the prosecution bore a “heavy burden” to establish that a valid waiver had occurred. While the waiver need not be express in order for it to be valid, neither may a suspect’s silence or similar conduct constitute a waiver. It must be shown that the suspect was competent to understand and appreciate the warning and to be able to waive his rights. Essentially, resolution of the issue of waiver “must be determined on ‘the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’” After a suspect has knowingly and voluntarily waived his Miranda rights, police officers may continue questioning until and unless the suspect clearly requests an attorney.

Sixth, the admissions of an unwarned or improperly warned suspect may not be used directly against him at trial, but the Court has permitted some use for other purposes, such as impeachment. A confession or other incriminating admissions obtained in violation of Miranda may not, of course, be introduced against him at trial for purposes of establishing guilt or for determining the sentence, at least in bifurcated trials in capital cases, and neither may the “fruits” of such a confession or admission be used.

361 441 U.S. at 373. But silence, “coupled with an understanding of his rights and a course of conduct indicating waiver,” may support a conclusion of waiver. Id.
363 North Carolina v. Butler, 441 U.S. 369, 374–75 (1979) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). In Oregon v. Elstad, 470 U.S. 298 (1985), the Court held that a confession following a Miranda warning is not necessarily tainted by an earlier confession obtained without a warning, as long as the earlier confession had been voluntary, And see Moran v. Burbine, 475 U.S. 412 (1986) (signed waivers following Miranda warnings not vitiated by police having kept from suspect information that attorney had been retained for him by relative).
364 Davis v. United States, 512 U.S. 452 (1994) (suspect’s statement that “maybe I should talk to a lawyer,” uttered after Miranda waiver and after an hour and a half of questioning, did not constitute such a clear request for an attorney when, in response to a direct follow-up question, he said “no, I don’t want a lawyer”).
366 Estelle v. Smith, 451 U.S. 454 (1981). The Court has yet to consider the applicability of the ruling in a noncapital, nonbifurcated trial case.
367 Cf. Harrison v. United States, 392 U.S. 219 (1968) (after confessions obtained in violation of McNabb-Mallory were admitted against him, defendant took the stand to rebut them and made damaging admissions; after his first conviction was reversed, he was retried without the confessions, but the prosecutor introduced his rebuttal testimony from the first trial; Court reversed conviction because testimony was tainted by the admission of the confessions). But see Michigan v. Tucker, 417 U.S. 433 (1974). Confessions may be the poisonous fruit of other constitutional viola-
The Court, in opinions which bespeak a sense of necessity to narrowly construe *Miranda*, has broadened the permissible impeachment purposes for which unlawful confessions and admissions may be used.\(^{368}\) Thus, in *Harris v. New York*,\(^ {369}\) the Court held that the prosecution could use statements, obtained in violation of *Miranda*, to impeach the defendant’s testimony if he voluntarily took the stand and denied commission of the offense. Subsequently, in *Oregon v. Hass*,\(^ {370}\) the Court permitted impeachment use of a statement made by the defendant after police had ignored his request for counsel following his *Miranda* warning. Such impeachment material, however, must still meet the standard of voluntariness associated with the pre-*Miranda* tests for the admission of confessions and statements.\(^ {371}\)

The Court has created a “public safety” exception to the *Miranda* warning requirement, but has refused to create another exception for misdemeanors and lesser offenses. In *New York v. Quarles*,\(^ {372}\) the Court held admissible a recently apprehended suspect’s response in a public supermarket to the arresting officer’s demand to know the location of a gun that the officer had reason to believe the suspect had just discarded or hidden in the supermarket. The Court, in an opinion by Justice Rehnquist,\(^ {373}\) declined to place officers in the “untenable position” of having to make instant decisions as to whether to proceed with *Miranda* warnings and thereby increase the risk to themselves or to the public or whether to dispense with the warnings and run the risk that re-
resulting evidence will be excluded at trial. While acknowledging that the exception itself will “lessen the desirable clarity of the rule,” the Court predicted that confusion would be slight: “[w]e think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.” 374 No such compelling justification was offered for a Miranda exception for lesser offenses, however, and protecting the rule’s “simplicity and clarity” counseled against creating one. 375 “[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in Miranda, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.” 376

The Operation of the Exclusionary Rule

Supreme Court Review.—The Court’s review of the question of admissibility of confessions or other incriminating statements is designed to prevent the foreclosure of the very question to be decided by it, the issue of voluntariness under the due process standard, the issue of the giving of the requisite warnings and the subsequent waiver, if there is one, under the Miranda rule. Recurring to Justice Frankfurter’s description of the inquiry as a “three-phased process” in due process cases at least, 377 it can be seen that the Court’s self-imposed rules of restraint on review of lower-court factfinding greatly influenced the process. The finding of facts surrounding the issue of coercion—the length of detention, circumstances of interrogation, use of violence or of tricks and ruses, et cetera—is the proper function of the trial court which had the advantage of having the witnesses before it. “This means that all testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one caveat, necessarily, that we are not to be bound by findings wholly lacking support in evidence.” 378

However, the conclusions of the lower courts as to how the accused reacted to the circumstances of his interrogation, and as to the legal significance of how he reacted, are subject to open review.

374 467 U.S. at 658–59.
376 468 U.S. at 434.
“No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply be declining to draw inferences which the historical facts compel. Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate . . . that the state court’s determination should control. But where, on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces, under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process—where this is all that appears in the record—a State judgment that the confession was voluntary cannot stand.”

Miranda, of course, does away with the judgments about the effect of lack of warnings, and the third phase, the legal determination of the interaction of the first two phases, is determined solely by two factual determinations: whether the warnings were given and if so whether there was a valid waiver. Presumably, supported determinations of these two facts by trial courts would preclude independent review by the Supreme Court. Yet, the Court has been clear that it may and will independently review the facts when the factfinding has such a substantial effect on constitutional rights.

In Withrow v. Williams, the Court held that the rule of Stone v. Powell, precluding federal habeas corpus review of a state prisoner’s claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal habeas review of a state prisoner’s claim that his conviction rests on statements obtained in violation of the safeguards mandated by Miranda.

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380 “In cases in which there is a claim of denial of rights under the Federal Constitution this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.” Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), and cases cited therein.


Procedure in the Trial Courts.—The Court has placed constitutional limitations upon the procedures followed by trial courts for determining the admissibility of confessions and other incriminating admissions. Three procedures were developed over time to deal with the question of admissibility when involuntariness was claimed. By the orthodox method, the trial judge heard all the evidence on voluntariness in a separate and preliminary hearing, and if he found the confession involuntary the jury never received it, while if he found it voluntary the jury received it with the right to consider its weight and credibility, which consideration included the circumstances of its making. By the New York method, the judge first reviewed the confession under a standard leading to its exclusion only if he found it not possible that “reasonable men could differ over the [factual] inferences to be drawn” from it; otherwise, the jury would receive the confession with instructions to first determine its voluntariness and to consider it if it were voluntary and to disregard it if it were not. By the Massachusetts method, the trial judge himself determined the voluntariness question and if he found the confession involuntary the jury never received it; if he found it to have been voluntarily made he permitted the jury to receive it with instructions that the jurors should make their own independent determination of voluntariness. 383

The New York method was upheld against constitutional attack in Stein v. New York, 384 but eleven years later a five-to-four decision in Jackson v. Denno, 385 found it inadequate to protect the due process rights of defendants. The procedure did not, the Court held, ensure a “reliable determination on the issue of voluntariness” and did not sufficiently guarantee that convictions would not be grounded on involuntary confessions. Since there was only a general jury verdict of guilty, it was impossible to determine whether the jury had first focused on the issue of voluntariness and then either had found the confession voluntary and considered it on the question of guilt or had found it involuntary, disregarded it, and reached a conclusion of guilt on wholly independent evidence. It was doubtful that a jury could appreciate the values

384 346 U.S. 156, 170–79 (1953). Significant to the Court’s conclusion on this matter was the further conclusion of the majority that coerced confessions were inadmissible solely because of their unreliability; if their trustworthiness could be established the utilization of an involuntary confession violated no constitutional prohibition. This conception was contrary to earlier cases and was subsequently repudiated. See Jackson v. Denno, 378 U.S. 368, 385–87 (1964).
served by the exclusion of involuntary confessions and put out of mind the content of the confession no matter what was determined with regard to its voluntariness. The rule was reitered in Sims v. Georgia, in which the Court voided a state practice permitting the judge to let the confession go to the jury for the ultimate decision on voluntariness, upon an initial determination merely that the prosecution had made out a prima facie case that the confession was voluntary. The Court has interposed no constitutional objection to utilization of either the orthodox or the Massachusetts method for determining admissibility. It has held that the prosecution bears the burden of establishing voluntariness by a preponderance of the evidence, rejecting a contention that it should be determined only upon proof beyond a reasonable doubt, or by clear and convincing evidence.

DUE PROCESS

History and Scope

“It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just.” The content of due process is “a historical product” that traces all the way back to chapter 39 of Magna Carta, in which King John promised that “[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.” The phrase “due process of law” first appeared in a

386 Jackson v. Denno, 378 U.S. 368 and n.8 (1964); Lego v. Twomey, 404 U.S. 477, 489–90 (1972) (rejecting contention that jury should be required to pass on voluntariness following judge’s determination).
392 Text and commentary on this chapter may be found in W. McKechnie, MAGNA CARTA—A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375–95 (Glasgow, 2d rev. ed. 1914). The chapter became chapter 29 in the Third Reissue of Henry III in 1225. Id. at 504, and see 139–59. As expanded, it read: “No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land.” See also J. Holt, MAGNA CARTA 226–29 (1965). The 1225 reissue also
statutory rendition of this chapter in 1354. “No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.” Though Magna Carta was in essence the result of a struggle over interest between the King and his barons, this particular clause over time transcended any such limitation of scope, and throughout the fourteenth century parliamentary interpretation expanded far beyond the intention of any of its drafters. The understanding which the founders of the American constitutional system, and those who wrote the due process clauses, brought to the subject they derived from Coke, who in his Second Institutes expounded the proposition that the term “by law of the land” was equivalent to “due process of law,” which he in turn defined as “by due process of the common law,” that is, “by the indictment or presentment of good and lawful men . . . or by writ original of the Common Law.” The significance of both terms was procedural, but there was in Coke’s writings on chapter 29 a rudimentary concept of substantive restrictions, which did not develop in England because of parliamentary supremacy, but which was to flower in the United States.

The term “law of the land” was early the preferred expression in colonial charters and declarations of rights, which gave way to the term “due process of law,” although some state constitutions continued to employ both terms. Whichever phraseology was used, the expression seems generally to have occurred in close association with precise safeguards of accused persons, but, as is true of the Fifth Amendment here under consideration, the provision also suggests some limitations on substance because of its association with the guarantee of just compensation upon the taking of private property for public use.

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393 28 Edw. III, c. 3. See F. THOMPSON, MAGNA CARTA—ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629, 86–97 (1948), recounting several statutory reconfirmations. Note that the limitation of “free man” had given way to the all-inclusive delineation.

394 W. MCKECHNIE, MAGNA CARTA—A COMMENTARY ON THE GREAT CHARTER OF KING JOHN (Glasgow, 2d rev. ed. 1914); J. HOLT, MAGNA CARTA (1965).


397 The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the “law of the land” phrase in a separate article, 3 F. Thorpe, The Federal and State Constitutions, H. Doc. No. 357, 59th
**Scope of the Guaranty.**—Standing by itself, the phrase “due process” would seem to refer solely and simply to procedure, to process in court, and therefore to be so limited that “due process of law” would be what the legislative branch enacted it to be. But that is not the interpretation which has been placed on the term. “It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process ‘due process of law’ by its mere will.”

All persons within the territory of the United States are entitled to its protection, including corporations, aliens, and presumptively citizens seeking readmission to the United States, but States as such are not so entitled. It is effective in the District of Columbia and in territories which are part of the United States, but it does not apply of its own force to unincorporated territories. Nor does it reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.

Early in our judicial history, a number of jurists attempted to formulate a theory of natural rights—natural justice, which would limit the power of government, especially with regard to the property rights of persons. State courts were the arenas in which this struggle was carried out prior to the Civil War. Opposing the “vested rights” theory of protection of property were jurists who argued first, that the written constitution was the supreme law of the State and that judicial review could look only to that document in scrutinizing legislation and not to the “unwritten law” of “natural

Congress, 2d Sess. 1688 (1809), whereas Virginia used the clause in a section of guarantees of procedural rights in criminal cases, id. at 3813. New York in its constitution of 1821 was the first State to pick up “due process of law” from the United States Constitution. 5 id. at 2648.


399 Sinking Fund Cases, 99 U.S. 700, 719 (1879).

400 Wong Wing v. United States, 163 U.S. 228, 238 (1896).


406 Johnson v. Eisentrager, 339 U.S. 763 (1950); In re Yamashita, 327 U.S. 1 (1946). Justices Rutledge and Murphy in the latter case argued that the due process clause applies to every human being, including enemy belligerents.

rights,” and second, that the “police power” of government enabled legislatures to regulate the use and holding of property in the public interest, subject only to the specific prohibitions of the written constitution. The “vested rights” jurists thus found in the “law of the land” and the “due process” clauses of the state constitutions a restriction upon the substantive content of legislation, which prohibited, regardless of the matter of procedure, a certain kind or degree of exertion of legislative power altogether. Thus, Chief Justice Taney was not innovating when in his opinion in the Dred Scott case he pronounced, without elaboration, that one of the reasons the Missouri Compromise was unconstitutional was that an act of Congress which deprived “a citizen of his liberty or property merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.” Following the War, with the ratification of the Fourteenth Amendment’s due process clause, substantive due process interpretations were urged on the Supreme Court with regard to state legislation; first resisted, the arguments came in time to be accepted, and they imposed upon both federal and state legislation a firm judicial hand which was not to be removed until the crisis of the 1930’s, and which today in non-economic legislation continues to be reasserted.

“It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. While the language of those Amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper.” The most obvious difference between the two due process clauses is that the Fifth Amendment clause as it binds the Federal Government coexists with a number of other express provisions in the Bill of Rights guaranteeing fair procedure and non-arbitrary action, such as jury trials, grand jury indictments, and nonexcessive bail and fines, as well as just compensation, whereas the Fourteenth Amendment clause as it binds the States has been held to contain implicitly not only the standards of fair-

408 The full account is related in E. CORWIN, LIBERTY AGAINST GOVERNMENT ch. 3 (1948). The pathbreaking decision of the era was Wynhamer v. The People, 13 N.Y. 378 (1856).
ness and justness found within the Fifth Amendment’s clause but also to contain many guarantees that are expressly set out in the Bill of Rights. In that sense, the two clauses are not the same thing, but insofar as they do impose such implicit requirements of fair trials, fair hearings, and the like, which exist separately from, though they are informed with, express constitutional guarantees, the interpretation of the two clauses is substantially if not wholly the same. Save for areas in which the particularly national character of the Federal Government requires separate treatment, discussion of the meaning of due process is largely reserved for the section on the Fourteenth Amendment. Finally, it should be noted that some Fourteenth Amendment interpretations have been carried back to broaden interpretations of the Fifth Amendment’s due process clause, such as, e.g., the development of equal protection standards as an aspect of Fifth Amendment due process.

**Procedural Due Process**

In 1855, the Court first attempted to assess its standards for judging what was due process. At issue was the constitutionality of summary proceedings under a distress warrant to levy on the lands of a government debtor. The Court first ascertained that Congress was not free to make any process “due process.” “To what principles, then are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.” A survey of history disclosed that the law in England seemed always to have contained a summary method for recovering debts owed the Crown not unlike the law in question. Thus, “tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law. . . .”\(^{411}\)

This formal approach to the meaning of due process could obviously have limited both Congress and the state legislatures in the

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\(^{411}\) Murray’s Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276–77, 280 (1856). A similar approach was followed in Fourteenth Amendment due process interpretation in Davidson v. City of New Orleans, 96 U.S. 97 (1878), and Munn v. Illinois, 94 U.S. 113 (1877).
development of procedures unknown to English law. But when California’s abandonment of indictment by grand jury was challenged, the Court refused to be limited by the fact that such proceeding was the English practice and that Coke had indicated that it was a proceeding required as “the law of the land.” The meaning of the Court in Murray’s Lessee was “that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law.” To hold that only historical, traditional procedures can constitute due process, the Court said, “would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.” Therefore, in observing the due process guarantee, it was concluded, the Court must look “not [to] particular forms of procedures, but [to] the very substance of individual rights to life, liberty, and property.” The due process clause prescribed “the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.”

**Generally.**—The phrase “due process of law” does not necessarily imply a proceeding in a court or a plenary suit and trial by jury in every case where personal or property rights are involved. “In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts.” What is unfair in one situation may be fair in another. “The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—

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413 110 U.S. at 531–32, 535, 537. This flexible approach has been the one followed by the Court. E.g., Twining v. New Jersey, 211 U.S. 78 (1908); Powell v. Alabama, 287 U.S. 45 (1932); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934).
415 Ex parte Wall, 107 U.S. 265, 289 (1883).
these are some of the considerations that must enter into the judicial judgment.”

Administrative Proceedings: A Fair Hearing.—With respect to action taken by administrative agencies, the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before the final order becomes effective. In Bowles v. Willingham, the Court sustained orders fixing maximum rents issued without a hearing at any stage, saying “where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires.” But where, after consideration of charges brought against an employer by a complaining union, the National Labor Relations Board undertook to void an agreement between an employer and another independent union, the latter was entitled to notice and an opportunity to participate in the proceedings. Although a taxpayer must be afforded a fair opportunity for hearing in connection with the collection of taxes, collection by distraint of personal property is lawful if the taxpayer is allowed a hearing thereafter.

When the Constitution requires a hearing it requires a fair one, held before a tribunal which meets currently prevailing standards of impartiality. A party must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to meet them. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon the proposal before the final command is issued. But a variance between the charges

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419 321 U.S. 503, 521 (1944).
420 Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).
424 Margan v. United States, 304 U.S. 1, 18–19 (1938). The Court has experienced some difficulty with application of this principle to administrative hearings and subsequent review in selective service cases. Compare Gonzales v. United
and findings will not invalidate administrative proceedings where the record shows that at no time during the hearing was there any misunderstanding as to the basis of the complaint. The mere admission of evidence which would be inadmissible in judicial proceedings does not vitiate the order of an administrative agency. A provision that such a body shall not be controlled by rules of evidence does not, however, justify orders without a foundation in evidence having rational probative force. Hearsay may be received in an administrative hearing and may constitute by itself substantial evidence in support of an agency determination, provided that there are present factors which assure the underlying reliability and probative value of the evidence and, at least in the case at hand, where the claimant before the agency had the opportunity to subpoena the witnesses and cross-examine them with regard to the evidence, while the Court has recognized that in some circumstances a “fair hearing” implies a right to oral argument, it has refused to lay down a general rule that would cover all cases.

In the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command, and applicable Navy regulations which confirm this authority, together with a stipulation in the contract between a restaurant concessionaire and the Naval Gun Factory forbidding em-

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employment on the premises of any person not meeting security requirements, due process was not denied by the summary exclusion on security grounds of the concessionaire’s cook, without hearing or advice as to the basis for the exclusion. The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest. Since the Civil Rights Commission acts solely as an investigative and fact-finding agency and makes no adjudications, the Court, in *Hannah v. Larche*,

Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 900–01 (1961). Four dissenters, Justices Brennan, Black, Douglas, and Chief Justice Warren, emphasized the inconsistency between the Court’s acknowledgment that the cook had a right not to have her entry badge taken away for arbitrary reasons, and its rejection of her right to be told in detail the reasons for such action. The case has subsequently been cited as involving an “extraordinary situation.” *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 264 n.10 (1970).

Manifesting a disposition to adjudicate on non-constitutional grounds dismissals of employees under the Federal Loyalty Program, the Court, in *Peters v. Hobby*, 349 U.S. 331 (1955), invalidated, as in excess of its delegated authority, a finding of reasonable doubt as to the loyalty of the petitioner by a Loyalty Review Board which, on its own initiative, reopened his case after he had twice been cleared by his Agency Loyalty Board, and arrived at its conclusion on the basis of adverse information not offered under oath and supplied by informants, not all of whom were known to the Review Board and none of whom was disclosed to petitioner for cross-examination by him. The Board was found not to possess any power to review on its own initiative. Concurring, Justices Douglas and Black condemned as irreconcilable with due process and fair play the use of faceless informers whom the petitioner is unable to confront and cross-examine.

In *Cole v. Young*, 351 U.S. 536 (1956), also decided on the basis of statutory interpretation, there is an intimation that grave due process issues would be raised by the application to federal employees, not occupying sensitive positions, of a measure which authorized, in the interest of national security, summary suspensions and unreviewable dismissals of allegedly disloyal employees by agency heads. In *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the Court nullified dismissals for security reasons by invoking an established rule of administrative law to the effect that an administrator must comply with procedures outlined in applicable agency regulations, notwithstanding that such regulations conform to more rigorous substantive and procedural standards than are required by Congress or that the agency action is discretionary in nature. In both of the last cited decisions, dismissals of employees as security risks were set aside by reason of the failure of the employing agency to conform the dismissal to its established security regulations. See *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Again avoiding constitutional issues, the Court, in *Greene v. McElroy*, 360 U.S. 474 (1959), invalidated the security clearance procedure required of defense contractors by the Defense Department as being unauthorized either by law or presidential order. However, the Court suggested that it would condemn, on grounds of denial of due process, any enactment or Executive Order which sanctioned a comparable department security clearance program, under which a defense contractor’s employee could have his security clearance revoked without a hearing at which he had the right to confront and cross-examine witnesses. Justices Frankfurter, Harlan, and Whittaker concurred without passing on the validity of such procedure, if authorized. Justice Clark dissented. See also the dissenting opinions of Justices Douglas and Black in *Beard v. Stahr*, 370 U.S. 41, 43 (1962), and in *Williams v. Zuckert*, 371 U.S. 531, 533 (1963).

*Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Justices Douglas and Black dissented on the ground that when the Commission summons a person accused of violating a federal
upheld supplementary rules of procedure adopted by the Commission, independently of statutory authorization, under which state electoral officials and others accused of discrimination and summoned to appear at its hearings, are not apprised of the identity of their accusers, and witnesses, including the former, are not accorded a right to confront and cross-examine witnesses or accusers testifying at such hearings. Such procedural rights, the Court maintained, have not been granted by grand juries, congressional committees, or administrative agencies conducting purely fact-finding investigations in no way determining private rights.

**Aliens: Entry and Deportation.**—To aliens who have never been naturalized or acquired any domicile or residence in the United States, the decision of an executive or administrative officer, acting within powers expressly conferred by Congress, with regard to whether or not they shall be permitted to enter the country, is due process of law. Since the status of a resident alien returning from abroad is equivalent to that of an entering alien, his exclusion by the Attorney General without a hearing, on the basis of secret, undisclosed information, also is deemed consistent with due process. The complete authority of Congress in the

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434 Shaughnessy v. United States ex rel. Mezel, 345 U.S. 206 (1953). The long continued detention on Ellis Island of a non-deportable alien does not change his status or give rise to any right of judicial review. In dissent, Justices Black and Douglas maintained that the protracted confinement on Ellis Island without a hearing could not be reconciled with due process. Also dissenting, Justices Frankfurter and Jackson contended that when indefinite commitment on Ellis Island becomes the means of enforcing exclusion, due process requires that a hearing precede such deprivation of liberty.

Cf. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953), wherein the Court, after acknowledging that resident aliens held for deportation are entitled to procedural due process, ruled that as a matter of law the Attorney General must accord notice of the charges and a hearing to a resident alien seaman who is sought to be “expelled” upon his return from a voyage overseas. The Knauff case was distinguished on the ground that the seaman's status was not that of an entrant, but
matter of admission of aliens justifies delegation of power to executive officers to enforce the exclusion of aliens afflicted with contagious diseases by imposing upon the owner of the vessel bringing any such alien into the country a money penalty, collectible before and as a condition of the grant of clearance. If the person seeking admission claims American citizenship, the decision of the Secretary of Labor may be made final, but it must be made after a fair hearing, however summary, and must find adequate support in the evidence. A decision based upon a record from which relevant and probative evidence has been omitted is not a fair hearing. Where the statute made the decision of an immigration inspector final unless an appeal was taken to the Secretary of the Treasury, a person who failed to take such an appeal did not, by an allegation of citizenship, acquire a right to a judicial hearing on habeas corpus.

Deportation proceedings are not criminal prosecutions within the meaning of the Bill of Rights. The authority to deport is drawn from the power of Congress to regulate the entrance of aliens and impose conditions upon their continued liberty to reside within the United States. Findings of fact reached by executive officers after a fair, though summary deportation hearing may be made conclusive. In Wong Yang Sung v. McGrath, however, wherein the Court emphasized that suspension of deportation is not a matter of right, but of grace, like probation or parole, and accordingly an alien is not entitled to a hearing which contemplates full disclosure of the considerations, specifically, information of a confidential nature pertaining to national security, which induced administrative officers to deny suspension. In four dissenting opinions, Chief Justice Warren, together with Justices Black, Frankfurter, and Douglas, found irreconcilable with a fair hearing and due process the delegation by the Attorney General of his discretion to an inferior officer and the vesting of the latter with power to deny a suspension on the basis of undisclosed evidence which may amount to no more than uncorroborated hearsay.

And see Leng May Ma v. Barber, 357 U.S. 185 (1958).


Harisiades v. Shaughnessy, 342 U.S. 580 (1952). But this fact does not mean that a person may be deported on the basis of judgment reached on the civil standard of proof, that is, by a preponderance of the evidence. Rather, the Court has held, a deportation order may only be entered if it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. Woodby v. INS, 385 U.S. 276 (1966). Woodby, and similar rulings, were the result of statutory interpretation and were not constitutionally compelled. Vance v. Terrazas, 444 U.S. 252, 266–67 (1980).

339 U.S. 33 (1956). See also Kimm v. Rosenberg, 363 U.S. 405, 408, 410, 415 (1960), wherein the Court ruled that when, at a hearing on his petition for suspension of a deportation order, an alien invoked the Fifth Amendment in response to questions as to Communist Party membership, and contended that the burden of
the Court intimated that a hearing before a tribunal which did not meet the standards of impartiality embodied in the Administrative Procedure Act might not satisfy the requirements of due process of law. To avoid such constitutional doubts, the Court construed the law to disqualify immigration inspectors as presiding officers in deportation proceedings. Except in time of war, deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on habeas corpus. In contrast with the decision in United States v. Ju Toy that a person seeking entrance to the United States was not entitled to a judicial hearing on his claim of citizenship, a person arrested and held for deportation is entitled to a day in court if he denies that he is an alien. Because aliens within the United States are protected by due process, Congress must give “clear indication” of an intent to authorize indefinite detention of illegal aliens, and probably must also cite “special justification,” as, e.g., for “suspected terrorists.” A closely divided Court has ruled that in time of war the deportation of an enemy alien may be ordered summarily by executive action; due process of law does not require the courts to determine the sufficiency of any hearing which is gratuitously afforded to the alien.

**Judicial Review of Administrative Proceedings**—To the extent that constitutional rights are involved, due process of law
imports a judicial review of the action of administrative or executive officers. This proposition is undisputed so far as questions of law are concerned, but the extent to which the courts should and will go in reviewing determinations of fact has been a highly controversial issue. In *St. Joseph Stock Yards Co. v. United States*, the Court held that upon review of an order of the Secretary of Agriculture establishing maximum rates for services rendered by a stockyard company, due process required that the court exercise its independent judgment upon the facts to determine whether the rates were confiscatory. Subsequent cases sustaining rate orders of the Federal Power Commission have not dealt explicitly with this point. The Court has said simply that a person assailing such an order "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

There has been a division of opinion in the Supreme Court with regard to what extent, if at all, proceedings before military tribunals should be reviewed by the courts for the purpose of determining compliance with the due process clause. In *In re Yamashita*, the majority denied a petition for certiorari and petitions for writs of habeas corpus to review the conviction of a Japanese war criminal by a military commission sitting in the Philippine Islands. It held that since the military commission, in admitting evidence to which objection was made, had not violated any act of Congress, a treaty, or a military command defining its authority, its ruling on evidence and on the mode of conducting the proceedings were not reviewable by the courts. Again, in *Johnson v. Eisentrager*, the Court overruled a lower court decision, which in reliance upon the dissenting opinion in the *Yamashita* case, had held that the due process clause required that the legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of habeas corpus.

Without dissent, the Court, in *Hiatt v. Brown*, reversed the judgment of a lower court which had discharged a prisoner serving a sentence imposed by a court-martial because of errors whereby the prisoner had been deprived of due process of law. The Court

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446 298 U.S. 38 (1936).
447 298 U.S. at 51–54. Justices Brandeis, Stone, and Cardozo, while concurring in the result, took exception to this proposition.
450 327 U.S. 1 (1946).
held that the court below had erred in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Clark wrote: “In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.”

Similarly, in *Burns v. Wilson*, the Court denied a petition for the writ to review a conviction by a military tribunal on the Island of Guam wherein the petitioners asserted that their imprisonment resulted from proceedings violative of their basic constitutional rights. Four Justices, with whom Justice Minton concurred, maintained that judicial review is limited to determining whether the military tribunal, or court-martial, had given fair consideration to each of petitioners’ allegations, and does not embrace an opportunity “to prove de novo” what petitioners had “failed to prove in the military courts.” According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

**Substantive Due Process**

Justice Harlan, dissenting in *Poe v. Ullman*, observed that one view of due process, “ably and insistently argued . . . , sought to limit the provision to a guarantee of procedural fairness.” But, he continued, due process “in the consistent view of this Court has ever been a broader concept . . . . Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta’s ‘per legem terrae’ and considered as procedural safeguards ‘against executive usurpation and tyranny,’ have in this country ‘become bulwarks also against arbitrary legislation.’”

**Discrimination.**—“Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guar-
At other times, however, the Court assumed that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." The theory that was to prevail seems first to have been enunciated by Chief Justice Taft, who observed that the due process and equal protection clauses are "associated" and that "[i]t may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law." Thus, in Bolling v. Sharpe, a companion case to Brown v. Board of Education, the Court held that segregation of pupils in the public schools of the District of Columbia violated the due process clause. "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper govern-

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460 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results it might have based on the equal protection clause if the cases had come from the States. E.g., Hurd v. Hodge, 334 U.S. 24 (1948); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Railroad Trainmen v. Howard, 343 U.S. 768 (1952). See also Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).
mental objective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”

“Equal protection analysis in the Fifth Amendment area, is the same as that under the Fourteenth Amendment.” 461 So saying, the court has applied much of its Fourteenth Amendment jurisprudence to strike down sex classifications in federal legislation, 462 reached classifications with an adverse impact upon illegitimates, 463 and invalidated some welfare assistance provisions with some interesting exceptions. 464 However, almost all legislation involves some degree of classification among particular categories of persons, things, or events, and, just as the equal protection clause itself does not outlaw “reasonable” classifications, neither is the due process clause any more intolerant of the great variety of social and economic legislation typically containing what must be arbitrary line-drawing. 465 Thus, for example, the Court has sustained a law imposing greater punishment for an offense involving rights of property of the United States than for a like offense involving the rights of property of a private person. 466 A veterans’ law which extended certain educational benefits to all veterans who had served “on active duty” and thereby excluded conscientious objectors from eligibility was held to be sustainable, it being rational for Congress to have determined that the disruption caused by military service was qualitatively and quantitatively dif


different from that caused by alternative service, and for Congress to have so provided to make military service more attractive.\textsuperscript{467}

"The federal sovereign, like the States, must govern impartially. . . . But . . . there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."\textsuperscript{468} The paramount federal power over immigration and naturalization is the principal example, although there are undoubtedly others, of the national government being able to classify upon some grounds—alienage, naturally, but also other suspect and quasi-suspect categories as well—that would result in invalidation were a state to enact them. The instances may be relatively few, but they do exist.

\textbf{Congressional Police Measures.}—Numerous regulations of a police nature, imposed under powers specifically granted to the Federal Government, have been sustained over objections based on the due process clause. Congress may require the owner of a vessel entering United States ports, and on which alien seamen are afflicted with specified diseases, to bear the expense of hospitalizing such persons.\textsuperscript{469} It may prohibit the transportation in interstate commerce of filled milk\textsuperscript{470} or the importation of convict-made goods into any State where their receipt, possession, or sale is a violation of local law.\textsuperscript{471} It may require employers to bargain collectively with representatives of their employees chosen in a manner prescribed by law, to reinstate employees discharged in violation of law, and to permit use of a company-owned hall for union meet-

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\item[467] Johnson v. Robison, 415 U.S. 361 (1974). See also Schlesinger v. Ballard, 419 U.S. 498 (1975) (military law that classified men more adversely than women deemed rational because it had the effect of compensating for prior discrimination against women). Wayte v. United States, 470 U.S. 598 (1985) (selective prosecution of persons who turned themselves in or were reported by others as having failed to register for the draft does not deny equal protection, there being no showing that these men were selected for prosecution because of their protest activities).
\item[468] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). Thus, the power over immigration and aliens permitted federal discrimination on the basis of alienage, \textit{Hampton}, supra (employment restrictions like those previously voided when imposed by States), durational residency, Mathews v. Diaz, 426 U.S. 67 (1976) (similar rules imposed by States previously voided), and illegitimacy, Fiallo v. Bell, 430 U.S. 787 (1977) (similar rules by States would be voided). Racial preferences and discriminations in immigration have had a long history, e.g., The Chinese Exclusion Cases, 130 U.S. 581 (1889), and the power continues today, e.g., Dunn v. INS, 499 F.2d 856, 858 (9th Cir.), cert. denied, 419 U.S. 1106 (1975); Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980), although Congress has removed most such classifications from the statute books.
\item[470] United States v. Caroleine Products Co., 304 U.S. 144 (1938); Caroleine Products Co. v. United States, 323 U.S. 18 (1944).
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ings.\footnote{\textit{E.g.}, Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Railway Employees’ Dep’t v. Hanson, 351 U.S. 225 (1956); NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).} Subject to First Amendment considerations, Congress may regulate the postal service to deny its facilities to persons who would use them for purposes contrary to public policy.\footnote{Ex parte Jackson, 96 U.S. 727 (1878); Rowan v. Post Office Dep’t, 397 U.S. 728 (1970).}

**Congressional Regulation of Public Utilities.**—Inasmuch as Congress, in giving federal agencies jurisdiction over various public utilities, usually has prescribed standards substantially identical with those by which the Supreme Court has tested the validity of state action, the review of agency orders seldom has turned on constitutional issues. In two cases, however, maximum rates prescribed by the Secretary of Agriculture for stockyard companies were sustained only after detailed consideration of numerous items excluded from the rate base or from operating expenses, apparently on the assumption that error with respect to any such item would render the rates confiscatory and void.\footnote{St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Denver Union Stock Yards Co. v. United States, 304 U.S. 470 (1938).} A few years later, in \textit{FPC v. Hope Gas Co.},\footnote{320 U.S. 591 (1944). The result of this case had been foreshadowed by the opinion of Justice Stone in \textit{FPC v. Natural Gas Pipeline Co.}, 315 U.S. 575, 586 (1942), to the effect that the Commission was not bound to the use of any single formula or combination of formulas in determining rates.} the Court adopted an entirely different approach. It took the position that the validity of the Commission’s order depended upon whether the impact or total effect of the order is just and reasonable, rather than upon the method of computing the rate base. Rates which enable a company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as unjust and unreasonable even though they might produce only a meager return in a rate base computed by the “present fair value” method.

Orders prescribing the form and contents of accounts kept by public utility companies,\footnote{A. T. & T. Co. v. United States, 299 U.S. 232 (1936); United States v. New York Tel. Co., 326 U.S. 638 (1946); Northwestern Co. v. FPC, 321 U.S. 119 (1944).} and statutes requiring a private carrier to furnish the Interstate Commerce Commission with information for valuing its property\footnote{Valvoline Oil Co. v. United States, 308 U.S. 141 (1939); Champlin Rfg. Co. v. United States, 329 U.S. 29 (1946).} have been sustained against the objection that they were arbitrary and invalid. An order of the Secretary of Commerce directed to a single common carrier by water requir-
ing it to file a summary of its books and records pertaining to its rates was also held not to violate the Fifth Amendment. 478

**Congressional Regulation of Railroads.**—Legislation or administrative orders pertaining to railroads have been challenged repeatedly under the due process clause but seldom with success. Orders of the Interstate Commerce Commission establishing through routes and joint rates have been sustained, 479 as has its division of joint rates to give a weaker group of carriers a greater share of such rates where the proportion allotted to the stronger group was adequate to avoid confiscation. 480 The recapture of one half of the earnings of railroads in excess of a fair net operating income, such recaptured earnings to be available as a revolving fund for loans to weaker roads, was held valid on the ground that any carrier earning an excess held it as trustee. 481 An order enjoining certain steam railroads from discriminating against an electric railroad by denying it reciprocal switching privileges did not violate the Fifth Amendment even through its practical effect was to admit the electric road to a part of the business being adequately handled by the steam roads. 482 Similarly, the fact that a rule concerning the allotment of coal cars operated to restrict the use of private cars did not amount to a taking of property. 483 Railroad companies were not denied due process of law by a statute forbidding them to transport in interstate commerce commodities which have been manufactured, mined or produced by them. 484 An order approving a lease of one railroad by another, upon condition that displaced employees of the lessor should receive partial compensation for the loss suffered by reason of the lease 485 is consonant with due process of law. A law prohibiting the issuance of free passes was held constitutional even as applied to abolish rights created by a prior agreement whereby the carrier bound itself to issue such passes annually for life, in settlement of a claim for personal injuries. 486 A non-arbitrary Interstate Commerce Commission order establishing a non-compensatory rate for carriage of certain commodities does not violate the due process or just compensation clauses as

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479 St. Louis S.W. Ry. v. United States, 245 U.S. 136, 143 (1917).
long as the public interest thereby is served and the rates as a whole yield just compensation. 487

Occasionally, however, regulatory action has been held invalid under the due process clause. An order issued by the Interstate Commerce Commission relieving short line railroads from the obligation to pay the usual fixed sum per day rental for cars used on foreign roads for a space of two days was held to be arbitrary and invalid. 488 A retirement act which made eligible for pensions all persons who had been in the service of any railroad within one year prior to the adoption of the law, counted past unconnected service of an employee toward the requirement for a pension without any contribution therefor, and treated all carriers as a single employer and pooled their assets, without regard to their individual obligations, was held unconstitutional. 489

**Taxation.**—In laying taxes, the Federal Government is less narrowly restricted by the Fifth Amendment than are the States by the Fourteenth. The Federal Government may tax property belonging to its citizens, even if such property is never situated within the jurisdiction of the United States, 490 and it may tax the income of a citizen resident abroad, which is derived from property located at his residence. 491 The difference is explained by the fact that protection of the Federal Government follows the citizen wherever he goes, whereas the benefits of state government accrue only to persons and property within the State’s borders. The Supreme Court has said that, in the absence of an equal protection clause, “a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment. . . .” 492 It has sustained, over charges of unfair differentiation between persons, a graduated income tax, 493 a higher tax on oleomargarine than on butter, 494 an excise tax on “puts” but not on “call,” 495 a tax on the income of business operated by corporations but not on similar enterprises carried on by individuals, 496 an income tax on foreign corporations, based on their income from sources within the United States, while domestic corporations are

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494 McCray v. United States, 195 U.S. 27, 61 (1904).
495 Treat v. White, 181 U.S. 264 (1901).
taxed on income from all sources, a tax on foreign-built but not upon domestic yachts, a tax on employers of eight or more persons, with exemptions for agricultural labor and domestic service, a gift tax law embodying a plan of graduations and exemptions under which donors of the same amount might be liable for different sums, an Alaska statute imposing license taxes only on nonresident fisherman, an act which taxed the manufacture of oil and fertilizer from herring at a higher rate than similar processing of other fish or fish offal, an excess profits tax which defined “invested capital” with reference to the original cost of the property rather than to its present value, an undistributed profits tax in the computation of which special credits were allowed to certain taxpayers, an estate tax upon the estate of a deceased spouse in respect of the moiety of the surviving spouse where the effect of the dissolution of the community is to enhance the value of the survivor’s moiety, and a tax on nonprofit mutual insurers although such insurers organized before a certain date were exempt inasmuch as a continuing exemption for all insurers would have led to their multiplication to the detriment of other federal programs.

Retroactive Taxes.—It has been customary from the beginning for Congress to give some retroactive effect to its tax laws, usually making them effective from the beginning of the tax year or from the date of introduction of the bill that became the law. Application of an income tax statute to the entire calendar year in which enactment took place has never, barring some peculiar circumstance, been deemed to deny due process. Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of gov-

ernment among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute.”

509 A special income tax on profits realized by the sale of silver, retroactive for 35 days, which was approximately the period during which the silver purchase bill was before Congress, was held valid. 510 An income tax law, made retroactive to the beginning of the calendar year in which it was adopted, was found constitutional as applied to the gain from the sale, shortly before its enactment, of property received as a gift during the year. 511 Retroactive assessment of penalties for fraud or negligence, 512 or of an additional tax on the income of a corporation used to avoid a surtax on its shareholder, 513 does not deprive the taxpayer of property without due process of law.

An additional excise tax imposed upon property still held for sale, after one excise tax had been paid by a previous owner, does not violate the due process clause. 514 Similarly upheld were a transfer tax measured in part by the value of property held jointly by a husband and wife, including that which comes to the joint tenancy as a gift from the decedent spouse 515 and the inclusion in the gross income of the settlor of income accruing to a revocable trust during any period when the settlor had power to revoke or modify it. 516

Although the Court during the 1920s struck down gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute, 517 those decisions have recently been distinguished, and their precedential

511 Cooper v. United States, 280 U.S. 409 (1930); see also Reinecke v. Smith, 289 U.S. 172 (1933).
value limited.\textsuperscript{518} In \textit{United States v. Carlton}, the Court declared that “[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation”—retroactive application of legislation must be shown to be “justified by a rational legislative purpose.”\textsuperscript{519} Applying that principle, the Court upheld retroactive application of a 1987 amendment limiting application of a federal estate tax deduction originally enacted in 1986. Congress’ purpose was “neither illegitimate nor arbitrary,” the Court noted, since Congress had acted “to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss.” Also, “Congress acted promptly and established only a modest period of retroactivity.” The fact that the taxpayer had transferred stock in reliance on the original enactment was not dispositive, since “[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.”\textsuperscript{520}

\textbf{Deprivation of Property: Retroactive Legislation}.—Federal regulation of future action, based upon rights previously acquired by the person regulated, is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not ordinarily condemn it. The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating former employees, who had terminated work in the industry before passage of the law, for black lung disabilities contracted in the course of their work, was sustained by the Court as a rational measure to spread the costs of the employees’ disabilities to those who had profited from the fruits of their labor.\textsuperscript{521} Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must

\textsuperscript{518} Untermyer was distinguished in United States v. Hemme, 476 U.S. 558, 568 (1986), upholding retroactive application of unified estate and gift taxation to a taxpayer as to whom the overall impact was minimal and not oppressive. All three cases were distinguished in United States v. Carlton, 512 U.S. 26, 30 (1994), as having been “decided during an era characterized by exacting review of economic legislation under an approach that ‘has long since been discarded.’” The Court noted further that Untermyer and Blodgett had been limited to situations involving creation of a wholly new tax, and that Nichols had involved a retroactivity period of 12 years. Id.

\textsuperscript{519} 512 U.S. 26, 30 (1994) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976)). These principles apply to estate and gift taxes as well as to income taxes, the Court added. 512 U.S. at 34.

\textsuperscript{520} 512 U.S. at 33.

\textsuperscript{521} Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976). But see id. at 38 (Justice Powell concurring) (questioning application of retroactive cost-spreading).
take account of the realities previously existing, i.e., that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law; therefore, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster. The Court has applied *Turner Elkhorn* in upholding retroactive application of pension plan termination provisions to cover the period of congressional consideration, declaring that the test for retroactive application of legislation adjusting economic burdens is merely whether “the retroactive application . . . is itself justified by a rational legislative purpose.”

Rent regulations were sustained as applied to prevent execution of a judgment of eviction rendered by a state court before the enabling legislation was passed. For the reason that “those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end,” no vested right to use housing, built with the aid of FHA mortgage insurance for transient purposes, was acquired by one obtaining insurance under an earlier section of the National Housing Act, which, though silent in this regard, was contemporaneously construed as barring rental to transients, and was later modified by an amendment which expressly excluded such use. An order by an Area Rent Director reducing an unapproved rental and requiring the landlord to refund the excess previously collected, was held, with one dissenting vote, not to be the type of

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522 Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). Accord, United States v. Sperry Corp., 493 U.S. 52, 65 (1989) (upholding imposition of user fee on claimants paid by Iran-United States Claims Tribunal prior to enactment of fee statute). Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 636–41 (1993) (imposition of multiemployer pension plan withdrawal liability on an employer is not irrational, even though none of its employees had earned vested benefits by the time of withdrawal). In Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), the challenge was to a statutory requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that had placed its mining operations in a wholly owned subsidiary three decades earlier, before labor agreements included an express promise of lifetime benefits. In a fractured opinion, the justices ruled 5–4 that the scheme’s severe retroactive effect offended the Constitution, though differing on the governing clause. Four of the majority justices based the judgment solely on takings law, while opining that “there is a question” whether the statute violated due process as well. The remaining majority justice, and the four dissenters, viewed substantive due process as the sole appropriate framework for resolving the case, but disagreed on whether a violation had occurred.


524 FHA v. The Darlington, Inc., 358 U.S. 84, 89–91, 92–93 (1958). Dissenting, Justices Harlan, Frankfurter, and Whittaker maintained that under the due process clause the United States, in its contractual relations, is bound by the same rules as private individuals unless the action taken falls within the general federal regulatory power.
retroactivity which is condemned by law.\textsuperscript{525} The application of a statute providing for tobacco marketing quotas, to a crop planted prior to its enactment, was held not to deprive the producers of property without due process of law since it operated, not upon production, but upon the marketing of the product after the act was passed.\textsuperscript{526}

In the exercise of its comprehensive powers over revenue, finance, and currency, Congress may make Treasury notes legal tender in payment of debts previously contracted\textsuperscript{527} and may invalidate provisions in private contracts calling for payment in gold coin,\textsuperscript{528} but rights against the United States arising out of contract are more strongly protected by the due process clause. Hence, a law purporting to abrogate a clause in government bonds calling for payment in gold coin was invalid,\textsuperscript{529} and a statute abrogating contracts of war risk insurance was held unconstitutional as applied to outstanding policies.\textsuperscript{530}

The due process clause has been successfully invoked to defeat retroactive invasion or destruction of property rights in a few cases. A revocation by the Secretary of the Interior of previous approval of plats and papers showing that a railroad was entitled to land under a grant was held void as an attempt to deprive the company of its property without due process of law.\textsuperscript{531} The exception of the period of federal control from the time limit set by law upon claims against carriers for damages caused by misrouting of goods, was read as prospective only because the limitation was an integral

\textsuperscript{526}Mulford v. Smith, 307 U.S. 38 (1939). An increase in the penalty for production of wheat in excess of quota was valid as applied retroactively to wheat already planted, where Congress concurrently authorized a substantial increase in the amount of the loan that might be made to cooperating farmers upon stored “farm marketing excess wheat.” Wickard v. Filburn, 317 U.S. 111 (1942).
\textsuperscript{527}Legal Tender Cases (Knox v. Lee ), 79 U.S. (12 Wall.) 457, 551 (1871).
\textsuperscript{529}Perry v. United States, 294 U.S. 330 (1935).
\textsuperscript{531}Noble v. Union River Logging R.R., 147 U.S. 165 (1893).
part of the liability, not merely a matter of remedy, and would violate the Fifth Amendment if retroactive.\footnote{Danzer Co. v. Gulf R.R., 268 U.S. 633 (1925).}

**Bankruptcy Legislation.**—In acting pursuant to its power to enact uniform bankruptcy legislation, Congress has regularly authorized retrospective impairment of contractual obligations,\footnote{E.g., Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902); Continental Illinois Nat’l Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648, 673–75 (1935).} but the due process clause (by itself or infused with takings principles) constitutes a limitation upon Congress’ power to deprive persons of more secure forms of property, such as the rights secured creditors have to obtain repayment of a debt. The Court had long followed a rule of construction favoring prospective-only application of bankruptcy laws, absent a clear showing of congressional intent,\footnote{Holt v. Henley, 232 U.S. 637, 639–40 (1914). See also Auffm’ordt v. Rasin, 102 U.S. 620, 622 (1881).} but it was not until 1935 that the Court actually held unconstitutional a retrospective law. Struck down by the Court was the Frazier-Lemke Act, which by its terms applied only retrospectively, and which authorized a court to stay proceedings for the foreclosure of a mortgage for five years, the debtor to remain in possession at a reasonable rental, with the option of purchasing the property at its appraised value at the end of the stay. The Act offended the Fifth Amendment, the Court held, because it deprived the creditor of substantial property rights acquired prior to the passage of the act.\footnote{Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).} However, a modified law, under which the stay was subject to termination by the court and which continued the right of the creditor to have the property sold to pay the debt, was sustained.\footnote{Wright v. Vinton Branch, 300 U.S. 440 (1937).}

Without violation of the due process clause, the sale of collateral under the terms of a contract may be enjoined, if such sale would hinder the preparation or consummation of a proposed railroad reorganization, provided the injunction does no more than delay the enforcement of the contract.\footnote{A provision that claims resulting from rejection of an unexpired lease should be treated as}
on a parity with provable debts, but limited to an amount equal to three years rent, was held not to amount to a taking of property without due process of law, since it provided a new and more certain remedy for a limited amount, in lieu of an existing remedy inefficient and uncertain in result.\footnote{Kuchner v. Irving Trust Co., 299 U.S. 445 (1937).} A right of redemption allowed by state law upon foreclosure of a mortgage was unavailing to defeat a plan for reorganization of a debtor corporation where the trial court found that the claims of junior lienholders had no value.\footnote{In re 620 Church Street Corp., 299 U.S. 24 (1936). In the context of Congress' plan to save major railroad systems, see Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).}

Right to Sue the Government.—A right to sue the Government on a contract is a privilege, not a property right protected by the Constitution.\footnote{Lynch v. United States, 292 U.S. 571, 581 (1934).} The right to sue for recovery of taxes paid may be conditioned upon an appeal to the Commissioner and his refusal to refund.\footnote{Dodge v. Osborn, 240 U.S. 118 (1916).} There was no denial of due process when Congress took away the right to sue for recovery of taxes, where the claim for recovery was without substantial equity, having arisen from the mistake of administrative officials in allowing the statute of limitations to run before collecting a tax.\footnote{Graham & Foster v. Goodcell, 282 U.S. 409 (1931).} The denial to taxpayers of the right to sue for refund of processing and floor stock taxes collected under a law subsequently held unconstitutional, and the substitution of a new administrative procedure for the recovery of such sums, was held valid.\footnote{Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937).} Congress may cut off the right to recover taxes illegally collected by ratifying the imposition and collection thereof, where it could lawfully have authorized such exactions prior to their collection.\footnote{United States v. Heinszen & Co., 206 U.S. 370, 386 (1907).}

Congressional Power to Abolish Common Law Judicial Actions.—Similarly, it is clearly settled that “[a] person has no property, no vested interest, in any rule of the common law.”\footnote{Second Employers' Liability Cases, 223 U.S. 1, 50 (1912). See also Silver v. Silver, 280 U.S. 117, 122 (1929) (a state case).} It follows, therefore, that Congress in its discretion may abolish common law actions, replacing them with other judicial actions or with administrative remedies at its discretion. There is slight intimation in some of the cases that if Congress does abolish a common law action it must either duplicate the recovery or provide a reasonable
substitute remedy.\textsuperscript{546} Such a holding seems only remotely likely,\textsuperscript{547} but some difficulties may be experienced with respect to legislation that retrospectively affects rights to sue, such as shortening or lengthening statutes of limitation, and the like, although these have typically risen in state contexts. In one interesting decision, the Court did sustain an award of additional compensation under the Longshoremen's and Harbor Workers' Compensation Act, made pursuant to a private act of Congress passed after expiration of the period for review of the original award, directing the Commission to review the case and issue a new order, the challenge being made by the employer and insurer.\textsuperscript{548}

\textbf{Deprivation of Liberty: Economic Legislation.}—The proscription of deprivation of liberty without due process, insofar as substantive due process was involved, was long restricted to invocation against legislation deemed to abridge liberty of contract.\textsuperscript{549} The two leading cases invalidating federal legislation, however, have both been overruled, as the Court adopted a very restrained standard of review of economic legislation.\textsuperscript{550} The Court's "hands-off" policy with regard to reviewing economic legislation is quite pronounced.\textsuperscript{551}

\section*{NATIONAL EMINENT DOMAIN POWER}

\textbf{Overview}

"The Fifth Amendment to the Constitution says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."\textsuperscript{552} Emi-
nent domain “appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.” In the early years of the nation the federal power of eminent domain lay dormant, and it was not until 1876 that its existence was recognized by the Supreme Court. In *Kohl v. United States* any doubts were laid to rest, as the Court affirmed that the power was as necessary to the existence of the National Government as it was to the existence of any State. The federal power of eminent domain is, of course, limited by the grants of power in the Constitution, so that property may only be taken for the effectuation of a granted power, but once this is conceded the ambit of national powers is so wide-ranging that vast numbers of objects may be effected. This prerogative of the National Government can neither be enlarged nor diminished by a State. Whenever lands in a State are needed for a public purpose, Congress may authorize that they be taken, either by proceedings in the courts of the State, with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State.

“Prior to the adoption of the Fourteenth Amendment,” the power of eminent domain of state governments “was unrestrained

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553 *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879).


559 *Chappell v. United States*, 160 U.S. 499, 510 (1896). The fact that land included in a federal reservoir project is owned by a state, or that its taking may impair the state’s tax revenue, or that the reservoir will obliterate part of the state’s boundary and interfere with the state’s own project for water development and conservation, constitutes no barrier to the condemnation of the land by the United States. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). So too, land held in trust and used by a city for public purposes may be condemned. *United States v. Carmack*, 329 U.S. 230 (1946).
by any federal authority." 560 The just compensation provision of the Fifth Amendment did not apply to the States, 561 and at first the contention that the due process clause of the Fourteenth Amendment afforded property owners the same measure of protection against the States as the Fifth Amendment did against the Federal Government was rejected. 562 However, within a decade the Court rejected the opposing argument that the amount of compensation to be awarded in a state eminent domain case is solely a matter of local law. On the contrary, the Court ruled, although a state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation. . . . The mere form of the proceeding instituted against the owner . . . cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation." 563 While the guarantees of just compensation flow from two different sources, the standards used by the Court in dealing with the issues appear to be identical, and both federal and state cases will be dealt with herein without expressly continuing to recognize the two different bases for the rulings.

It should be borne in mind that while the power of eminent domain, though it is inherent in organized governments, may only be exercised through legislation or through legislative delegation, usually to another governmental body, the power may be delegated as well to private corporations, such as public utilities, railroad and bridge companies, when they are promoting a valid public purpose. Such delegation has long been approved. 564

Public Use

Explicit in the just compensation clause is the requirement that the taking of private property be for a public use; the Court has long accepted the principle that one is deprived of his property in violation of this guarantee if a State takes the property for any reason other than a public use. 565 The question whether a par-

562 Davidson v. City of New Orleans, 96 U.S. 97 (1878). The Court attached most weight to the fact that both due process and just compensation were guaranteed in the Fifth Amendment while only due process was contained in the Fourteenth, and refused to equate the missing term with the present one.
565 Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–59 (1896); Cole v. La Grange, 113 U.S. 1, 6 (1885).
ticular intended use is a public use is clearly a judicial one, but the Court has always insisted on a high degree of judicial deference to the legislative determination. “The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.” When it is state action being challenged under the Fourteenth Amendment, there is the additional factor of the Court’s willingness to defer to the highest court of the State in resolving such an issue. As early as 1908, the Court was obligated to admit that notwithstanding its retention of the power of judicial review, “no case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State court as a taking for public uses . . . .” However, in a 1946 case involving federal eminent domain power, the Court cast considerable doubt upon the power of courts to review the issue of public use. “We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority.” There is some suggestion that “the scope of the judicial power to determine what is a ‘public use’ may be different as between Fifth and Fourteenth Amendment cases, with greater power in the latter type of cases than in the former, but it may well be that the case simply stands for the necessity for great judicial restraint. Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or expediency of the particular taking is exclusively in the legislature or the body to which the legislature has delegated the decision, and is not subject to judicial review.

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566 “It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.” City of Cincinnati v. Vester, 281 U.S. 439, 444 (1930).
569 Hairston v. Danville & Western Ry., 208 U.S. 598, 607 (1908). An act of condemnation was voided as not for a public use in Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896), but the Court read the state court opinion as acknowledging this fact, thus not bringing it within the literal content of this statement.
570 United States ex rel. TVA v. Welch, 327 U.S. 546, 551–52 (1946). Justices Reed and Frankfurter and Chief Justice Stone disagreed with this view. Id. at 555, 557 (concurring).
571 327 U.S. at 552.
572 So it seems to have been considered in Berman v. Parker, 348 U.S. 26, 32 (1954).
573 Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919); Berman v. Parker, 358 U.S. 26, 33 (1954). “When the
At an earlier time, the factor of judicial review would have been vastly more important than it is now, inasmuch as the prevailing judicial view was that the term “public use” was synonymous with “use by the public” and that if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. But this view was rejected some time ago. The modern conception of public use equates it with the police power in the furtherance of the public interest. No definition of the reach or limits of the power is possible, the Court has said, because such “definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the . . . traditional application[s] of the police power . . . .” Effectuation of these matters being within the authority of the legislature, the power to achieve them through the exercise of eminent domain is established. “For the power of eminent domain is merely the means to the end.” Traditionally, eminent domain has been utilized to facilitate transportation, the supplying of water, and the like, but the use of the power to establish public parks, to preserve places of historic interest, and to promote beautification has substantial precedent.

576 E.g., Kohl v. United States, 91 U.S. 367 (1876) (public buildings); Chicago M. & S.P. Ry. v. City of Minneapolis, 232 U.S. 430 (1914) (canal); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897) (condemnation of privately owned water supply system formerly furnishing water to municipality under contract); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916) (land, water, and water rights condemned for production of electric power by public utility); Doanh v. Rogers, 281 U.S. 362 (1930) (land taken for purpose of exchange with a railroad company for a portion of its right-of-way required for widening a highway); Delaware, L & W.R.R. v. Morristown, 276 U.S. 182 (1928) (establishment by a municipality of a public hack stand upon driveway maintained by railroad upon its own terminal grounds to afford ingress and egress to its patrons); Clark v. Nash, 198 U.S. 361 (1905) (right-of-way across neighbor’s land to enlarge irrigation ditch for water without which land would remain valueless); Strickley v. Highland Boy Mining Co., 200 U.S. 527 (1906) (right of way across a placer mining claim for aerial bucket line). In Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896), however, the Court held that it was an invalid use when a State attempted to compel, on payment of compensation, a railroad, which had permitted the erection of two grain elevators by private citizens on its right-of-way, to grant upon like terms a location to another group of farmers to erect a third grain elevator for their own benefit.

577 E.g., Shoemaker v. United States, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); Rindge Co. v. Los Angeles County, 262 U.S. 700
The Supreme Court has approved generally the widespread use of the power of eminent domain by federal and state governments in conjunction with private companies to facilitate urban renewal, destruction of slums, erection of low-cost housing in place of deteriorated housing, and the promotion of aesthetic values as well as economic ones. In Berman v. Parker, a unanimous Court observed: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." For "public use," then, it may well be that "public interest" or "public welfare" is the more correct phrase. Berman was applied in Hawaii Housing Auth. v. Midkiff, upholding the Hawaii Land Reform Act as a "rational" effort to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly." Direct transfer of land from lessors to lessees was permissible, the Court held, there being no requirement "that government possess and use property at some point during a taking." The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," the Court concluded.


578 348 U.S. 26, 32–33 (1954) (citations omitted). Rejecting the argument that the project was illegal because it involved the turning over of condemned property to private associations for redevelopment, the Court said: "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude." Id. at 33–34 (citations omitted).


580 467 U.S. at 243.

581 467 U.S. at 240. See also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a "conceivable public character").
Just Compensation

“When . . . [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation.”582 The Fifth Amendment’s guarantee “that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”583

The just compensation required by the Constitution is that which constitutes “a full and perfect equivalent for the property taken.”584 Originally the Court required that the equivalent be in money, not in kind,585 but more recently has cast some doubt on this assertion.586 Just compensation is measured “by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future, . . . [but] ‘mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded.’”587 The general standard thus is the market value of the property, i.e., what a willing buyer would pay a willing seller.588 If fair market value does not exist or cannot be cal-

582 Backus v. Fort Street Union Depot Co., 169 U.S. 557, 573, 575 (1898).
588 United States v. Miller, 317 U.S. 369, 374 (1943); United States ex rel. TVA v. Powelson, 319 U.S. 266, 275 (1943). See also United States v. New River Col-
cularized, resort must be had to other data which will yield a fair compensation.\footnote{United States v. Miller, 317 U.S. 369, 374 (1943).} However, the Court is resistant to alternative standards, having repudiated reliance on the cost of substitute facilities.\footnote{United States v. Commodities Trading Corp., 339 U.S. 121 (1950). \textit{And see} Vogelstein & Co. v. United States, 269 U.S. 55 (1925).} Just compensation is especially difficult to compute in wartime, when enormous disruptions in supply and governmentally imposed price ceilings totally skew market conditions. Holding that the reasons which underlie the rule of market value when a free market exists apply as well where value is measured by a government-fixed ceiling price, the Court permitted owners of cured pork and black pepper to recover only the ceiling price for the commodities, despite findings by the Court of Claims that the replacement cost of the meat exceeded its ceiling price and that the pepper had a "retention value" in excess of that price.\footnote{United States v. Toronto Navigation Co., 338 U.S. 396 (1949).} By a five-to-four decision, the Court ruled that the Government was not obliged to pay the present market value of a tug when the value had been greatly enhanced as a consequence of the Government's wartime needs.\footnote{United States v. Cors, 337 U.S. 325 (1949). \textit{And see} United States v. Toronto Navigation Co., 338 U.S. 396 (1949).}  

Illustrative of the difficulties in applying the fair market standard of just compensation are two cases decided by five-to-four votes, one in which compensation was awarded and one in which it was denied. Held entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease was a company that, while its lease had no renewal option, had occupied the land for nearly 50 years and had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possibility.\footnote{Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).} However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally owned grazing land,
it was held that the compensation owed need not include the value attributable to the proximity to the federal land. The result would have been different if the adjacent grazing land had been privately owned, but the general rule is that government need not pay for value that it itself creates. 594

**Interest.**—Ordinarily, property is taken under a condemnation suit upon the payment of the money award by the condemner, and no interest accrues. 595 If, however, the property is taken in fact before payment is made, just compensation includes an increment which, to avoid use of the term “interest,” the Court has called “an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.” 596 If the owner and the Government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth Amendment is inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed. 597 Where property of a citizen has been mistakenly seized by the Government and it is converted into money which is invested, the owner is entitled in recovering compensation to an allowance for the use of his property. 598

**Rights for Which Compensation Must Be Made.**—If real property is condemned the market value of that property must be paid to the owner. But there are many kinds of property and many uses of property which cause problems in computing just compensation. It is not only the full fee simple interest in land that is compensable “property,” but also such lesser interests as easements and leaseholds. 599 If only a portion of a tract is taken, the owner’s compensation includes any element of value arising out of the relation of the part taken to the entire tract. 600 On the other hand, if

594 United States v. Fuller, 409 U.S. 488 (1973). The dissent argued that the principle denying compensation for governmentally created value should apply only when the Government was in fact acting in the use of its own property; here the Government was acting only as a condemnor. Id. at 494.


598 Henkels v. Sutherland, 271 U.S. 298 (1926); see also Phelps v. United States, 274 U.S. 341 (1927).


601 Bauman v. Ross, 167 U.S. 548 (1897); Sharp v. United States, 191 U.S. 341, 351–52, 354 (1903). Where the taking of a strip of land across a farm closed a pri-
the taking has in fact benefitted the owner, the benefit may be set off against the value of the land condemned, although any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated may not be set off. When certain lands were condemned for park purposes, with resulting benefits set off against the value of the property taken, the subsequent erection of a fire station on the property instead was held not to have deprived the owner of any part of his just compensation.

Interests in intangible as well as tangible property are subject to protection under the Taking Clause. Thus compensation must be paid for the taking of contract rights, patent rights, and trade secrets. So too, the franchise of a private corporation is property that cannot be taken for public use without compensation. Upon condemnation of a lock and dam belonging to a navigation company, the Government was required to pay for the franchise to take tolls as well as for the tangible property. The frustration of a private contract by the requisitioning of the entire output of a steel manufacturer is not a taking for which compensation is required, but government requisitioning from a power company of all the electric power which could be produced by use of the water diverted through its intake canal, thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under state law, to draw a portion of that water, entitles the lessee to compensation for the rights taken.

When, upon default of a ship-builder, the Government, pursuant to contract with him, took title to uncompleted boats, the material men, whose liens under state laws had attached when they supplied the shipbuilder, had a compensable interest equal to whatever value these liens had when the Government “took” or destroyed them in perfecting its title. As a general matter, there is no property interest in the continuation of a rule of law. And, even though state participa-

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tion in the social security system was originally voluntary, a state had no property interest in its right to withdraw from the program when Congress had expressly reserved the right to amend the law and the agreement with the state.\footnote{Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986).} Similarly, there is no right to the continuation of governmental welfare benefits.\footnote{"Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." Bowen v. Gilliard, 483 U.S. 587, 604 (1987).}

**Consequential Damages.**—The Fifth Amendment requires compensation for the taking of “property,” hence does not require payment for losses or expenses incurred by property owners or tenants incidental to or as a consequence of the taking of real property, if they are not reflected in the market value of the property taken.\footnote{Mitchell v. United States, 267 U.S. 341 (1925); United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372 (1946). For consideration of the problem of fair compensation in government-supervised bankruptcy reorganization proceedings, see New Haven Inclusion Cases, 399 U.S. 392, 489–95 (1970).} Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever, he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of ‘consequential damage’ as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.\footnote{An exception to the general principle has been established by the Court where only a temporary occupancy is assumed; then the taking body must pay the value which a hypothetical long-term tenant in possession would require when leasing to a temporary occupier requiring his removal, including in the market value of the interest the reasonable cost of moving out the personal property stored in the premises, the cost of storage of goods against their sale, and the cost of returning the property to the premises. United States v. Pewee Coal Co., 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).} Another exception to the general rule occurs with

\footnote{\footnote{United States v. General Motors Corp., 323 U.S. 373, 382 (1945).} United States v. General Motors Corp., 323 U.S. 373 (1945). In Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), the Government seized the tenant’s plant for the duration of the war, which turned out to be less than the full duration of the lease, and, having no other means of serving its customers, the laundry suspended business for the period of military occupancy; the Court narrowly held that the Government must compensate for the loss in value of the business attributable to the destruction of its “trade routes,” that is, for the loss of customers built up over the years and for the continued hold of the laundry upon their patronage. See also United States v. Pewee Coal Co., 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).}
a partial taking, in which the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before; in such a case compensation includes any diminished value of the remaining portion ("severance damages") as well as the value of the taken portion. 618

**Enforcement of Right to Compensation.**—The nature and character of the tribunal to determine compensation is in the discretion of the legislature, and may be a regular court, a special legislative court, a commission, or an administrative body. 619 Proceedings to condemn land for the benefit of the United States are brought in the federal district court for the district in which the land is located. 620 The estimate of just compensation is not required to be made by a jury but may be made by a judge or entrusted to a commission or other body. 621 Federal courts may appoint a commission in condemnation actions to resolve the compensation issue. 622 If a body other than a court is designated to determine just compensation, its decision must be subject to judicial review, 623 although the scope of review may be limited by the legislature. 624 When the judgment of a state court with regard to the amount of compensation is questioned, the Court's review is restricted. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution." 625 "[T]here must be something more than an ordinary honest mistake of law in the proceedings for compensation be-

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618 United States v. Miller, 317 U.S. 369, 375–76 (1943). "On the other hand," the Court added, "if the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken." Id.


620 28 U.S.C. § 1403. On the other hand, inverse condemnation actions (claims that the United States has taken property without compensation) are governed by the Tucker Act, 28 U.S.C. § 1491(a)(1), which vests the Court of Federal Claims (formerly the Claims Court) with jurisdiction over claims against the United States "founded . . . upon the Constitution." See Preseault v. ICC, 494 U.S. 1 (1990).

621 Bauman v. Ross, 167 U.S. 548 (1897). Even when a jury is provided to determine the amount of compensation, it is the rule at least in federal court that the trial judge is to instruct the jury with regard to the criteria and this includes determination of "all issues" other than the precise issue of the amount of compensation, so that the judge decides those matters relating to what is computed in making the calculation. United States v. Reynolds, 397 U.S. 14 (1970).

622 Rule 71A(h), Fed. R. Civ. P. These commissions have the same powers as a court-appointed master.


624 Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897). In federal courts, reports of Rule 71A commissions are to be accepted by the court unless "clearly erroneous." Fed. R. Civ. P. 53(e)(2).

625 Backus v. Fort Street Union Depot Co., 169 U.S. 557, 569 (1898).
fore a party can make out that the State has deprived him of his property unconstitutionally.” Unless, by its rulings of law, the state court prevented a complainant from obtaining substantially any compensation, its findings as to the amount of damages will not be overturned on appeal, even though as a consequence of error therein the property owner received less than he was entitled to.

When Property Is Taken

The issue whether one's property has been “taken” with the consequent requirement of just compensation can hardly arise when government institutes condemnation proceedings directed to it. Where, however, physical damage results to property because of government action, or where regulatory action limits activity on the property or otherwise deprives it of value, whether there has been a taking in the Fifth Amendment sense becomes critical.

**Government Activity Not Directed at the Property.**—The older cases proceeded on the basis that the requirement of just compensation for property taken for public use referred only to “direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.” Accordingly, a variety of consequential injuries were held not to constitute takings: damage to abutting property resulting from the authorization of a railroad to erect tracts, sheds, and fences over a street; similar deprivations, lessening the circulation of light and air and impairing access to premises, resulting from the erection of an elevated viaduct over a street, or resulting from the changing of a grade in the street. Nor was government held liable for the extra expense which the property owner must obligate in order to ward off the consequence of the governmental action, such as the expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen, or by a landowner in raising the height of the dikes around his land to prevent their partial flooding consequent to private construction of a dam under public licensing.

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627 229 U.S. at 371. And see Provo Bench Canal Co. v. Tanner, 239 U.S. 323 (1915); Appleby v. City of Buffalo, 221 U.S. 524 (1911).
628 Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871). The Fifth Amendment “has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals,” the Court explained.
629 Meyer v. City of Richmond, 172 U.S. 82 (1898).
But the Court also decided long ago that land can be “taken” in the constitutional sense by physical invasion or occupation by the government, as occurs when government floods land. A later formulation was that “[p]roperty is taken in the constitutional sense when inroads are made upon an owner’s use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.” It was thus held that the government had imposed a servitude for which it must compensate the owner on land adjoining its fort when it repeatedly fired the guns at the fort across the land and had established a fire control service there. In two major cases, the Court held that the lessees or operators of airports were required to compensate the owners of adjacent land when the noise, glare, and fear of injury occasioned by the low altitude overflights during takeoffs and landings made the land unfit for the use to which the owners had applied it. Eventually, the term “inverse condemnation” came to be used to refer to such cases where the government has not instituted formal condemnation proceedings, but instead the property owner has sued for just compensation, claiming that governmental action or regulation has “taken” his property.

Navigable Waters.—The repeated holdings that riparian ownership is subject to the power of Congress to regulate commerce constitute an important reservation to the developing law of liability in the taking area. When damage results consequentially from an improvement to a river’s navigable capacity, or from an improvement on a nonnavigable river designed to affect navigability elsewhere, it is generally not a taking of property but merely an exercise of a servitude to which the property is always subject.

635 Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922).
636 United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962). A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in a suit by one whose property was so injured by smoke and gas forced from the tunnel as to amount to a taking. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).
637 The phrase ‘inverse condemnation’ generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a ‘taking’ of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign’s power of eminent domain have not been instituted by the government entity.” San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Justice Brennan dissenting). See also United States v. Clarke, 445 U.S. 253, 257 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).
638 Gibson v. United States, 166 U.S. 269 (1897); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Appalachian Power Co., 311 U.S. 377 (1940);
This exception does not apply to lands above the ordinary high-water mark of a stream, hence is inapplicable to the damage the Government may do to such “fast lands” by causing overflows, by erosion, and otherwise, consequent on erection of dams or other improvements. And, when previously nonnavigable waters are made navigable by private investment, government may not, without paying compensation, simply assert a navigation servitude and direct the property owners to afford public access.

**Regulatory Takings.**—While it is established that government may take private property, with compensation, to promote the public interest, that interest also may be served by regulation of property use pursuant to the police power, and for years there was broad dicta that no one may claim damages due to a police regulation designed to secure the common welfare, especially in the area of health and safety regulations. “The distinguishing characteristic between eminent domain and the police power is that the former involves the taking of property because of its need for the public use while the latter involves the regulation of such property to prevent the use thereof in a manner that is detrimental to the public interest.” But regulation may deprive an owner of most or all beneficial use of his property and may destroy the values of the property for the purposes to which it is suited. The older cases flatly denied the possibility of compensation for this diminu-
tion of property values, but the Court in 1922 established as a general principle that "if regulation goes too far it will be recognized as a taking."  

In the Mahon case, Justice Holmes for the Court, over Justice Brandeis' vigorous dissent, held unconstitutional a state statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. The homeowners had purchased by deeds that reserved to the coal companies ownership of subsurface mining rights and that held the companies harmless for damage caused by subsurface mining operations. The statute thus gave the homeowners more than they had been able to obtain through contracting, and at the same time deprived the coal companies of the entire value of their subsurface estates. The Court observed that "for practical purposes, the right to coal consists in the right to mine," and that the statute, by making it "commercially impracticable to mine certain coal," had essentially "the same effect for constitutional purposes as appropriating or destroying it." The regulation, therefore, in precluding the companies from exercising any mining rights whatever, went "too far." However, when presented 65 years later with a very similar restriction on coal mining, the Court upheld it, pointing out that, unlike its predecessor, the newer law identified important public interests.

The Court had been early concerned with the imposition upon one or a few individuals of the costs of furthering the public interest. But it was with respect to zoning, in the context of substantive due process, that the Court first experienced some difficulty in this regard. The Court's first zoning case involved a real estate company's challenge to a comprehensive municipal zoning

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645 Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (ban on manufacture of liquor greatly devalued plaintiff's plant and machinery; no taking possible simply because of legislation deeming a use injurious to public health and welfare).

646 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). See also Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (a regulation that deprives a property owner of all beneficial use of his property requires compensation, unless the owner's proposed use is one prohibited by background principles of property or nuisance law existing at the time the property was acquired).

647 260 U.S. at 414–15. However, when presented 65 years later with a very similar restriction on coal mining, the Court upheld it, pointing out that, unlike its predecessor, the newer law identified important public interests.

648 260 U.S. at 415. In dissent, Justice Brandeis argued that a restriction imposed to abridge the owner's exercise of his rights in order to prohibit a noxious use or to protect the public health and safety simply could not be a taking, because the owner retained his interest and his possession. Id. at 416.


ordinance, alleging that the ordinance prevented development of its land for industrial purposes and thereby reduced its value from $10,000 an acre to $2,500 an acre. Acknowledging that zoning was of recent origin, the Court observed that it must find its justification in the police power and be evaluated by the constitutional standards applied to exercises of the police power. After considering traditional nuisance law, the Court determined that the public interest was served by segregation of incompatible land uses and the ordinance was thus valid on its face; whether its application to diminish property values in any particular case was also valid would depend, the Court said, upon a finding that it was not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” A few years later the Court, again relying on due process rather than taking law, did invalidate the application of a zoning ordinance to a tract of land, finding that the tract would be rendered nearly worthless and that to exempt the tract would impair no substantial municipal interest. But then the Court withdrew from the land-use scene until the 1970s, giving little attention to States and their municipalities as they developed more comprehensive zoning techniques.

As governmental regulation of property has expanded over the years—in terms of zoning and land use controls, environmental regulations, and the like—the Court never developed, as it admitted, a “set formula to determine where regulation ends and taking begins.” Rather, as one commentator remarked, its decisions constitute a “crazy quilt pattern” of judgments. Nonetheless, the Court has now formulated general principles that guide many of its decisions in the area.

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654 Initially, the Court’s return to the land-use area involved substantive due process, not takings. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining single-family zoning as applied to group of college students sharing a house); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (voiding single-family zoning so strictly construed as to bar a grandmother from living with two grandchildren of different children). See also City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976).
In *Penn Central Transportation Co. v. City of New York*, the Court, while cautioning that regulatory takings cases require “essentially ad hoc, factual inquiries,” nonetheless laid out general guidance for determining whether a regulatory taking has occurred. “The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So too, is the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”

At issue in *Penn Central* was the City’s landmarks preservation law, as applied to deny approval to construct a 53-story office building atop Grand Central Terminal. The Court upheld the landmarks law against Penn Central’s takings claim through application of the principles set forth above. The economic impact on Penn Central was considered: the Company could still make a “reasonable return” on its investment by continuing to use the facility as a rail terminal with office rentals and concessions, and the City specifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions, a valuable right that mitigated the burden otherwise to be suffered by the owner. As for the character of the governmental regulation, the Court found the landmarks law to be an economic regulation rather than a governmental appropriation of property, the preservation of historic sites being a permissible goal and one that served the public interest.

Justice Holmes began his analysis in *Mahon* with the observation that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law,” and *Penn Central’s* economic impact standard also leaves ample room for recognition of this principle. Thus, the Court can easily hold that a mere permit requirement does not amount to a taking, nor does it show a simple re-
ordination requirement. The tests become more useful, however, when compliance with regulation becomes more onerous.

Several times the Court has relied on the concept of “distinct [or, in later cases, ‘reasonable’] investment-backed expectations” first introduced in Penn Central. In Ruckelshaus v. Monsanto Co., the Court used the concept to determine whether a taking had resulted from the government’s disclosure of trade secret information submitted with applications for pesticide registrations. Disclosure of data that had been submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and thus “formed the basis of a distinct investment-backed expectation,” would have destroyed the property value of the trade secret and constituted a taking. Following 1978 amendments setting forth conditions of data disclosure, however, applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality. Relying less heavily on the concept but rejecting an assertion that reasonable investment backed-expectations had been upset, the Court in Connolly v. Pension Benefit Guaranty Corp. upheld retroactive imposition of liability for pension plan withdrawal on the basis that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits. However, where a statute imposes severe and “substantially disproportionate” retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in Eastern Enterprises v. Apfel struck down the Coal Miner Retiree Health


664 467 U.S. at 1011.

665 467 U.S. at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against “unauthorized” disclosure. Id. at 1008–10.


667 524 U.S. 498 (1998). The split doctrinal basis of Eastern Enterprises undercut its precedent value, and that of Connolly and Concrete Pipe, for takings law. A majority of the justices (one supporting the judgment and four dissenters) found substantive due process, not takings law, to provide the analytical framework...
Benefit Act’s requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that spun off its mining operation in 1965 before collective bargaining agreements included an express promise of lifetime benefits.

On the other hand, a federal ban on the sale of artifacts made from eagle feathers was sustained as applied to the existing inventory of a commercial dealer in such artifacts, the Court not directly addressing the ban’s obvious interference with investment-backed expectations. The Court merely noted that the ban served a substantial public purpose in protecting the eagle from extinction, that the owner still had viable economic uses for his holdings, such as displaying them in a museum and charging admission, and that he still had the value of possession.

The Court has made plain that in applying the economic impact and investment-backed expectations factors of *Penn Central*, courts are to compare what the property owner has lost through the challenged government action with what the owner retains. Discharging this mandate requires a court to define the extent of plaintiff’s property—the “parcel as a whole”—that sets the scope of analysis. The Supreme Court holds that takings law “does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” But while this apparently means that one may not exclude acreage from the relevant parcel solely to isolate the regulated portion, there are numerous arguments for excluding acreage (purchased by plaintiff at a different time, in different zoning status, etc.) that the Court has not addressed. And roiling the waters are persistent expressions of concern by the conservative justices, often in dicta, about the possible unfairness of an absolute par-

where, as in *Eastern Enterprises*, the gravamen of the complaint is the unfairness and irrationality of the statute, rather than its economic impact.


669 Similarly, the Court in *Goldblatt* had pointed out that the record contained no indication that the mining prohibition would reduce the value of the property in question. 369 U.S. at 594. *Contrast* *Hodel v. Irving*, 481 U.S. 704 (1987), where the Court found insufficient justification for a complete abrogation of the right to pass on to heirs interests in certain fractionated property. Note as well the differing views expressed in *Irving* as to whether that case limits *Andrus v. Allard* to its facts. Id. at 718 (Justice Brennan concurring, 719 (Justice Scalia concurring). *And see* the suggestion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992), that *Allard* may rest on a distinction between permissible regulation of personal property, on the one hand, and real property, on the other.

AMENDMENT 5—RIGHTS OF PERSONS

Most recently, however, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, a six-justice majority including Justices Kennedy and O'Connor offered a ringing endorsement of relevant-parcel doctrine. *Tahoe-Sierra* affirmed the established spatial (court must consider the entire relevant tract) and functional (court must consider plaintiff's full bundle of rights) dimensions of the doctrine, and added a temporal one (court must consider the entire time span of plaintiff's property interest). Invoking this temporal dimension, the Court held that temporary land-use development moratoria do not effect a total elimination of use, since use and value return in the period following the moratorium’s expiration. Thus, such moratoria are to be tested under the ad hoc, multifactor *Penn Central* test, rather than the per se approach to “total takings” discussed further on.

In the course of its opinion in *Penn Central* the Court rejected the principle that no compensation is required when regulation bans a noxious or harmful effect of land use. The principle, it had been contended, followed from several earlier cases, including *Goldblatt v. Town of Hempstead*. In that case, after the town had expanded around an excavation used by a company for mining sand and gravel, the town enacted an ordinance that in effect terminated further mining at the site. Declaring that no compensation was owed, the Court stated that “[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes,

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671 See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (“answer ... may lie in how the owner's reasonable expectations have been shaped by the State's law of property”). Justice Kennedy provided extended dicta in his majority opinion in *Palazzolo v. Rhode Island*, referring to this “difficult, persisting question” and noting that “we have at times expressed discomfort with the logic of this rule.” 533 U.S. 606, 631 (2001).

672 122 S. Ct. 1465 (2002).

673 The spatial dimension is illustrated by the takings analysis in *Penn Central*, declining to segment Grand Central Terminal from the air rights over it. Functional parcel as a whole—refusing to segment one “stick” in the “bundle” of rights—was applied in *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), holding that denial of the right to sell Indian artifacts was not a taking in light of rights in the artifacts that were retained.

674 The dissent was based upon this test. 438 U.S. at 144–46.

675 369 U.S. 590 (1962). *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and, perhaps, *Miller v. Schoene*, 276 U.S. 272 (1928), also fall under this heading, although *Schoene* may also be assigned to the public peril line of cases.
is prejudicial to the public interests." In *Penn Central*, however, the Court denied that there was any such test and that prior cases had turned on the concept. "These cases are better understood as resting not on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." More recently, in *Lucas v. South Carolina Coastal Council*, the Court explained "noxious use" analysis as merely an early characterization of police power measures that do not require compensation. "[N]oxious use logic cannot serve as a touchstone to distinguish regulatory ‘ takings’—which require compensation—from regulatory deprivations that do not require compensation."

*Penn Central* is not the only guide to when an inverse condemnation has occurred; other criteria have emerged from other cases before and after *Penn Central*. The Court has long recognized a *per se* takings rule for certain physical invasions: when government permanently occupies (or authorizes someone else to permanently occupy property), the action constitutes a taking and compensation must be paid regardless of the public interests served by the occupation or the extent of damage to the parcel as a whole. The modern case dealt with a law that required landlords to permit a cable television company to install its cable facilities upon their buildings; although the equipment occupied only about 1 ½ cubic feet of space on the exterior of each building and had only

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676 369 U.S. at 593 (quoting Mugler v. Kansas, 123 U.S. 623, 668–69 (1887). The Court posited a two-part test. First, the interests of the public required the interference, and, second, the means were reasonably necessary for the accomplishment of the purpose and were not unduly oppressive of the individual. 369 U.S. at 595. The test was derived from Lawton v. Steele, 152 U.S. 133, 137 (1894) (holding that state officers properly destroyed fish nets that were banned by state law in order to preserve certain fisheries from extinction).

677 438 U.S. at 133–34 n.30.


679 The Court explained "noxious use" analysis as merely an early characterization of police power measures that do not require compensation. "[N]oxious use logic cannot serve as a touchstone to distinguish regulatory ‘ takings’—which require compensation—from regulatory deprivations that do not require compensation."


de minimis economic impact, a divided Court held that the regulation authorized a permanent physical occupation of the property and thus constituted a taking. Recently, the Court sharpened further the distinction between regulatory takings and permanent physical occupations by declaring it “inappropriate” to use case law from either realm as controlling precedent in the other. Physical invasions falling short of permanent physical occupations remain subject to Penn Central.

A second per se taking rule is of more recent vintage. Land use controls constitute takings, the Court stated in Agins v. City of Tiburon, if they do not “substantially advance legitimate governmental interests,” or if they deny a property owner “economically viable use of his land.” This second Agins criterion creates a categorical rule: when, with respect to the parcel as a whole, the landowner “has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.” The only exceptions, the Court explained in Lucas, are for those restrictions that come with the property as title encumbrances or other legally enforceable limitations. Regulations “so severe” as to prohibit all economically beneficial use of land “cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent land owners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its com-

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682 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Loretto was distinguished in FCC v. Florida Power Corp., 480 U.S. 245 (1987); regulation of the rates that utilities may charge cable companies for pole attachments does not constitute a taking in the absence of any requirement that utilities allow attachment and acquiesce in physical occupation of their property. See also Yee v. City of Escondido, 503 U.S. 519 (1992) (emphasis in original). The Agins/ Lucas total deprivation rule does not create an all-or-nothing situation, since “the landowner whose deprivation is one step short of complete” may still be able to recover through application of the Penn Central economic impact and “distinct [or reasonable] investment-backed expectations” criteria. Id. at 1019 n.8 (1992). See also Palazzolo, 533 U.S. at 632.

683 Tahoe-Sierra, 122 S. Ct. at 1479.

684 This test was derived from Nectow v. City of Cambridge, 277 U.S. 183 (1928), a due process case.


plemimentary power to abate [public] nuisances . . . , or other-
wise.” 687 Thus, while there is no broad “noxious use” exception separ-
ating police power regulations from takings, there is a narrower “background principles” exception based on the law of nuisance and unspecified “property law” principles.

Together with the investment-backed expectations factor of Penn Central, background principles were viewed by many lower courts as supporting a “notice rule” under which a taking claim was absolutely barred if based on a restriction imposed under a regulatory regime predating plaintiff’s acquisition of the property. In Palazzolo v. Rhode Island, 688 the Court forcefully rejected the absolute version of the notice rule, regardless of rationale. Under such a rule, it said, “[a] State would be allowed, in effect, to put an expiration date on the ‘Takings Clause.’” 689 Whether any role is left for preacquisition regulation in the takings analysis, however, the Court’s majority opinion did not say, leaving the issue to dueling concurrences from Justice O’Connor (prior regulation remains a factor) and Justice Scalia (prior regulation is irrelevant). Less than a year later, Justice O’Connor’s concurrence carried the day in extended dicta in Tahoe-Sierra, 690 though the decision failed to elucidate the factors affecting the weighting to be accorded the pre-existing regime.

The “or otherwise” reference, the Court explained in Lucas, 691 was principally directed to cases holding that in times of great public peril, such as war, spreading municipal fires, and the like, property may be taken and destroyed without necessitating compensation. Thus, in United States v. Caltex, 692 the owners of property destroyed by retreating United States armies in Manila during World War II were held not entitled to compensation, and in United States v. Central Eureka Mining Co., 693 the Court held that a federal order suspending the operations of a nonessential gold mine for the duration of the war in order to redistribute the miners, unaccompanied by governmental possession and use or a forced sale of the facility, was not a taking entitling the owner to compen-

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687 505 U.S. at 1029.
689 533 U.S. at 627.
690 122 S. Ct. at 1486.
691 505 U.S. at 1029 n.16.
692 344 U.S. 149 (1952). In dissent, Justices Black and Douglas advocated the applicability of a test formulated by Justice Brandeis in Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 429 (1935), a regulation case, to the effect that “when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.”
tion for loss of profits. Finally, the Court held that when federal troops occupied several buildings during a riot in order to dislodge rioters and looters who had already invaded the buildings, the action was taken as much for the owners’ benefit as for the general public benefit and the owners must bear the costs of the damage inflicted on the buildings subsequent to the occupation. 694

The first prong of the Agins test, 695 asking whether land use controls “substantially advance legitimate governmental interests,” has been applied by the Court only in Nollan v. California Coastal Commission. 696 There the Court held that extraction of a public access easement across a strip of beach as a condition for a permit to enlarge a beachfront home did not “substantially advance” the state’s legitimate interest in preserving public view of the beach from the street in front of the lot. The easement instead was designed to allow the public to walk back and forth along the beach between two public beaches. “[U]nless the permit condition serves the same governmental purpose as the development ban,” the Court concluded, “the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” 697 “If [the government] wants an easement across the Nollans’ property, it must pay for it.” 698 Because the Nollan Court found no essential nexus between the permit condition and the asserted governmental interest, it did not address whether there is any additional requirement when such a nexus does exist. 699 Seven years later, however, the Court announced in Dolan v. City of Tigard 700 that conditions attached to development permits must be related to the impact of the proposed development not only in nature but also in degree. Gov-

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694 National Bd. of YMCA v. United States, 395 U.S. 85 (1969). “An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government’s work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect.” United States v. Sponenbarger, 308 U.S. 256, 265 (1939).


697 483 U.S. at 837.

698 483 U.S. at 842.

699 Justice Scalia, author of the Court’s opinion in Nollan, amplified his views in a concurring and dissenting opinion in Pennell v. City of San Jose, 485 U.S. 1 (1988), explaining that “common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of” the social evil (e.g., congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that “should be borne by the public as a whole.” 485 U.S. at 20, 22.

ernment must establish a “rough proportionality” between the burden imposed by such conditions on the property owner, and the impact of the property owner’s proposed development on the community—at least in the context of adjudicated (rather than legislated) conditions.

_Nollan_ and _Dolan_ occasioned considerable debate over the breadth of what became known as the “heightened scrutiny” test. The stakes were plainly high in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In _City of Monterey v. Del Monte Dunes at Monterey, Ltd._, the Court unanimously confined the _Dolan_ rough proportionality test, and, by implication, the _Nollan_ nexus test, to the exaction context that gave rise to those cases. For certain, then, is that _City of Monterey_ bars application of rough proportionality to outright denials of development. Still unclear, however, is whether the Court meant to place outside _Dolan_ exactions of a purely monetary nature, in contrast with the dedication conditions involved in _Nollan_ and _Dolan_.

Following the _Penn Central_ decision, the Court grappled with the issue of the appropriate remedy property owners should pursue in objecting to land use regulations. The remedy question arises because there are two possible constitutional objections to be made to regulations that go “too far” in reducing the value of property or which do not substantially advance a legitimate governmental interest. The regulation may be invalidated as a denial of due process, or may be deemed a taking requiring compensation, at least for the period in which the regulation was in effect. The Court finally resolved the issue in _First English Evangelical Lutheran Church v. County of Los Angeles_, holding that when land use regulation is held to be a taking, compensation is due for the period of implementation prior to the holding. The Court recognized that,

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701 _526 U.S. 687 (1999)._  
702 _City of Monterey_ also appears to give a lax interpretation to the “substantially advances a legitimate government interest” test of _Agins_, by endorsing jury instructions interpreting “substantially advance” to require only a “reasonable relationship.” _526 U.S._ at 704. Such a reading of _City of Monterey_, however, puts it squarely at odds with _Nollan_, 483 U.S. at 834 n.3, where the Court earlier stressed that “substantially advance” imposes a stricter standard than the due process one of rational basis.  
704 _482 U.S. 304 (1987)._ The decision was 6–3, Chief Justice Rehnquist’s opinion of the Court being joined by Justices Brennan, White, Marshall, Powell, and Scalia,
even though government may elect in such circumstances to discontinue regulation and thereby avoid compensation for a permanent property deprivation, “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” 705 Outside the land-use context, however, the Court has now recognized a limited number of situations where invalidation, rather than compensation, remains the appropriate takings remedy. 706

The process of describing general criteria to guide resolution of regulatory taking claims, begun in Penn Central, has reduced to some extent the ad hoc character of takings law. It is nonetheless true that not all cases fit neatly into the categories delimited to date, and that still other cases that might be so categorized are explained in different terms by the Court. The overriding objective, the Court frequently reminds us, is to vitalize the Takings Clause’s protection against government “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” 707 Thus a taking may be found if the effect of regulation is enrichment of the government itself rather than adjustment of the benefits and burdens of economic life in promotion of the public good. 708 Similarly, the Court looks askance at governmental efforts to secure public benefits at a landowner’s expense—“government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions.” 709


707 Webb’s Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) (government retained the interest derived from funds required to be deposited with the clerk of the county court as a precondition to certain suits; the interest earned was not reasonably related to the costs of using the courts, since a separate statute required payment for the clerk’s services). By contrast, a charge for governmental services “not so clearly excessive as to belie [its] purported character as [a] user fee” does not qualify as a taking. United States v. Sperry Corp., 493 U.S. 52, 62 (1989).

708 Penn Central Transp. Co. v. New York City, 438 U.S. 104, 128 (1978). In addition to the cases cited there, see also Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (viewed as governmental effort to turn private pond into “public aquatic
On the other side of the coin, the nature as well as the extent of property interests affected by governmental regulation sometimes takes on importance. Some strands are more important than others. The right to exclude others from one’s land is so basic to ownership that extinguishment of this right ordinarily constitutes a taking. Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (“extortion” of beachfront easement for public as permit condition unrelated to purpose of permit). Similarly valued is the right to pass on property to one’s heirs. Nor must property have realizable net value to fall under the Takings Clause.

Even though takings were found or assumed in several decisions since 1987, considerable obstacles remain for future litigants challenging regulatory restrictions on land use. As suggested above, regulatory takings will most likely remain difficult to establish in spite of Nollan. The Lucas fact situation, in which government regulation renders land entirely without economic use, will doubtless prove rare, as the Court itself envisioned on more than one occasion. Buttressing this point is Tahoe-Sierra’s strong implication that the Lucas per se rule is triggered only by complete elimination of use and value, something that occurs exceedingly infrequently in the real world in light of the lingering value even undevelopable land may have as open space or for speculation. More broadly, Tahoe-Sierra is suffused with a general distaste for the use of per se rules in takings analysis, leading observers to argue that in the ordinary regulatory situation, the ad hoc Penn Central standard will often be “the only game in town.”

Failure to incur administrative (and judicial) delays can result in dismissal of an as-applied taking claim based on ripeness doc-

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710 Nollan v. California Coastal Comm’n, 483 U.S. 825, 831–32 (1987) (physical occupation occurs with public easement that eliminates right to exclude others); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (imposition of navigation servitude requiring public access to a privately-owned pond was a taking under the circumstances; owner’s commercially valuable right to exclude others was taken, and requirement amounted to “an actual physical invasion”); But see PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (requiring shopping center to permit individuals to exercise free expression rights on property onto which public had been invited was not destructive of right to exclude others or “so essential to the use or economic value of [the] property” as to constitute a taking).


713 Lucas spoke of the total taking situation to which its rule applied as “extraordinary” and “relatively rare.” 505 U.S. at 1017-18. Quite recently, Tahoe-Sierra reiterated the “extraordinary” reference. 122 S. Ct. at 1483.

714 First English, Nollan, Lucas, Dolan, and City of Monterey.
trine, an area of takings law that the Court has developed extensively since *Penn Central*. In the leading decision of *Williamson County Regional Planning Commission v. Hamilton Bank*, the Court announced the canonical two-part ripeness test for takings actions brought in federal court. First, for an as-applied challenge, the property owner must obtain from the regulating agency a "final, definitive position" regarding how it will apply its regulation to the owner's land. Second, when suing a state or municipality, the owner must exhaust any possibilities for obtaining compensation from the state or its courts before coming to federal court. Thus, the claim in *Williamson County* was found unripe because the plaintiff had failed to seek a variance (first prong of test), and had not sought compensation from the state courts in question even though they recognized inverse condemnation claims (second prong). Similarly, in *MacDonald, Sommer & Frates v. County of Yolo*, a final decision was found lacking where the landowner had been denied approval for one subdivision plan calling for intense development, but that denial had not foreclosed the possibility that a scaled-down (though still economic) version would be approved. In a somewhat different context, a taking challenge to a municipal rent control ordinance was considered "premature" in the absence of evidence that a tenant hardship provision had ever been applied to reduce what would otherwise be considered a reasonable rent increase. Beginning with *Lucas* in 1992, however, the Court's ripeness determinations have displayed an impatience with formalistic reliance on the "final decision" rule, while nonetheless explicitly reaffirming it. In *Palazzolo v. Rhode Island*, for example, the Court saw no point in requiring the landowner to apply for approval of a scaled-down development of his wetland, since the regulations at issue made plain that no development at all would be permitted there. "[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."  

Facial challenges dispense with the *Williamson County* final decision prerequisite, though at great risk to the plaintiff in that without pursuing administrative remedies, a claimant often lacks

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720 533 U.S. at 620. See also *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (taking claim ripe despite plaintiff's not having applied for sale of her transferrable development rights, since no discretion remains to agency and value of such rights is simple issue of fact).
# SIXTH AMENDMENT

## RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

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RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

SIXTH AMENDMENT

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

CRIMINAL PROSECUTIONS

Coverage

Criminal prosecutions in the District of Columbia and in incorporated territories must conform to this Amendment, but those in the unincorporated territories need not do so. In upholding a trial before a United States consul of a United States citizen for a crime committed within the jurisdiction of a foreign nation, the Court specifically held that this Amendment reached only citizens and others within the United States or who were brought to the United States for trial for alleged offenses committed elsewhere, and not to citizens residing or temporarily sojourning abroad. It is clear that this holding no longer is supportable after Reid v. Covert, but it is not clear what the constitutional rule is. All of the

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1 Callan v. Wilson, 127 U.S. 540 (1888).
4 In re Ross, 140 U.S. 453 (1891).
5 354 U.S. 1 (1957) (holding that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by court-martial in time of peace for capital offenses committed abroad). Four Justices, Black, Douglas, Brennan, and Chief Justice Warren, disapproved Ross as "resting ... on a fundamental misconception" that the Constitution did not limit the actions of the United States Government wherever it acted, id. at 5–6, 10–12, and evinced some doubt with regard to the Insular Cases as well. Id. at 12–14. Justices Frankfurter and Harlan, concur-
rights guaranteed in this Amendment are so fundamental that they have been made applicable against state abridgment by the due process clause of the Fourteenth Amendment.  

**Offenses Against the United States.**—There are no common-law offenses against the United States. Only those acts which Congress has forbidden, with penalties for disobedience of its command, are crimes.  

Actions to recover penalties imposed by act of Congress generally but not invariably have been held not to be criminal prosecutions, as is true also of deportation proceedings, but contempt proceedings which were at one time not considered to be criminal prosecutions are no longer within that category. To what degree Congress may make conduct engaged in outside the territorial limits of the United States a violation of federal criminal law is a matter not yet directly addressed by the Court.  

**RIGHT TO A SPEEDY AND PUBLIC TRIAL**

**Speedy Trial**

**Source and Rationale.**—The right to a speedy trial may be derived from a provision of Magna Carta, and it was a right so interpreted by Coke. Much the same language was incorporated
into the Virginia Declaration of Rights of 1776 and from there into the Sixth Amendment. Unlike other provisions of the Amendment, this guarantee can be attributable to reasons which have to do with the rights of and infliction of harms to both defendants and society. The provision is “an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself.” The passage of time alone may lead to the loss of witnesses through death or other reasons and the blurring of memories of available witnesses. But on the other hand, “there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused.” Persons in jail must be supported at considerable public expense and often families must be assisted as well. Persons free in the community may commit other crimes, may be tempted over a lengthening period of time to “jump” bail, and may be able to use the backlog of cases to engage in plea bargaining for charges or sentences which do not give society justice. And delay often retards the deterrent and rehabilitative effects of the criminal law.

**Application and Scope.**—Because the guarantee of a speedy trial “is one of the most basic rights preserved by our Constitution,” it is one of those “fundamental” liberties embodied in the Bill of Rights which the due process clause of the Fourteenth Amendment makes applicable to the States. The protection afforded by this guarantee “is activated only when a criminal prosecution has begun and extends only to those persons who have been ‘accused’ in the course of that prosecution.” Invocation of the right need not await indictment, information, or other formal charge but begins with the actual restraints imposed by arrest if those restraints preclude the formal preferring of charges. Possible prejudice that may

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15. United States v. Marion, 404 U.S. 307, 313, 320, 322 (1971). Justices Douglas, Brennan, and Marshall disagreed, arguing that the “right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pretrial indictment delays as it is to post-indictment delays,” but concurring because they did not think the guarantee violated under the facts of the case. Id. at 328. In United States v. MacDonald, 456 U.S. 1 (1982), the Court held the clause was not
implicated by the action of the United States when, in May of 1970, it proceeded with a charge of murder against defendant under military law but dismissed the charge in October of that year, and he was discharged in December. In June of 1972, the investigation was reopened and an investigation was begun, but a grand jury was not convened until August of 1974, and MacDonald was not indicted until January of 1975. The period between dismissal of the first charge and the later indictment had none of the characteristics which called for application of the speedy trial clause. The period between arrest and indictment must be considered in evaluating a speedy trial claim.

Marion and MacDonald were applied in United States v. Loud Hawk, 474 U.S. 302 (1986), holding the speedy trial guarantee inapplicable to the period during which the government appealed dismissal of an indictment, since during that time the suspect had not been subject to bail or otherwise restrained.

In two cases, the Court held that the speedy trial guarantee had been violated by States which preferred criminal charges against persons who were already incarcerated in prisons of other jurisdictions following convictions on other charges when those States ignored the defendants’ requests to be given prompt trials and made no effort through requests to prison authorities to obtain custody of the prisoners for purposes of trial. A state practice permitting the prosecutor to take *nolle prosequi* with leave, which discharged the accused from custody but left him subject at any time thereafter to prosecution at the discretion of the prosecutor, the statute of limitations being tolled, was condemned as violative of the guarantee.

**When the Right is Denied.**—“The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.”

No length of time is per se too long

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18Klopfer v. North Carolina, 386 U.S. 213 (1967). In Pollard v. United States, 352 U.S. 354 (1957), the majority assumed and the dissent asserted that sentence is part of the trial and that too lengthy or unjustified a delay in imposing sentence could run afoul of this guarantee.

19Beavers v. Haubert, 198 U.S. 77, 87 (1905) (holding that the guarantee could not be invoked by a defendant first indicted in one district to prevent removal to another district where he had also been indicted).
to pass scrutiny under this guarantee, but on the other hand neither does the defendant have to show actual prejudice by delay. The Court rather has adopted an ad hoc balancing approach. "We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." The fact of delay triggers an inquiry and is dependent on the circumstances of the case. Reasons for delay will vary. A deliberate delay for advantage will weigh heavily, whereas the absence of a witness would justify an appropriate delay, and such factors as crowded dockets and negligence will fall between these other factors. It is the duty of the prosecution to bring a defendant to trial, and the failure of the defendant to demand the right is not to be construed as a waiver of the right; yet, the defendant's acquiescence in delay when it works to his advantage should be considered against his later assertion that he was denied the guarantee, and the defendant's responsibility for the delay would be conclusive. Finally, a court should look to the possible prejudices and disadvantages suffered by a defendant during a delay.

A determination that a defendant has been denied his right to a speedy trial results in a decision to dismiss the indictment or to reverse a conviction in order that the indictment be dismissed.

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25 Barker v. Wingo, 407 U.S. 514, 531 (1972). Delays caused by the prosecution's interlocutory appeal will be judged by the Barker factors, of which the second—the reason for the appeal—is the most important. United States v. Loud Hawk, 474 U.S. 302 (1986) (no denial of speedy trial, since prosecution's position on appeal was strong, and there was no showing of bad faith or dilatory purpose). If the interlocutory appeal is taken by the defendant, he must "bear the heavy burden of showing an unreasonable delay caused by the prosecution [or] wholly unjustifiable delay by the appellate court" in order to win dismissal on speedy trial grounds. Id. at 316.
26 Barker v. Wingo, 407 U.S. at 528. See generally id. at 523–29. Waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and it is not to be presumed but must appear from the record to have been intelligently and understandably made. Carnley v. Cochran, 369 U.S. 506, 516 (1962).
28 Strunk v. United States, 412 U.S. 434 (1973). A trial court denial of a motion to dismiss on speedy trial grounds is not an appealable order under the "collateral
Public Trial

“This nation’s accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution’s Sixth Amendment . . . most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.”

“The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the letter de cachet. All of these institution obviously symbolized a menace to liberty. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.”

The purposes of the requirement of open trials are multiple: it helps to assure the criminal defendant a fair and accurate adjudication of guilt or innocence, it provides a public demonstration of fairness, it discourages perjury, the misconduct of participants, and decisions based on secret bias or partiality. The Court has also explicated upon the therapeutic value to the community of open trials to enable the public to see justice done and the fulfillment of the urge for retribution that people feel upon the commission of some kinds of crimes. Because of the near universality of the guarantee in this country, the Supreme Court has had little occasion to deal with the right. It is a right so fundamental that it is protected

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order” exception to the finality rule. One must raise the issue on appeal from a conviction. United States v. MacDonald, 435 U.S. 850 (1977).


against state deprivation by the due process clause, but it is not so absolute that reasonable regulation designed to forestall prejudice from publicity and disorderly trials is foreclosed. The banning of television cameras from the courtroom and the precluding of live telecasting of a trial is not a denial of the right, although the Court does not inhibit televised trials under the proper circumstances.

The Court has borrowed from First Amendment cases in protecting the right to a public trial. Closure of trials or pretrial proceedings over the objection of the accused may be justified only if the state can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." In Waller v. Georgia, the Court held that an accused's Sixth Amendment rights had been violated by closure of all 7 days of a suppression hearing in order to protect persons whose phone conversations had been taped, when less than 2 and 1/2 hours of the hearing had been devoted to playing the tapes. The need for openness at suppression hearings "may be particularly strong," the Court indicated, due to the fact that the conduct of police and prosecutor is often at issue. However, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings ... demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."

The Sixth Amendment guarantee is apparently a personal right of the defendant, which he may in some circumstances waive.

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31 In re Oliver, 333 U.S. 257 (1948); Levine v. United States, 362 U.S. 610 (1960). Both cases were contempt proceedings which were not then "criminal prosecutions" to which the Sixth Amendment applied (for the modern rule see Bloom v. Illinois, 391 U.S. 194 (1968)), so that the cases were wholly due process holdings. Cf. Richmond Newspapers v. Virginia, 448 U.S. 555, 591 n.16 (1980) (Justice Brennan concurring).


in conjunction with the prosecution and the court.\textsuperscript{39} The First Amendment, however, has been held to protect public and press access to trials in all but the most extraordinary circumstances,\textsuperscript{40} hence a defendant’s request for closure of his trial must be balanced against the public and press right of access. Before such a request for closure will be honored, there must be “specific findings . . . demonstrating that first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.”\textsuperscript{41}

**RIGHT TO TRIAL BY IMPARTIAL JURY**

**Jury Trial**

By the time the United States Constitution and the Bill of Rights were drafted and ratified, the institution of trial by jury was almost universally revered, so revered that its history had been traced back to Magna Carta.\textsuperscript{42} The jury began in the form of a grand or presentment jury with the role of inquest and was started by Frankish conquerors to discover the King’s rights. Henry II regularized this type of proceeding to establish royal control over the machinery of justice, first in civil trials and then in criminal trials. Trial by petit jury was not employed at least until the reign of Henry III, in which the jury was first essentially a body of witnesses, called for their knowledge of the case; not until the reign of Henry VI did it become the trier of evidence. It was during the Seventeenth Century that the jury emerged as a safeguard for the criminally accused.\textsuperscript{43} Thus, in the Eighteenth Century, Blackstone could commemorate the institution as part of a “strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown” because “the truth of every accusation . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.”\textsuperscript{44} The

\textsuperscript{39} Gannett Co. v. DePasquale, 443 U.S. 368 (1979).
\textsuperscript{41} Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986). See also First Amendment discussion, “Government and the Conduct of Trials.”
\textsuperscript{42} Historians no longer accept this attribution. Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 249, 265 (1892), and the Court has noted this. Duncan v. Louisiana, 391 U.S. 145, 151 n.16 (1968).
\textsuperscript{43} W. Forsyth, HISTORY OF TRIAL BY JURY (1852).
\textsuperscript{44} W. Blackstone, *Commentaries on the Laws of England* 349–350 (T. Cooley, 4th ed. 1896). The other of the “two-fold barrier” was, of course, indictment by grand jury.
right was guaranteed in the constitutions of the original 13 States, was guaranteed in the body of the Constitution and in the Sixth Amendment, and the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases. "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'"

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge.... [T]he jury trial provisions ... reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power ... found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."}

Because "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants," the Sixth Amendment provision is binding on the States through the due process clause of the Fourteenth Amendment. But inasmuch as it cannot be said that every criminal trial or any par-
The particular trial which is held without a jury is unfair, it is possible for a defendant to waive the right and go to trial before a judge alone.

The Attributes and Function of the Jury.—It was previously the position of the Court that the right to a jury trial meant “a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted.” It had therefore been held that this included trial by a jury of 12 persons who must reach a unanimous verdict and that the jury trial must be held during the first court proceeding and not de novo at the first appellate stage. However, as it extended the guarantee to the States, the Court indicated that at least some of these standards were open to re-examination, and in subsequent cases it has done so. In Williams v. Florida, the Court held that

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50 391 U.S. at 159. Thus, state trials conducted before Duncan was decided were held to be valid still. DeStefano v. Woods, 392 U.S. 631 (1968).


52 399 U.S. 78 (1970). Justice Marshall would have required juries of 12 in both federal and state courts, id. at 116, while Justice Harlan contended that the Sixth Amendment required juries of 12, although his view of the due process standard was that the requirement was not imposed on the States. Id. at 117.
the fixing of jury size at 12 was “a historical accident” which, while firmly established when the Sixth Amendment was proposed and ratified, was not required as an attribute of the jury system, either as a matter of common-law background or by any ascertainment of the intent of the framers. Being bound neither by history nor framers’ intent, the Court thought the “relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial.” The size of the jury, the Court continued, bore no discernable relationship to the purposes of jury trial—the prevention of oppression and the reliability of fact-finding. Furthermore, there was little reason to believe that any great advantage accrued to the defendant by having a jury composed of 12 rather than six, which was the number at issue in the case, or that the larger number appreciably increased the variety of viewpoints on the jury. A jury should be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility that a cross-section of the community will be represented on it, but the Court did not speculate whether there was a minimum permissible size and it recognized the propriety of conditioning jury size on the seriousness of the offense.

When the unanimity rule was reconsidered, the division of the Justices was such that different results were reached for state and federal courts. Applying the same type of analysis as that used in Williams, four Justices acknowledged that unanimity was a common-law rule but observed for the reasons reviewed in Williams

58 The development of 12 as the jury size is traced in Williams, 399 U.S. at 86-92.

59 399 U.S. at 92-99. While the historical materials were scanty, the Court thought it more likely than not that the framers of the Bill of Rights did not intend to incorporate into the word “jury” all its common-law attributes. This conclusion was drawn from the extended dispute between House and Senate over inclusion of a “vicinage” requirement in the clause, which was a common law attribute, and the elimination of language attaching to jury trials their “accustomed requisites.” But see id. at 123 n.9 (Justice Harlan).

60 Apodaca v. Oregon, 406 U.S. 404 (1972), involved a trial held after decision in Duncan v. Louisiana, 391 U.S. 145 (1968), and thus concerned whether the Sixth Amendment itself required jury unanimity, while Johnson v. Louisiana, 406 U.S. 356 (1972), involved a pre-Duncan trial and thus raised the question whether due process required jury unanimity. Johnson held, five-to-four, that the due process requirement of proof of guilt beyond a reasonable doubt was not violated by a conviction on a nine-to-three jury vote in a case in which punishment was necessarily at hard labor.
that it seemed more likely than not that the framers of the Sixth Amendment had not intended to preserve the requirement within the term "jury." Therefore, the Justices undertook a functional analysis of the jury and could not discern that the requirement of unanimity materially affected the role of the jury as a barrier against oppression and as a guarantee of a commonsense judgment of laymen. The Justices also determined that the unanimity requirement is not implicated in the constitutional requirement of proof beyond a reasonable doubt, and is not necessary to preserve the feature of the requisite cross-section representation on the jury.\footnote{Apodaca v. Oregon, 406 U.S. 404 (1972) (Justices White, Blackmun, and Rehnquist, and Chief Justice Burger). Justice Blackmun indicated a doubt that any closer division than nine-to-three in jury decisions would be permissible. Id. at 365.} Four dissenting Justices thought that omitting the unanimity requirement would undermine the reasonable doubt standard, would permit a majority of jurors simply to ignore those interpreting the facts differently, and would permit oppression of dissenting minorities.\footnote{406 U.S. at 366. Burch v. Louisiana, 441 U.S. 130 (1979), however, held that conviction by a non-unanimous six-person jury in a state criminal trial for a nonpetty offense, under a provision permitting conviction by five out of six jurors, violated the right of the accused to trial by jury. Acknowledging that the issue was "close" and that no bright line illuminated the boundary between permissible and impermissible, the Court thought the near-uniform practice throughout the Nation of requiring unanimity in six-member juries required nullification of the state policy. See also Brown v. Louisiana, 447 U.S. 323 (1980) (Burch held retroactive).} Justice Powell, on the other hand, thought that unanimity was mandated in federal trials by history and precedent and that it should not be departed from; however, because it was the due process clause of the Fourteenth Amendment which imposed the basic jury-trial requirement on the States, he did not believe that it was necessary to impose all the attributes of a federal jury on the States. He therefore concurred in permitting less-than-unanimous verdicts in state courts.\footnote{See In re Winship, 397 U.S. 358, 364 (1970).}

Certain functions of the jury are likely to remain consistent between the federal and state court systems. For instance, the requirement that a jury find a defendant guilty beyond a reasonable doubt, which had already been established under the Due Process Clause,\footnote{Sullivan v. Louisiana, 508 U.S. 275 (1993).} has been held to be a standard mandated by the Sixth Amendment.\footnote{United States v. Gaudin, 515 U.S. 506 (1995).} The Court further held that the Fifth Amendment Due Process Clause and the Sixth Amendment require that a jury find a defendant guilty of every element of the crime with which he is charged, including questions of mixed law and fact.\footnote{Brown v. Louisiana, 380 U.S. 131, 140 (1965).} Thus,
a district court presiding over a case of providing false statements to a federal agency in violation of 18 U.S.C. §1001 erred when it took the issue of the "materiality" of the false statement away from the jury. Later, however, the Court backed off from this latter ruling, holding that failure to submit the issue of materiality to the jury in a tax fraud case can constitute harmless error.

**Criminal Proceedings to Which the Guarantee Applies.**— Although the Sixth Amendment provision does not differentiate among types of criminal proceedings in which the right to a jury trial is or is not present, the Court has always excluded petty offenses from the guarantee in federal courts, defining the line between petty and serious offenses either by the maximum punishment available or by the nature of the offense. This line has been adhered to in the application of the Sixth Amendment to the States and the Court has now held "that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." A defendant who is prosecuted in a single proceeding for multiple petty offenses, however, does not have a constitutional right to a jury trial, even if the aggregate of sentences authorized for the offense exceeds six months.

The Court has also made some changes in the meaning attached to the term "criminal proceeding." Previously, it had been applied only to situations in which a person has been accused of an offense by information or presentment. Thus, a civil action to

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68 Gaudin, 515 U.S. at 523.
73 Baldwin v. New York, 399 U.S. 66, 69 (1970). Justices Black and Douglas would have required a jury trial in all criminal proceedings in which the sanction imposed bears the indicia of criminal punishment. Id. at 74 (concurring); Cheff v. Schnackenberg, 384 U.S. 372, 384, 386 (1966) (dissenting). Chief Justice Burger and Justices Harlan and Stewart objected to setting this limitation at six months for the States, preferring to give them greater leeway. Baldwin, 399 U.S. at 76; Williams v. Florida, 399 U.S. 78, 117, 143 (1970) (dissenting). No jury trial was required when the trial judge suspended sentence and placed defendant on probation for three years. Frank v. United States, 395 U.S. 147 (1969). There is a presumption that offenses carrying a maximum imprisonment of six months or less are "petty," although it is possible that such an offense could be pushed into the "serious" category if the legislature tacks on onerous penalties not involving incarceration. No jury trial is required, however, when the maximum sentence is six months in jail, a fine not to exceed $1,000, a 90-day driver's license suspension, and attendance at an alcohol abuse education course. Blanton v. City of North Las Vegas, 489 U.S. 538, 542–44 (1989).
collect statutory penalties and punitive damages, because not technically criminal, has been held to implicate no right to jury trial. But more recently the Court has held denationalization to be punishment which Congress may not impose without adhering to the guarantees of the Fifth and Sixth Amendments, and the same type of analysis could be used with regard to other sanctions. There is, however, no constitutional right to a jury trial in juvenile proceedings, at least in state systems and probably in the federal system as well.

In a long line of cases, the Court had held that no constitutional right to jury trial existed in trials of criminal contempt. But in Bloom v. Illinois, the Court announced that “our deliberations have convinced us . . . that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution . . . and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial.”

Within the context of a criminal trial, what factual issues are submitted to the jury may be influenced by whether the fact to be established is an element of a crime or a sentencing factor. While the right to a jury extends to all facts establishing the elements of a crime, sentencing factors may be evaluated by a judge.

76See also Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909).
78E.g., Green v. United States, 403 U.S. 528 (1971).
81For instance, the Court has held that whether a defendant “visibly possessed a gun” during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). It should be noted that these cases may also implicate the Fourteenth Amendment, as a criminal conviction is generally established by a jury using the “beyond a reasonable doubt” standard, while sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient “preponderance of the evidence” standard. See, e.g., id. at 86-93. See discussion in “Proof, Burden of Proof, and Presumptions” infra.
Court has generally taken a formalistic approach to this issue, allowing states to essentially designate which facts fall under which of these two categories. In an exception to this deference, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.  

Despite suggestions that *Apprendi* was a decision of limited import, the Court’s reasoning ultimately led to the overruling of significant prior case law which had upheld a judge’s authority to decide whether or not to impose capital punishment by evaluating aggravating and mitigating sentencing factors. On the other hand, the requirement that a sentencing factor cannot increase a maximum penalty has been subject to at least one exception. Further, the impact of these decisions might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

### Impartial Jury

Impartiality as a principle of the right to trial by jury is served not only by the Sixth Amendment, which is as applicable to the States as to the Federal Government, but as well by the due
Thus, it violates the Equal Protection Clause to exclude African Americans from grand and petit juries, Strauder v. West Virginia, 100 U.S. 303 (1880); Alexander v. Louisiana, 405 U.S. 625 (1972), whether defendant is or is not an African American, Peters v. Kiff, 407 U.S. 493 (1972), and exclusion of potential jurors because of their national ancestry is unconstitutional, at least where defendant is of that ancestry as well, Hernandez v. Texas, 347 U.S. 475 (1954); Castaneda v. Partida, 430 U.S. 482 (1977).

In the exercise of its supervisory power over the federal courts, the Court has permitted any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. Glasser v. United States, 315 U.S. 60, 83–87 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Ballard v. United States, 329 U.S. 187 (1946). In Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357 (1979), male defendants were permitted to challenge the exclusion of women as a Sixth Amendment violation.

Impartiality is a two-fold requirement. First, “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment.” This requirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves. “In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in

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89 Taylor v. Louisiana, 419 U.S. 522, 528 (1975). See also Williams v. Florida, 399 U.S. 78, 100 (1970); Brown v. Allen, 344 U.S. 443, 474 (1953). In Fay v. New York, 332 U.S. 261 (1947), and Moore v. New York, 333 U.S. 565 (1948), the Court in 5-to-4 decisions upheld state use of “blue ribbon” juries from which particular groups, such as laborers and women, had been excluded. With the extension of the jury trial provision and its fair cross section requirement to the States, the opinions in these cases must be considered tenuous, but the Court has reiterated that defendants are not entitled to a jury of any particular composition. Taylor, 419 U.S. at 538. Congress has implemented the constitutional requirement by statute in federal courts by the Federal Jury Selection and Service Act of 1968, Pub. L. No. 90–274, 82 Stat. 53, 28 U.S.C. §§ 1861 et seq.

90 Lockhart v. McCree, 476 U.S. 162 (1986). “We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.” 476 U.S. at 173. The explanation is that the fair cross-section requirement “is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does).” Holland v. Illinois, 493 U.S. 474, 480 (1990) (emphasis original).
the jury-selection process.”

Thus, in one case the Court voided a selection system under which no woman would be called for jury duty unless she had previously filed a written declaration of her desire to be subject to service, and, in another it invalidated a state selection system granting women who so requested an automatic exemption from jury service. While disproportion alone is insufficient to establish a prima facie showing of unlawful exclusion, a statistical showing of disparity combined with a demonstration of the easy manipulability of the selection process can make out a prima facie case.

Second, there must be assurance that the jurors chosen are unbiased, i.e., willing to decide the case on the basis of the evidence presented. The Court has held that in the absence of an actual showing of bias, a defendant in the District of Columbia is not denied an impartial jury when he is tried before a jury composed primarily of government employees. A violation of a defendant’s right to an impartial jury does occur, however, when the jury or any of its members is subjected to pressure or influence which could impair freedom of action; the trial judge should conduct a hearing in which the defense participates to determine whether impartiality has been undermined. Exposure of the jury to possibly prejudicial material and disorderly courtroom activities may deny impartiality and must be inquired into.

Private communications,

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93 Castaneda v. Partida, 430 U.S. 482 (1977) (Mexican-American defendant successfully made out prima facie case of intentional exclusion of persons of his ethnic background by showing a substantial underrepresentation of Mexican-Americans based on a comparison of the group’s proportion in the total population of eligible jurors to the proportion called, and this in the face of the fact that Mexican-Americans controlled the selection process).
94 Frazier v. United States, 335 U.S. 497 (1948); Dennis v. United States, 339 U.S. 162 (1950). On common-law grounds, the Court in Crawford v. United States, 212 U.S. 183 (1909), disqualified such employees, but a statute removing the disqualification because of the increasing difficulty in finding jurors in the District of Columbia was sustained in United States v. Wood, 299 U.S. 123 (1936).
95 Remmer v. United States, 350 U.S. 377 (1956) (attempted bribe of a juror reported by him to authorities); Smith v. Phillips, 455 U.S. 209 (1982) (during trial one of the jurors had been actively seeking employment in the District Attorney’s office).
96 E.g., Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966). Exposure of the jurors to knowledge about the defendant’s prior criminal record and activities is not alone sufficient to establish a presumption of reversible prejudice, but on voir dire jurors should be questioned about their ability to judge impartially. Murphy v. Florida, 421 U.S. 794 (1975). The Court indicated that under the same circumstances in a federal trial it would have overturned the conviction pursuant to its supervisory power. Id. at 797–98, citing Marshall v. United States, 360 U.S. 310 (1959). Essentially, the defendant must make a showing of prejudice which the court then may inquire into. Chandler v. Florida, 449 U.S. 560, 575, 581
contact, or tampering with a jury, or the creation of circumstances raising the dangers thereof, is not to be condoned.\(^97\) When the locality of the trial has been saturated with publicity about a defendant, so that it is unlikely that he can obtain a disinterested jury, he is constitutionally entitled to a change of venue.\(^98\) It is undeniably a violation of due process to subject a defendant to trial in an atmosphere of mob or threatened mob domination.\(^99\)

Because it is too much to expect that jurors can remain uninfluenced by evidence they receive even though they are instructed to use it for only a limited purpose and to disregard it for other purposes, the Court will not permit a confession to be submitted to the jury without a prior determination by the trial judge that it is admissible. A defendant is denied due process, therefore, if he is convicted by a jury that has been instructed to first determine the voluntariness of a confession and then to disregard the confession if it is found to be inadmissible.\(^100\) Similarly invalid is a jury instruction in a joint trial to consider a confession only with regard to the defendant against whom it is admissible, and to disregard that confession as against a co-defendant which it implicates.\(^101\)

In *Witherspoon v. Illinois*,\(^102\) the Court held that the exclusion in capital cases of jurors conscientiously scrupled about capital punishment, without inquiring whether they could consider the imposition of the death penalty in the appropriate case, violated a defendant’s constitutional right to an impartial jury. Inasmuch as the jury is given broad discretion whether or not to fix the penalty at death, the Court ruled, the jurors must reflect “the conscience of the community” on the issue, and the automatic exclusion of all scrupled jurors “stacked the deck” and made of the jury a tribunal.

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“organized to return a verdict of death.” 103 A court may not refuse a defendant’s request to examine potential jurors to determine whether they would vote automatically to impose the death penalty; general questions about fairness and willingness to follow the law are inadequate. 104

The proper standard for exclusion is “whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’” 105 Thus the juror need not indicate that he would “automatically” vote against the death penalty, and his “bias [need not] be proved with ‘unmistakable clarity.’” 106 Persons properly excludable under Witherspoon may also be excluded from the guilt/innocence phase of a bifurcated capital trial. 107 It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this, concluding that “it is simply not possible to define jury impartiality . . . by reference to some hypothetical mix of individual viewpoints.” 108 Moreover, the state has “an entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a] case,” and need not select separate panels and duplicate evidence for the two distinct but interrelated functions. 109 For the same reasons, there is no violation of the right to an impartial jury if a defendant for whom capital charges have been dropped is tried, along with a codefendant still facing capital charges, before a “death qualified” jury. 110

103 391 U.S. at 519, 521, 523. The Court thought the problem went only to the issue of the sentence imposed and saw no evidence that a jury from which death scrupled persons had been excluded was more prone to convict than were juries on which such person sat. Cf. Bumper v. North Carolina, 391 U.S. 543, 545 (1968). The Witherspoon case was given added significance when in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), the Court held mandatory death sentences unconstitutional and ruled that the jury as a representative of community mores must make the determination as guided by legislative standards. See also Adams v. Texas, 448 U.S. 38 (1980) (holding Witherspoon applicable to bifurcated capital sentencing procedures and voiding a statute permitting exclusion of any juror unable to swear that the existence of the death penalty would not affect his deliberations on any issue of fact).


106 Wainwright v. Witt, 469 U.S. at 424. Accord, Darden v. Wainwright, 477 U.S. 168 (appropriateness of exclusion should be determined by context, including excluded juror’s understanding based on previous questioning of other jurors).

Exclusion of one juror qualified under Witherspoon constitutes reversible error, and the exclusion may not be subjected to harmless error analysis. However, a court’s error in refusing to dismiss for cause a prospective juror prejudiced in favor of the death penalty does not deprive a defendant of his right to trial by an impartial jury if he is able to exclude the juror through exercise of a peremptory challenge. The relevant inquiry is “on the jurors who ultimately sat,” the Court declared, rejecting as overly broad the assertion in Gray that the focus instead should be on “whether the composition of the jury panel as a whole could have been affected by the trial court’s error.”

It is the function of the voir dire to give the defense and the prosecution the opportunity to inquire into, or have the trial judge inquire into, possible grounds of bias or prejudice that potential jurors may have, and to acquaint the parties with the potential jurors. It is good ground for challenge for cause that a juror has formed an opinion on the issue to be tried, but not every opinion which a juror may entertain necessarily disqualifies him. The judge must determine whether the nature and strength of the opinion raise a presumption against impartiality. It suffices for the judge to question potential jurors about their ability to put aside what they had heard or read about the case, listen to the evidence with an open mind, and render an impartial verdict; the judge’s refusal to go further and question jurors about the contents of news reports to which they had been exposed did not violate the Sixth Amendment. Under some circumstances, it may be constitutionally required that questions specifically directed to the existence of racial bias must be asked. Thus, in a situation in which defendant, a black man, alleged that he was being prosecuted on false charges because of his civil rights activities in an atmosphere perhaps open to racial appeals, prospective jurors must be asked about their racial prejudice, if any. A similar rule applies in some capital trials, where the risk of racial prejudice “is especially serious in light of the complete finality of the death sentence.” A defendant accused of an interracial capital offense is entitled to have prospective jurors informed of the victim’s race and questioned as to racial

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bias.\textsuperscript{118} But in circumstances not suggesting a significant likelihood of racial prejudice infecting a trial, as when the facts are merely that the defendant is black and the victim white, the Constitution is satisfied by a more generalized but thorough inquiry into the impartiality of the veniremen.\textsuperscript{119}

Although government is not constitutionally obligated to allow peremptory challenges, typically a system of peremptory challenges has existed in criminal trials, in which both prosecution and defense may, without stating any reason, excuse a certain number of prospective jurors.\textsuperscript{120} While, in \textit{Swain v. Alabama},\textsuperscript{121} the Court held that a prosecutor's purposeful exclusion of members of a specific racial group from the jury would violate the Equal Protection Clause, it posited so difficult a standard of proof that defendants could seldom succeed. The \textit{Swain} standard of proof was relaxed in \textit{Batson v. Kentucky},\textsuperscript{122} with the result that a defendant may now establish an equal protection violation resulting from a prosecutor's use of peremptory challenges to systematically exclude blacks from the jury.\textsuperscript{123} A violation can occur whether or not the defendant and the excluded jurors are of the same race.\textsuperscript{124} Racially discriminatory use of peremptory challenges does not, however, constitute a violation of the Sixth Amendment, the Court ruled in \textit{Holland v. Illinois}.\textsuperscript{125} The Sixth Amendment “no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them

\textsuperscript{118}Turner v. Murray, 476 U.S. 28 (1986). The quote is from a section of Justice White's opinion not adopted as opinion of the Court. Id. at 35.

\textsuperscript{119}Ristaino v. Ross, 424 U.S. 589 (1976). The Court noted that under its supervisory power it would require a federal court faced with the same circumstances to propound appropriate questions to identify racial prejudice if requested by the defendant. Id. at 597 n.9. \textit{See} Aldridge v. United States, 283 U.S. 308 (1931). \textit{But see} Rosales-Lopez v. United States, 451 U.S. 182 (1981), in which the trial judge refused a defense request to inquire about possible bias against Mexicans. A plurality apparently adopted a rule that, all else being equal, the judge should necessarily inquire about racial or ethnic prejudice only in cases of violent crimes in which the defendant and victim are members of different racial or ethnic groups, id. at 192, a rule rejected by two concurring Justices. Id. at 194. Three dissenting Justices thought the judge must always ask when defendant so requested. Id. at 195.

\textsuperscript{120}\textit{Cf.} Stilson v. United States, 250 U.S. 583, 586 (1919), an older case holding that it is no violation of the guarantee to limit the number of peremptory challenges to each defendant in a multi-party trial.

\textsuperscript{121}380 U.S. 202 (1965).

\textsuperscript{122}476 U.S. 79 (1986).

\textsuperscript{123}See Fourteenth Amendment discussion of “Equal Protection and Race,” infra.

\textsuperscript{124}Powers v. Ohio, 499 U.S. 400 (1991) (defendant has standing to raise equal protection rights of excluded juror of different race).

\textsuperscript{125}493 U.S. 474 (1990). \textit{But see} Trevino v. Texas, 503 U.S. 562 (1992) (claim of Sixth Amendment violation resulting from racially discriminatory use of peremptory challenges treated as sufficient to raise equal protection claim under Swain and Batson).
on the basis of innumerable other generalized characteristics."  

To rule otherwise, the Court reasoned, "would cripple the device of peremptory challenge" and thereby undermine the Amendment's goal of "impartiality with respect to both contestants." 

The restraint on racially discriminatory use of peremptory challenges is now a two-way street. The Court ruled in 1992 that a criminal defendant's use of peremptory challenges to exclude jurors on the basis of race constitutes "state action" in violation of the Equal Protection Clause. Disputing the contention that this limitation would undermine "the contribution of the peremptory challenge to the administration of justice," the Court nonetheless asserted that such a result would in any event be "too high" a price to pay. "It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race." It followed, therefore, that the limitation on peremptory challenges does not violate a defendant's right to an impartial jury. While a defendant has "the right to an impartial jury that can view him without racial animus," this means that "there should be a mechanism for removing those [jurors] who would be incapable of confronting and suppressing their racism," not that the defendant may remove jurors on the basis of race or racial stereotypes.

**PLACE OF TRIAL—JURY OF THE VICINAGE**

Article III, § 2 requires that federal criminal cases be tried by jury in the State and district in which the offense was committed, but much criticism arose over the absence of any guarantee that the jury be drawn from the "vicinage" or neighborhood of the crime. Madison's efforts to write into the Bill of Rights an
express vicinage provision were rebuffed by the Senate, and the present language was adopted as a compromise. The provisions limit the Federal Government only.

An accused cannot be tried in one district under an indictment showing that the offense was committed in another; the place where the offense is charged to have been committed determines the place of trial. Thus, a defendant cannot be tried in Missouri for money-laundering if the charged offenses occurred in Florida and there was no evidence that the defendant had been involved with the receipt or transportation of the proceeds from Missouri. In a prosecution for conspiracy, the accused may be tried in any State and district where an overt act was performed. Where a United States Senator was indicted for agreeing to receive compensation for services to be rendered in a proceeding before a government department, and it appeared that a tentative arrangement for such services was made in Illinois and confirmed in St. Louis, the defendant was properly tried in St. Louis, although he was not physically present in Missouri when notice of ratification was dispatched. The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates, or the sending of excluded matter through the mails, may be made triable in any district through which the forbidden transportation is conducted. By virtue of a presumption that a letter is delivered in the district to which it is addressed, the offense of scheming to defraud a corporation by mail was held to have been committed in that district although the letter was posted elsewhere. The Constitution does not require any preliminary hearing before issuance of a warrant for removal of an accused to the court having jurisdiction of the charge. The assignment of a district judge from one district to another, conformably to statute, does not create a new...
judicial district whose boundaries are undefined nor subject the accused to trial in a district not established when the offense with which he is charged was committed. For offenses against federal laws not committed within any State, Congress has the sole power to prescribe the place of trial; such an offense is not local and may be tried at such place as Congress may designate. The place of trial may be designated by statute after the offense has been committed.

**NOTICE OF ACCUSATION**

The constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge. No indictment is sufficient if it does not allege all of the ingredients that constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology, but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in the words of the statute. The facts necessary to bring the case within the statutory definition must also be alleged. If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment which does not contain such allegation is defective. Despite the omission of obscene particulars, an indictment in general language is good if the unlawful conduct is described so as reasonably to inform the accused of the nature of the charge sought to be established against him. The Constitution does not require the Government to furnish a copy of the indictment to an accused. The right to

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notice of accusation is so fundamental a part of procedural due process that the States are required to observe it.\footnote{153}

CONFRONTATION

“The primary object of the constitutional provision in question was to prevent depositions of \textit{ex parte} affidavits \ldots being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”\footnote{154} The right of confrontation is “[o]ne of the fundamental guarantees of life and liberty \ldots long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union.”\footnote{155} Before 1965, when the Court held the right to be protected against state abridgment,\footnote{156} it had little need to clarify the relationship between the right of confrontation and the hearsay rule,\footnote{157} inasmuch as its supervisory powers over the inferior federal courts permitted it to control the admission of hearsay on this basis.\footnote{158} Thus, on the basis of the Confrontation Clause, it had concluded that evidence given at a preliminary hearing could not be used at the trial if the absence of the witness was attributable to the negligence of the prosecution,\footnote{159} but that if a witness’ absence had been procured by the defendant, testimony given at a previous trial on a different indictment could be used at the subsequent trial.\footnote{160} It had also rec-
ognized the admissibility of dying declarations and of testimony given at a former trial by a witness since deceased. The prosecution was not permitted to use a judgment of conviction against other defendants on charges of theft in order to prove that the property found in the possession of defendant now on trial was stolen. A prosecutor, however, can comment on a defendant's presence at trial, and call attention to the defendant's opportunity to tailor his or her testimony to comport with that of previous witnesses.

In a series of decisions beginning in 1965, the Court seemed to equate the Confrontation Clause with the hearsay rule, positing that a major purpose of the clause was "to give the defendant charged with crime an opportunity to cross-examine the witnesses against him," unless one of the hearsay exceptions applies. Thus, in Pointer v. Texas, the complaining witness had testified at a preliminary hearing at which he was not cross-examined and the defendant was not represented by counsel; by the time of trial, the witness had moved to another State and the prosecutor made no effort to obtain his return. Offering the preliminary hearing testimony violated defendant's right of confrontation. In Douglas v. Alabama, the prosecution called as a witness the defendant's al...

163 Kirby v. United States, 174 U.S. 47 (1899), and Dowdell v. United States, 221 U.S. 325 (1911), recognized the inapplicability of the clause to the admission of documentary evidence to establish collateral facts, admissible under the common law, to permit certification as an additional record to the appellate court of the events of the trial.
166 See also Smith v. Illinois, 390 U.S. 129 (1968) (informant as prosecution witness permitted to identify himself by alias and to conceal his true name and address; Confrontation Clause violated because defense could not effec-
leged accomplice, and when the accomplice refused to testify, pleading his privilege against self-incrimination, the prosecutor read to him to “refresh” his memory a confession in which he implicated defendant. Because defendant could not cross-examine the accomplice with regard to the truth of the confession, the Court held the Confrontation Clause had been violated. In *Bruton v. United States*, the use at a joint trial of a confession made by one of the defendants was held to violate the confrontation rights of the other defendant who was implicated by it because he could not cross-examine the codefendant not taking the stand. The Court continues to view as “presumptively unreliable accomplices’ confessions that incriminate defendants.”

More recently, however, the Court has moved away from these cases. “While … hearsay rules and the Confrontation Clause are

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169 391 U.S. 123 (1968). The Court in this case equated confrontation with the hearsay rule, first emphasizing “that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence”, id. at 128 n.3, and then observing that “[t]he reason for excluding this evidence as an evidentiary matter also requires its exclusion as a constitutional matter.” Id. at 136 n.12 (emphasis by Court). *Bruton* was applied retroactively in a state case in Roberts v. Russell, 392 U.S. 293 (1968). Where, however, the codefendant takes the stand in his own defense, denies making the alleged out-of-court statement implicating defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has not been denied his right of confrontation under *Bruton*, Nelson v. O’Neill, 402 U.S. 622 (1971). In two cases, violations of the rule in *Bruton* have been held to be “harmless error” in the light of the overwhelming amount of legally admitted evidence supporting conviction. Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972). *Bruton* was held inapplicable, however, when the nontestifying codefendant’s confession was redacted to omit any reference to the defendant, and was circumstantially incriminating only as the result of other evidence properly introduced. Richardson v. Marsh, 481 U.S. 200 (1987). *Bruton* was held applicable, however, where a blank space or the word “deleted” is substituted for the defendant’s name in a co-defendant’s confession, making such confession incriminating of the defendant on its face. Gray v. Maryland, 523 U.S. 185 (1998).

170 In *Parker v. Randolph*, 442 U.S. 62 (1979), the Court was evenly divided on the question whether interlocking confessions may be admitted without violating the clause. Four Justices held that admission of such confessions is proper, even though neither defendant testifies, if the judge gives the jury a limiting instruction. Four Justices held that a harmless error analysis should be applied, although they then divided over its meaning in this case. The former approach was rejected in favor of the latter in *Cruzan v. New York*, 481 U.S. 186 (1987). The appropriate focus is on reliability, the Court indicated, and “the defendant’s confession may be considered at trial in assessing whether his codefendant’s statements are supported by sufficient ‘indicia of reliability’ to be directly admissible against him (assuming the ‘unavailability of the codefendant’ despite the lack of opportunity for cross-examination.” 481 U.S. at 193–94.

generally designed to protect similar values it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception .... The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.”

Further, the Court in *California v. Green* 172 upheld the use at trial as substantive evidence of two prior statements made by a witness who at the trial claimed that he had been under the influence of LSD at the time of the occurrence of the events in question and that he could therefore neither deny nor affirm the truth of his prior statements. One of the earlier statements was sworn testimony given at a preliminary hearing at which the defendant was represented by counsel with the opportunity to cross-examine the witness; that statement was admissible because it had been subjected to cross-examination earlier, the Court held, and that was all that was required. The other statement had been made to policemen during custodial interrogation, had not been under oath, and, of course, had not been subject to cross-examination, but the Court deemed it admissible because the witness had been present at the trial and could have been cross-examined then. “[T]he Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both

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stories.” But in *Dutton v. Evans*, the Court upheld the use as substantive evidence at trial of a statement made by a witness whom the prosecution could have produced but did not. Presentation of a statement by a witness who is under oath, in the presence of the jury, and subject to cross-examination by the defendant is only one way of complying with the Confrontation Clause, four Justices concluded. Thus, at least in the absence of prosecutorial misconduct or negligence and where the evidence is not “crucial” or “devastating,” the Confrontation Clause is satisfied if the circumstances of presentation of out-of-court statements are such that “the trier of fact [has] a satisfactory basis for evaluating the truth of the [hearsay] statement,” and this is to be ascertained in each case by focusing on the reliability of the proffered hearsay statement, that is, by an inquiry into the likelihood that cross-examination of the declarant at trial could successfully call into question the declaration’s apparent meaning or the declarant’s sincerity, perception, or memory.

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173 399 U.S. at 164. Justice Brennan dissented. Id. at 189. See also *Nelson v. O’Neil*, 402 U.S. 622 (1971). “The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a fair opportunity to probe and expose these infirmities through cross-examination.” *Delaware v. Fensterer*, 474 U.S. 15, 21–22 (1985) (per curiam) (expert witness testified as to conclusion, but could not remember basis for conclusion). See also *United States v. Owens*, 484 U.S. 554 (1988) (testimony as to previous, out-of-court identification statement is not barred by witness’ inability, due to memory loss, to explain the basis for his identification).

174 400 U.S. 74 (1970). The statement was made by an alleged co-conspirator of the defendant on trial and was admissible under the co-conspirator exception to the hearsay rule permitting the use of a declaration by one conspirator against all his fellow conspirators. The state rule permitted the use of a statement made during the concealment stage of the conspiracy while the federal rule permitted use of a statement made only in the course of and in furtherance of the conspiracy. Id. at 78, 81–82.

175 400 U.S. at 86-89. The quoted phrase is at 89, (quoting *California v. Green*, 399 U.S. 149, 161 (1970)). Justice Harlan concurred to carry the case, on the view that (1) the Confrontation Clause requires only that any testimony actually given at trial must be subject to cross-examination, but (2) in the absence of countervailing circumstances introduction of prior recorded testimony— “trial by affidavit”—would violate the clause. Id. at 93, 95, 97. Justices Marshall, Black, Douglas, and Brennan dissented, id. at 100, arguing for adoption of a rule that: “The inculminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule.” Id. at 110–11. The Clause protects defendants against use of substantive evidence against them, but does not bar rebuttal of the defendant’s own testimony. *Tennessee v. Street*, 471 U.S. 409 (1985) (use of accomplice’s confession not to establish facts as to defendant’s participation in the crime, but instead to support officer’s rebuttal of defendant’s testimony as to circumstances of defendant’s confession; presence of officer assured right of cross-examination).
In Ohio v. Roberts, 176 the Court explained that it had construed the clause “in two separate ways to restrict the range of admissible hearsay.” First, there is a rule of “necessity,” under which in the usual case “the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.” Second, “once a witness is shown to be unavailable . . . , the Clause countenances only hearsay marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’” 177 That is, if the hearsay declarant is not present for cross-examination at trial, the “statement is admissible only if it bears adequate ‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.” 178

Roberts was narrowed in United States v. Inadi, 179 holding that the rule of “necessity” is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators’ out-of-court statements. The latter—at least those “made while the conspiracy is in progress”—have “independent evidentiary significance of [their] own”; hence in-court testimony is not a necessary or valid substitute. 180 Similarly, “evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment” is not barred from trial by the Confrontation Clause. 181 Particularized guarantees of trustworthiness inherent in the circumstances under which a statement is made must be shown for admission of other hearsay evidence not covered by a “firmly rooted exception;” evidence tending to corroborate the truthfulness of a statement may not be relied upon as a bootstrap. 182

176 448 U.S. 56 (1980). The witness was absent from home and her parents testified they did not know where she was or how to get in touch with her. The State’s sole effort to locate her was to deliver a series of subpoenas to her parents’ home. Over the objection of three dissenters, the Court held this to be an adequate basis to demonstrate her unavailability. Id. at 74–77.

177 448 U.S. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)).

178 448 U.S. at 66. Applying Roberts, the Court held that the fact that defendant’s and codefendant’s confessions “interlocked” on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986).


180 475 U.S. at 394-95.


182 Idaho v. Wright, 497 U.S. 805, 822–23 (1990) (insufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a “residual” hearsay exception rather than under a firmly rooted exception).
Contrasting approaches to the Confrontation Clause were taken by the Court in two cases involving state efforts to protect a child from trauma while testifying. In *Coy v. Iowa*, the Court held that the right of confrontation is violated by a procedure, authorized by statute, placing a one-way screen between complaining child witnesses and the defendant, thereby sparing the witnesses from viewing the defendant. This conclusion was reached even though the witnesses could be viewed by the defendant’s counsel and by the judge and jury, even though the right of cross-examination was in no way limited, and even though the state asserted a strong interest in protecting child sex-abuse victims from further trauma. The Court’s opinion by Justice Scalia declared that a defendant’s right during his trial to face-to-face confrontation with his accusers derives from “the irreducible literal meaning of the clause,” and traces “to the beginnings of Western legal culture.” Squarely rejecting the Wigmore view “that the only essential interest preserved by the right was cross-examination,” the Court emphasized the importance of face-to-face confrontation in eliciting truthful testimony.

*Coy’s* interpretation of the Clause, though not its result, was rejected in *Maryland v. Craig*. In *Craig* the Court upheld Maryland’s use of one-way, closed circuit television to protect a child witness in a sex crime from viewing the defendant. As in *Coy*, procedural protections other than confrontation were afforded: the child witness must testify under oath, is subject to cross examination, and is viewed by the judge, jury, and defendant. The critical factual difference between the two cases was that Maryland required a case-specific finding that the child witness would be traumatized by presence of the defendant, while the Iowa procedures struck down in *Coy* rested on a statutory presumption of trauma. But the difference in approach is explained by the fact that Justice O’Connor’s views, expressed in a concurring opinion in *Coy*, became the opinion of the Court in *Craig*. Beginning with the propo-
position that the Confrontation Clause does not, as evidenced by hearsay exceptions, grant an absolute right to face-to-face confrontation, the Court in Craig described the Clause as "reflect[ing] a preference for face-to-face confrontation." This preference can be overcome "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Relying on the traditional and "transcendent" state interest in protecting the welfare of children, on the significant number of state laws designed to protect child witnesses, and on "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims," the Court found a state interest sufficiently important to outweigh a defendant's right to face-to-face confrontation. Reliability of the testimony was assured by the "rigorous adversarial testing [that] preserves the essence of effective confrontation." All of this, of course, would have led to a different result in Coy as well, but Coy was distinguished with the caveat that "[t]he requisite finding of necessity must of course be a case-specific one;" Maryland's required finding that a child witness would suffer "serious emotional distress" if not protected was clearly adequate for this purpose.

In another case involving child sex crime victims, the Court held that there is no right of face-to-face confrontation at an in-chambers hearing to determine the competency of a child victim to testify, since the defendant's attorney participated in the hearing, and since the procedures allowed "full and effective" opportunity to cross-examine the witness at trial and request reconsideration of the competency ruling. And there is no absolute right to confront witnesses with relevant evidence impeaching those witnesses; failure to comply with a rape shield law's notice requirement can validly preclude introduction of evidence relating to a witness's prior sexual history.

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189 497 U.S. at 849 (emphasis original).
190 497 U.S. at 850. Dissenting Justice Scalia objected that face-to-face confrontation "is not a preference 'reflected' by the Confrontation Clause [but rather] a constitutional right unqualifiedly guaranteed," and that the Court "has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it." Id. at 863, 870.
191 497 U.S. at 855.
192 497 U.S. at 857.
193 497 U.S. at 855.
COMPULSORY PROCESS

The provision requires, of course, that the defendant be afforded legal process to compel witnesses to appear, but another apparent purpose of the provision was to make inapplicable in federal trials the common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law," applicable to states by way of the Fourteenth Amendment, and the right is violated by a state law providing that coparticipants in the same crime could not testify for one another.

The right to present witnesses is not absolute, however; a court may refuse to allow a defense witness to testify when the court finds that defendant's counsel willfully failed to identify the witness in a pretrial discovery request and thereby attempted to gain a tactical advantage.

In Pennsylvania v. Ritchie, the Court indicated that requests to compel the government to reveal the identity of witnesses or produce exculpatory evidence should be evaluated under due process rather than compulsory process analysis, adding that "compulsory process provides no greater protections in this area than due process."

ASSISTANCE OF COUNSEL

Development of an Absolute Right to Counsel at Trial

Neither in the Congress which proposed what became the Sixth Amendment guarantee that the accused is to have the assistance of counsel nor in the state ratifying conventions is there any indication of the understanding associated with the language em-
ployed. The development of the common-law principle in England had denied to anyone charged with a felony the right to retain counsel, while the right was afforded in misdemeanor cases, a rule ameliorated in practice, however, by the judicial practice of allowing counsel to argue points of law and then generously interpreting the limits of “legal questions.” The colonial and early state practice in this country was varied, ranging from the existent English practice to appointment of counsel in a few States where needed counsel could not be retained. 201 Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions which seemed to indicate an understanding that the guarantee was limited to assuring that a person wishing and able to afford counsel would not be denied that right. 202 It was not until the 1930s that the Supreme Court began expanding the clause to its present scope.

Powell v. Alabama.—The expansion began in Powell v. Alabama, 203 in which the Court set aside the convictions of eight black youths sentenced to death in a hastily carried-out trial without benefit of counsel. Due process, Justice Sutherland said for the Court, always requires the observance of certain fundamental personal rights associated with a hearing, and “the right to the aid of counsel is of this fundamental character.” This observation was about the right to retain counsel of one’s choice and at one’s expense, and included an eloquent statement of the necessity of counsel. “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and

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[202] Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided that in federal courts parties could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of court. The Act of April 30, 1790, ch. 9, 1 Stat. 118, provided: “Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours.” It was apparently the practice almost invariably to appoint counsel for indigent defendants charged with noncapital crimes, although it may be assumed that the practice fell short often of what is now constitutionally required. W. Beane, The Right to Counsel in American Courts 29–30 (1955).
knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”

The failure to afford the defendants an opportunity to retain counsel violated due process, but the Court acknowledged that as indigents the youths could not have retained counsel. Therefore, the Court concluded, under the circumstances— “the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives”— “the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.” The holding was narrow. “[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .”

*Johnson v. Zerbst.*—Next step in the expansion came in *Johnson v. Zerbst*, in which the Court announced an absolute rule requiring appointment of counsel for federal criminal defendants who could not afford to retain a lawyer. The right to assistance of counsel, Justice Black wrote for the Court, “is necessary to insure fundamental human rights of life and liberty.” Without stopping to distinguish between the right to retain counsel and the right to have counsel provided if the defendant cannot afford to hire one, the Justice quoted Justice Sutherland’s invocation of the necessity of legal counsel for even the intelligent and educated layman and said: “The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.” Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from

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204 287 U.S. at 68-69.
205 287 U.S. at 71.
206 304 U.S. 458 (1938).
207 304 U.S. at 462, 463.
a silent record, and must be determined by the trial court before proceeding in the absence of counsel. 208

**Betts v. Brady and Progeny.**—An effort to obtain the same rule in the state courts in all criminal proceedings was rebuffed in *Betts v. Brady.* 209 Justice Roberts for the Court observed that the Sixth Amendment would compel the result only in federal courts but that in state courts the Due Process Clause of the Fourteenth Amendment “formulates a concept less rigid and more fluid” than those guarantees embodied in the Bill of Rights, although a state denial of a right protected in one of the first eight Amendments might “in certain circumstances” be a violation of due process. The question was rather “whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.” 210 Examining the common-law rules, the English practice, and the state constitutions, laws and practices, the Court concluded that it was the “considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right essential to a fair trial.” Want of counsel in a particular case might result in a conviction lacking in fundamental fairness and so necessitate the interposition of constitutional restriction upon state practice, but this was not the general rule. 211 Justice Black in dissent argued that the Fourteenth Amendment made the Sixth applicable to the States and required the appointment of counsel, but that even on the Court’s terms counsel was a fundamental right and appointment was required by due process. 212

Over time the Court abandoned the “special circumstances” language of *Powell v. Alabama* 213 when capital cases were involved and finally in *Hamilton v. Alabama,* 214 held that in a capital case

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a defendant need make no showing of particularized need or of prejudice resulting from absence of counsel; henceforth, assistance of counsel was a constitutional requisite in capital cases. In non-capital cases, developments were such that Justice Harlan could assert that “the ‘special circumstances’ rule has continued to exist in form while its substance has been substantially and steadily eroded.” The rule was designed to afford some certainty in the determination of when failure to appoint counsel would result in a trial lacking in “fundamental fairness.” Generally, the Court developed three categories of prejudicial factors, often overlapping in individual cases, which required the furnishing of assistance of counsel. There were (1) the personal characteristics of the defendant which made it unlikely he could obtain an adequate defense of his own, (2) the technical complexity of the charges or of possible defenses to the charges, and (3) events occurring at trial that raised problems of prejudice. The last characteristic especially had been utilized by the Court to set aside convictions occurring in
the absence of counsel, and the last case rejecting a claim of denial of assistance of counsel had been decided in 1950.

Gideon v. Wainwright.—Against this background, a unanimous Court in Gideon v. Wainwright overruled Betts v. Brady and held “that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” Justice Black, a dissenter in the 1942 decision, asserted for the Court that Betts was an “abrupt break” with earlier precedents, citing Powell and Johnson v. Zerbst. Rejecting the Betts reasoning, the Court decided that the right to assistance of counsel is “fundamental” and the Fourteenth Amendment does make the right constitutionally required in state courts. The Court’s opinion in Gideon left unanswered the question whether the right to assistance of counsel was claimable by defendants charged with misdemeanors or serious misdemeanors as well as with felonies, and it was not until recently that the Court held that the right applies to any misdemeanor case in which imprisonment is imposed—that no person may be sentenced to jail who was convicted in the absence of counsel, unless he validly waived his right. The Court subsequently extended the right to cases where a suspended sentence or proba-

219 Hudson v. North Carolina, 363 U.S. 697 (1960), held that an unrepresented defendant had been prejudiced when his co-defendant’s counsel plead his client guilty in the presence of the jury, the applicable state rules to avoid prejudice in such situation were unclear, and the defendant in any event had taken no steps to protect himself. The case seemed to require reversal of any conviction when the record contained a prejudicial occurrence that under state law might have been prevented or ameliorated. Carnley v. Cochran, 369 U.S. 506 (1962), reversed a conviction because the unrepresented defendant failed to follow some advantageous procedure that a lawyer might have utilized. Chewning v. Cunningham, 368 U.S. 443 (1962), found that a lawyer might have developed several defenses and adopted several tactics to defeat a charge under a state recidivist statute, and that therefore the unrepresented defendant had been prejudiced.


222 372 U.S. at 344.

223 372 U.S. at 342-43, 344. Justice Black, of course, believed the Fourteenth Amendment made applicable to the States all the provisions of the Bill of Rights, Adamson v. California, 332 U.S. 46, 71 (1947), but for purposes of delivering the opinion of the Court followed the due process absorption doctrine. Justice Douglas, concurring, maintained the incorporation position. Gideon, 372 U.S. at 345. Justice Harlan concurred, objecting both to the Court’s manner of overruling Betts v. Brady and to the incorporation implications of the opinion. Id. at 349.

224 Scott v. Illinois, 440 U.S. 367 (1979), adopted a rule of actual punishment and thus modified Argersinger v. Hamlin, 407 U.S. 25 (1972), which had held counsel required if imprisonment were possible. The Court has also extended the right of assistance of counsel to juvenile proceedings. In re Gault, 387 U.S. 1 (1967). See also Specht v. Patterson, 386 U.S. 605 (1967).
tionary period is imposed, on the theory that any future incarceration which occurred would be based on the original uncounseled conviction.225

Because the absence of counsel when a defendant is convicted or pleads guilty goes to the fairness of the proceedings and undermines the presumption of reliability that attaches to a judgment of a court, Gideon has been held fully retroactive, so that convictions obtained in the absence of counsel without a valid waiver are not only voidable,226 but also may not be subsequently used either to support guilt in a new trial or to enhance punishment upon a valid conviction.227

Protection of the Right to Retained Counsel.—The Sixth Amendment has also been held to protect absolutely the right of a defendant to retain counsel of his choice and to be represented in the fullest measure by the person of his choice. Thus, in Chandler v. Fretag,228 when a defendant appearing to plead guilty on a house-breaking charge was orally advised for the first time that, because of three prior convictions for felonies, he would be tried also as an habitual criminal and if convicted would be sentenced to life imprisonment, the court’s denial of his request for a continuance in order to consult an attorney was a violation of his Fourteenth Amendment due process rights. “Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified.... A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth.”229 But the right to retain counsel of choice does not bar operation of forfeiture

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227 Burgett v. Texas, 389 U.S. 109 (1967) (admission of record of prior counselless conviction at trial with instruction to jury to regard it only for purposes of determining sentence if it found defendant guilty but not to use it in considering guilt inherently prejudicial); United States v. Tucker, 404 U.S. 443 (1972) (error for sentencing judge in 1953 to have relied on two previous convictions at which defendant was without counsel); Loper v. Beto, 405 U.S. 473 (1972) (error to have permitted counseled defendant in 1947 trial to have his credibility impeached by introduction of prior uncounseled convictions in the 1930’s; Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented); But see Nichols v. United States, 511 U.S. 738 (1994) (as Scott v. Illinois, 440 U.S. 367 (1979) provides that an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction may be used as the basis for penalty enhancement upon a subsequent conviction).
228 348 U.S. 3 (1954).
229 348 U.S. at 9, 10. See also House v. Mayo, 324 U.S. 42 (1945); Hawk v. Olson, 326 U.S. 271 (1945); Reynolds v. Cochran, 365 U.S. 525 (1961).
provisions, even if the result is to deny to a defendant the wherewithal to employ counsel. In *Caplin & Drysdale v. United States*, the Court upheld a federal statute requiring forfeiture to the government of property and proceeds derived from drug-related crimes constituting a "continuing criminal enterprise," even though a portion of the forfeited assets had been used to retain defense counsel. While a defendant may spend his own money to employ counsel, the Court declared, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice." Because the statute vests title to the forfeitable assets in the United States at the time of the criminal act, the defendant has no right to give them to a "third party" even if the purpose is to exercise a constitutionally protected right.

Whenever defense counsel is representing two or more defendants and asserts in timely fashion to the trial judge that because of possible conflicts of interest between or among his clients he is unable to render effective assistance, the judge must examine the claim carefully, and unless he finds the risk too remote he must permit or appoint separate counsel. Subsequently, the Court elaborated upon this principle and extended it. First, the Sixth Amendment right to counsel applies to defendants who retain private counsel as well as to defendants served by appointed counsel. Second, judges are not automatically required to initiate an inquiry into the propriety of multiple representation, being able to assume in the absence of undefined "special circumstances" that no conflict exists. Third, to establish a violation, a defendant must show an "actual conflict of interest which adversely affected his lawyer's performance." Once it is established that a conflict affected the lawyer's action, however, prejudice need not be proved.

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232 491 U.S. at 626.
233 The statute was interpreted in United States v. Monsanto, 491 U.S. 600 (1989), as requiring forfeiture of all assets derived from the covered offenses, and as making no exception for assets the defendant intends to use for his defense.
234 Dissenting Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, described the Court's ruling as allowing the Sixth Amendment right to counsel of choice to be "outweighed by a legal fiction." 491 U.S. at 644 (dissenting from both *Caplin & Drysdale* and *Monsanto*).
237 446 U.S. at 348-50. For earlier cases presenting more direct violations of defendant's rights, see Glasser v. United States, 315 U.S. 60 (1942); United States v. Hayman, 342 U.S. 205 (1952); and Ellis v. United States, 365 U.S. 674 (1960).
“[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments.”

So saying, the Court invalidated a statute empowering every judge in a nonjury criminal trial to deny the parties the right to make a final summation before rendition of judgment which had been applied in the specific case to prevent defendant’s counsel from making a summation. The opportunity to participate fully and fairly in the adversary factfinding process includes counsel’s right to make a closing argument. And, in Geders v. United States, the Court held that a trial judge’s order preventing defendant from consulting his counsel during a 17-hour overnight recess between his direct and cross-examination, in order to prevent tailoring of testimony or “coaching,” deprived defendant of his right to assistance of counsel and was invalid. Other direct and indirect restraints upon counsel and his discretion have been found to be in violation of the Amendment. Actions of governmental investigative agents may interfere as well with the relationship of defense and counsel. Actions of governmental investigative agents may interfere as well with the relationship of defense and counsel.

Effective Assistance of Counsel.—“[T]he right to counsel is the right to the effective assistance of counsel.” From the beginning of the cases holding that counsel must be appointed for defendants unable to afford to retain a lawyer, the Court has indicated that appointment must be made in a manner that affords “effective aid in the preparation and trial of the case.” Of course, the government must not interfere with representation, either...

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240 Geders was distinguished in Perry v. Leeke, 488 U.S. 272 (1989), in which the Court upheld a trial court’s order that the defendant and his counsel not consult during a 15-minute recess between the defendant’s direct and cross-examination, in order to prevent tailoring of testimony or “coaching,” deprived defendant of his right to assistance of counsel and was invalid.
241 E.g., Ferguson v. Georgia, 365 U.S. 570 (1961) (where defendant was prevented by statute from giving sworn testimony in his defense, the refusal of a state court to permit defense counsel to question him to elicit his unsworn statement denied due process because it denied him assistance of counsel); Brooks v. Tennessee, 406 U.S. 605 (1972) (alternative holding) (statute requiring defendant to testify prior to any other witness for defense or to forfeit the right to testify denied him due process by depriving him of decision of counsel on questions whether to testify and when).
242 United States v. Morrison, 449 U.S. 361 (1981) (Court assumed that investigators who met with defendant, on another matter, without knowledge or permission of counsel and who disparaged counsel and suggested she could do better without him interfered with counsel, but held that in absence of showing of adverse consequences to representation, dismissal of indictment was inappropriate remedy).
through the manner of appointment or through the imposition of restrictions upon appointed or retained counsel that would impede his ability fairly to provide a defense, but the Sixth Amendment goes further than that. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.

That is, a criminal trial initiated and conducted by government is state action that may be so fundamentally unfair that no conviction obtained thereby may be allowed to stand, irrespective of the possible fact that government did nothing itself to bring about the unfairness. Thus, ineffective assistance provided by retained counsel provides a basis for finding a Sixth Amendment denial in a trial.

The trial judge must not only refrain from creating a situation of ineffective assistance, but may well be obligated under certain circumstances to inquire whether defendant’s counsel, because of a possible conflict of interest or otherwise, is rendering or may render ineffective assistance. A much more difficult issue is presented when a defendant on appeal or in a collateral proceeding alleges that his counsel was incompetent or was not competent enough to provide effective assistance. While the Court touched on the question in 1970, it was not until 1984, in Strickland v.廀
Washington, \textsuperscript{250} that the Court articulated a general test for ineffective assistance of counsel in criminal trials and in capital sentencing proceedings. \textsuperscript{251}

There are two components to the test: deficient attorney performance and resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question. Although the gauge of effective attorney performance is an objective standard of reasonableness, the Court concluded that “[j]udicial scrutiny of counsel’s performance must be highly deferential.” Strategic choices made after thorough investigation of relevant law and facts are “virtually unchallengeable,” as are “reasonable” decisions making investigation unnecessary. \textsuperscript{252} In order to establish prejudice resulting from attorney error, the defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” \textsuperscript{253}

In \textit{Strickland}, neither part of the test was satisfied. The attorney’s decision to forego character and psychological evidence in the capital sentencing proceeding in order to avoid evidence of the defendant’s criminal history was deemed “the result of reasonable professional judgment,” and prejudice could not be shown because “the overwhelming aggravating factors” outweighed whatever evidence of good character could have been presented. \textsuperscript{254} In \textit{Lockhart v. Fretwell}, \textsuperscript{255} the Court refined the \textit{Strickland} test to require that not only would a different trial result be probable because of attor-

\textsuperscript{250} 466 U.S. 668 (1984).

\textsuperscript{251} \textit{Strickland} involved capital sentencing, and the Court left open the issue of what standards might apply in ordinary sentencing, where there is generally far more discretion than in capital sentencing, or in the guilt/innocence phase of a capital trial. 466 U.S. at 686.

\textsuperscript{252} 466 U.S. at 689-91. The obligation is to stay within the wide range of legitimate, lawful, professional conduct; there is no obligation to assist the defendant in presenting perjured testimony. Nix v. Whiteside, 475 U.S. 157 (1986). See also Georgia v. McCollum, 505 U.S. 42 (1992) (no right to carry out through counsel the racially discriminatory exclusion of jurors during voir dire). Also, “effective” assistance of counsel does not guarantee the accused a “meaningful relationship” of “rapport” with his attorney such that he is entitled to a continuance in order to change attorneys during a trial. Morris v. Slappy, 461 U.S. 1 (1983). See also Jones v. Barnes, 463 U.S. 745 (1983) (no obligation to present on appeal all nonfrivolous issues requested by defendant; appointed counsel may exercise his professional judgement in determining which issues are best raised on appeal).

\textsuperscript{253} 466 U.S. at 694.

\textsuperscript{254} 466 U.S. at 699. Accord, Darden v. Wainwright, 477 U.S. 168 (1986) (decision not to introduce mitigating evidence). In Hill v. Lockhart, 474 U.S. 52 (1985), the Court applied the Strickland test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty.

\textsuperscript{255} 506 U.S. 364 (1993).
However, the Court has since held that *Lockhart* was merely intended to prevent a defendant from benefitting from undeserved “windfalls” in the trial process, and was not an invitation to courts to weigh and discount the prejudicial effect of a changed trial result. Further, there are times when a court is required to presume prejudice, i.e. there can be “circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.” These situations include actual or constructive denial of counsel, denial of such basics as the right to effective cross-examination, or failure of counsel to subject the prosecution’s case to meaningful adversarial testing. However, “[a]part from circumstances of that magnitude . . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice].”

**Self-Representation.**—The Court has held that the Sixth Amendment, in addition to guaranteeing the right to retained or appointed counsel, also guarantees a defendant the right to represent himself. It is a right the defendant must adopt knowingly and intelligently; under some circumstances the trial judge may deny the authority to exercise it, as when the defendant simply

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256 506 U.S. at 368-70 (failure of counsel to raise a constitutional claim that was valid at time of trial did not constitute “prejudice” because basis of claim had since been overruled).
260 *But see Bell v. Cone*, 122 S. Ct. 1843 (2002) (failure to introduce mitigating evidence and waiver of closing argument in penalty phase of death penalty case was not failure to test prosecution’s case, where mitigating evidence had been presented during guilt phase and where waiver of argument deprived skilled prosecutor an opportunity for rebuttal); *Mickens v. Taylor*, 122 S. Ct. 1237 (2002) (failure of judge who knew or should have known of an attorney’s conflicting interest to inquire as to whether such conflict was prejudicial not grounds for automatic reversal).
262 *Faretta v. California*, 422 U.S. 806 (1975). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. Id. at 834–35 n.46. Related to the right of self-representation is the right to testify in one’s own defense. *Rock v. Arkansas*, 483 U.S. 44 (1987) (*per se* rule excluding all hypnotically refreshed testimony violates right).
lacks the competence to make a knowing or intelligent waiver of counsel or when his self-representation is so disruptive of orderly procedures that the judge may curtail it. The right applies only at trial; there is no constitutional right to self-representation on direct appeal from a criminal conviction. 263

The essential elements of self-representation were spelled out in McKaskle v. Wiggins, 264 a case involving the self-represented defendant’s rights vis-a-vis “standby counsel” appointed by the trial court. The “core of the Faretta right” is that the defendant “is entitled to preserve actual control over the case he chooses to present to the jury,” and consequently, standby counsel’s participation “should not be allowed to destroy the jury’s perception that the defendant is representing himself.” 265 But participation of standby counsel even in the jury’s presence and over the defendant’s objection does not violate the defendant’s Sixth Amendment rights when serving the basic purpose of aiding the defendant in complying with routine courtroom procedures and protocols and thereby relieving the trial judge of these tasks. 266

Right to Assistance of Counsel in Nontrial Situations

Judicial Proceedings Before Trial.—Dicta in Powell v. Alabama 267 indicated that “during perhaps the most critical period of the proceedings ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants ... [are] as much entitled to such aid [of counsel] during that period as at the trial itself.” This language has gradually been expanded upon and the Court has developed a concept of “a critical stage in a criminal proceeding” as indicating when the defendant must be represented by counsel. Thus, in Hamilton v. Alabama, 268 the Court noted that arraignment under state law was a “critical stage” because the defense of insanity had to be pleaded then or lost, pleas in abatement had to be made then, and motions to quash on the ground of racial exclusion of grand jurors or that the grand jury was improperly drawn had to be made then. White v. Maryland 269 set aside a conviction obtained at a trial at which defendant’s plea of guilty, entered at a preliminary hearing

265 465 U.S. at 178.
266 465 U.S. at 184.
267 287 U.S. 45, 57 (1932).
where he was without counsel, was introduced as evidence against him at trial. Finally in Coleman v. Alabama, the Court denominated a preliminary hearing as a "critical stage" necessitating counsel even though the only functions of the hearing were to determine probable cause to warrant presenting the case to a grand jury and to fix bail; no defense was required to be presented at that point and nothing occurring at the hearing could be used against the defendant at trial. The Court hypothesized that a lawyer might by skilled examination and cross-examination expose weaknesses in the prosecution's case and thereby save the defendant from being bound over, and could in any event preserve for use in cross-examination at trial and impeachment purposes testimony he could elicit at the hearing; he could discover as much as possible of the prosecution's case against defendant for better trial preparation; and he could influence the court in such matters as bail and psychiatric examination. The result seems to be that reached in pre-Gideon cases in which a defendant was entitled to counsel if a lawyer might have made a difference.

**Custodial Interrogation.**—At first, the Court followed the rule of "fundamental fairness," assessing whether under all the circumstances a defendant was so prejudiced by the denial of access to counsel that his subsequent trial was tainted. It was held in Spano v. New York that under the totality of circumstances a confession obtained in a post-indictment interrogation was involuntary, and four Justices wished to place the holding solely on the basis that post-indictment interrogation in the absence of defendant's lawyer was a denial of his right to assistance of counsel. That holding was made in Massiah v. United States, in which federal officers caused an informer to elicit from the already-indicted defendant, who was represented by a lawyer, incriminating admit-

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270 399 U.S. 1 (1970). Justice Harlan concurred solely because he thought the precedents compelled him to do so, id. at 19, while Chief Justice Burger and Justice Stewart dissented. Id. at 21, 25. Inasmuch as the role of counsel at the preliminary hearing stage does not necessarily have the same effect upon the integrity of the factfinding process as the role of counsel at trial, Coleman was denied retroactive effect in Adams v. Illinois, 405 U.S. 278 (1972). Justice Blackmun joined Chief Justice Burger in pronouncing Coleman wrongly decided. Id. at 285, 286. Hamilton and White, however, were held to be retroactive in Arsenault v. Massachusetts, 393 U.S. 5 (1968).


272 Crooker v. California, 357 U.S. 433 (1958) (five-to-four decision); Cicenia v. Lagay, 357 U.S. 504 (1958) (five-to-three).


sions which were secretly overheard over a broadcasting unit. Then, in Escobedo v. Illinois, the Court held that preindictment interrogation was a violation of the Sixth Amendment. But Miranda v. Arizona switched from reliance on the Sixth Amendment to the Fifth Amendment’s self-incrimination clause, although that case still placed great emphasis upon police warnings with regard to counsel and foreclosure of interrogation in the absence of counsel without a valid waiver by defendant.

Massiah was reaffirmed and in some respects expanded by the Court. Thus, in Brewer v. Williams, the right to counsel was found violated when police elicited from defendant incriminating admissions not through formal questioning but rather through a series of conversational openings designed to play on the defendant’s known weakness. The police conduct occurred in the post-arraignment period in the absence of defense counsel and despite assurances to the attorney that defendant would not be questioned in his absence. United States v. Henry held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him payment under a contingent fee arrangement if he would “pay attention” to incriminating remarks initiated by the defendant and others. The Court concluded that even if the government agents did not intend the informant to take affirmative steps to elicit incriminating statements from the defendant in the absence of counsel, the agents must have known that result would follow.

The Court has extended the Edwards v. Arizona rule protecting in-custody requests for counsel to post-arraignment situations where the right derives from the Sixth Amendment rather than the Fifth. Thus, the Court held in Michigan v. Jackson, “if police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant’s right to counsel for that police-initiated interrogation is invalid.” The Court concluded that “the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been

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formally charged with an offense than before.” 281 The protection, however, is not as broad under the Sixth Amendment as it is under the Fifth. While Edwards has been extended to bar custodial questioning stemming from a separate investigation as well as questioning relating to the crime for which the suspect was arrested, 282 this extension does not apply for purposes of the Sixth Amendment right to counsel. The Sixth Amendment right is “offense-specific,” and so also is “its Michigan v. Jackson effect of invalidating subsequent waivers in police-initiated interviews.” 283 Therefore, while a defendant who has invoked his Sixth Amendment right to counsel with respect to the offense for which he is being prosecuted may not waive that right, he may waive his Miranda-based right not to be interrogated about unrelated and uncharged offenses. 284

The remedy for violation of the Sixth Amendment rule is exclusion from evidence of statements so obtained. 285 And, while the basis for the Sixth Amendment exclusionary rule—to protect the right to a fair trial—differs from that of the Fourth Amendment rule—to deter illegal police conduct—exceptions to the Fourth Amendment’s exclusionary rule can apply as well to the Sixth. In Nix v. Williams, 286 the Court held the “inevitable discovery” exception applicable to defeat exclusion of evidence obtained as a result of an interrogation violating the accused’s Sixth Amendment rights. “Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial.” 287 Also, an exception to the Sixth Amendment ex-

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281 475 U.S. at 621. If a prisoner does not ask for the assistance of counsel, however, and voluntarily waives his rights following a Miranda warning, these reasons disappear. Moreover, although the right to counsel is more difficult to waive at trial than before trial, “whatever standards suffice for Miranda’s purposes will also be sufficient [for waiver of Sixth Amendment rights] in the context of postindictment questioning.” Patterson v. Illinois, 487 U.S. 285, 298 (1988).


283 McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). The reason why the right is “offense-specific” is that “it does not attach until a prosecution is commenced.” Id.

284 Rejecting an exception to the offense-specific limitation for crimes that are closely related factually to a charged offense, the Court instead borrowed the Blockburger test from double-jeopardy law: if the same transaction constitutes a violation of two separate statutory provisions, the test is “whether each provision requires proof of a fact which the other does not.” Texas v. Cobb, 532 U.S. 162, 173 (2001). This meant that the defendant, who had been charged with burglary, had a right to counsel on that charge, but not with respect to murders committed during the burglary.


287 467 U.S. at 446.
clusionary rule has been recognized for the purpose of impeaching the defendant’s trial testimony. 288

Lineups and Other Identification Situations.—The concept of the “critical stage” was again expanded and its rationale formulated in United States v. Wade, 289 which, with Gilbert v. California, 290 held that lineups are a critical stage and that in-court identification of defendants based on out-of-court lineups or show-ups without the presence of defendant’s counsel is inadmissible. The Sixth Amendment guarantee, said Justice Brennan, was intended to do away with the common-law limitation of assistance of counsel to matters of law, excluding matters of fact. The abolition of the fact-law distinction took on new importance due to the changes in investigation and prosecution since adoption of the Sixth Amendment. “When the Bill of Rights was adopted there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him and the evidence was marshalled, largely at the trial itself. In contrast, today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings.... The plain wording of this guarantee thus encompasses counsel’s assistance whenever necessary to assure a meaningful ‘defence.’” 291

“It is central to [the principle of Powell v. Alabama] that in addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” 292 Counsel’s presence at a lineup is constitutionally necessary because the lineup stage is filled with numerous possibilities for errors, both inadvertent and intentional, which cannot adequately be discovered and remedied at trial. 293 However, because there was less certainty and

288 Michigan v. Harvey, 494 U.S. 344 (1990) (postarraignment statement taken in violation of Sixth Amendment is admissible to impeach defendant’s inconsistent trial testimony).
292 388 U.S. at 226 (citations omitted).
293 388 U.S. at 227-39. Previously, the manner of an extra-judicial identification affected only the weight, not the admissibility, of identification testimony at trial. Justices White, Harlan, and Stewart dissented, denying any objective need for the Court’s per se rule and doubting its efficacy in any event. Id. at 250.
frequency of possible injustice at this stage, the Court held that the two cases were to be given prospective effect only; more egregious instances, where identification had been based upon lineups conducted in a manner that was unnecessarily suggestive and conducive to irreparable mistaken identification, could be invalidated under the due process clause.\footnote{Stovall v. Denno, 388 U.S. 293 (1967).} The \textit{Wade-Gilbert} rule is inapplicable to other methods of obtaining identification and other evidentiary material relating to the defendant, such as blood samples, handwriting exemplars, and the like, because there is minimal risk that the absence of counsel might derogate from the defendant's right to a fair trial.\footnote{Gilbert v. California, 388 U.S. 263, 265–67 (1967) (handwriting exemplars); Schmerber v. California, 384 U.S. 757, 765–66 (1966) (blood samples).}

In \textit{United States v. Ash},\footnote{Schmerber v. California, 384 U.S. 757, 765–66 (1966) (blood samples).} the Court redefined and modified its "critical stage" analysis. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in the light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."\footnote{413 U.S. at 309-10, 312-13. Justice Stewart, concurring on other grounds, rejected this analysis, id. at 321, as did the three dissenters. Id. at 326, 338–344. “The fundamental premise underlying all of this Court’s decisions holding the right to counsel applicable at ‘critical’ pretrial proceedings, is that a ‘stage’ of the prosecution must be deemed ‘critical’ for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary ‘to protect the fairness of the trial itself.’” Id. at 339 (Justice Brennan dissenting). Examination of defendant by a court-appointed psychiatrist to determine his competency to stand trial, after his indictment, was a "critical" stage, and he was entitled to the assistance of counsel before submitting to it. Estelle v. Smith, 451 U.S. 454, 469–71 (1981). Constructive notice is insufficient to alert counsel to a psychiatric examination to assess future dangerousness of an indicted client. Satterwhite v. Texas, 486 U.S. 249 (1987) (also subjecting \textit{Estelle v. Smith} violations to harmless error analysis in capital cases).} Therefore, unless the pretrial stage involved the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.

Since the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, and therefore there was no trial-like confrontation, and since the possibilities of
abuse in a photographic display are discoverable and reconstructable at trial by examination of witnesses, an indicted defendant is not entitled to have his counsel present at such a display.\textsuperscript{298} 

Both Wade and Gilbert had already been indicted and counsel had been appointed to represent them when their lineups were conducted, a fact noted in the opinions and in subsequent ones,\textsuperscript{299} but the cases in which the rulings were denied retroactive application involved preindictment lineups.\textsuperscript{300} Nevertheless, in Kirby v. Illinois \textsuperscript{301} the Court held that no right to counsel existed with respect to lineups that precede some formal act of charging a suspect. The Sixth Amendment does not become operative, explained Justice Stewart’s plurality opinion, until “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearings, indictment, information, or arraignment… The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the ‘criminal prosecutions’ to which alone the explicit guarantees of the Sixth Amendment are applicable.”\textsuperscript{302} The Court’s distinguishing of the underlying basis for Miranda v. Arizona\textsuperscript{303} left that case basically unaffected by Kirby, but it appears...

\textsuperscript{298}413 U.S. at 317-21. The due process standards are discussed under the Fourteenth Amendment, “Criminal Identification Process,” infra.
\textsuperscript{301}406 U.S. 682, 689 (1972).
\textsuperscript{302}406 U.S. at 689-90. Justices Brennan, Douglas, and Marshall, dissenting, argued that it had never previously been doubted that Wade and Gilbert applied in preindictment lineup situations and that in any event the rationale of the rule was no different whatever the formal status of the case. Id. at 691. Justice White, a dissenter in Wade and Gilbert, dissented simply on the basis that those two cases controlled this one. Id. at 705. Indictment, as the quotation from Kirby indicates, is not a necessary precondition. Any initiation of judicial proceedings suffices. E.g., Brewer v. Williams, 430 U.S. 387 (1977) (suspect had been seized pursuant to an arrest warrant, arraigned, and committed by court). United States v. Gouveia, 467 U.S. 180 (1984) (Sixth Amendment attaches as of arraignment—there is no right to counsel for prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes).
\textsuperscript{303}“The Miranda decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory...
that Escobedo v. Illinois,\(^{304}\) and perhaps other cases, are greatly restricted thereby.

**Post-Conviction Proceedings.**—Counsel is required at the sentencing stage,\(^{305}\) and the Court has held that where sentencing was deferred after conviction and the defendant was placed on probation, he must be afforded counsel at a hearing on revocation of probation and imposition of the deferred sentence.\(^{306}\) Beyond this stage, however, it would appear that the issue of counsel at hearings on the granting of parole or probation, the revocation of parole which has been imposed following sentencing, and prison disciplinary hearings will be determined according to due process and equal protection standards rather than by further expansion of the Sixth Amendment.\(^{307}\)

**Noncriminal and Investigatory Proceedings.**—Commitment proceedings which lead to the imposition of essentially criminal punishment are subject to the due process clause and require the assistance of counsel.\(^{308}\) A state administrative investigation by a fire marshal inquiring into the causes of a fire was held not to be a criminal proceeding and hence, despite the fact that the petitioners had been committed to jail for noncooperation, not the type of hearing at which counsel was requisite.\(^{309}\) Another decision refused to extend the right to counsel to investigative proceedings antedating a criminal prosecution, and sustained the contempt conviction of private detectives who refused to testify before a judge authorized to conduct a non-prosecutorial, fact-finding inquiry akin to a grand jury proceeding, and who based their refusal on the ground that their counsel were required to remain outside the hearing room.\(^{310}\)

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\(^{304}\) "But Escobedo is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the 'prime purpose' of Escobedo was not to vindicate the constitutional right to counsel as such, but, like Miranda, 'to guarantee full effectuation of the privilege against self-incrimination....'" Johnson v. New Jersey, 384 U.S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of Escobedo to its own facts, Johnson v. New Jersey, supra, at 733–34, and those facts are not remotely akin to the facts of the case before us." 406 U.S. at 689. *But see* id. at 693 n.3 (Justice Brennan dissenting).

\(^{305}\) Townsend v. Burke, 334 U.S. 736 (1948).


\(^{308}\) Specht v. Patterson, 386 U.S. 605 (1967).


## SEVENTH AMENDMENT

### CIVIL TRIALS

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CIVIL TRIALS

SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

TRIAL BY JURY IN CIVIL CASES

The Right and the Characteristics of the Civil Jury

History.—On September 12, 1787, as the Convention was in its final stages, Mr. Williamson of North Carolina “observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it.” The comment elicited some support and the further observation that because of the diversity of practice in civil trials in the States it would be impossible to draft a suitable provision. When on September 15 it was moved that a clause be inserted in Article III, § 2, to guarantee that “a trial by jury shall be preserved as usual in civil cases,” this objection seems to have been the only one urged in opposition and the motion was defeated. The omission, however, was cited by many opponents of ratification and “was pressed with an urgency and zeal . . . well-nigh preventing its ratification.” A guarantee of right to jury in civil cases was one of the amendments urged on Congress by the ratifying conventions and it was included from the first among Madison’s proposals to the House. It does not appear that the text

2 Id. at 628.
3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1757 (1833). “[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty.” Id. at 1762.
4 J. ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1836) (New Hampshire); 2 id. at 399–414 (New York); 3 id. at 658 (Virginia).
5 1 ANNALS OF CONGRESS 436 (1789). “In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.”
of the proposed amendment or its meaning was debated during its passage.⁶

**Composition and Functions of Civil Jury.**—Traditionally, the Supreme Court has treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it “existed under the English common law when the amendment was adopted.”⁷ The right was to “a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.”⁸ Decision of the jury must be by unanimous verdict.⁹ In *Colgrove v. Battin*,¹⁰ however, the Court by a five-to-four vote held that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and congressional enactments. By the reference in the Amendment to the “common law,” the Court thought, “the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury.”¹¹

The Amendment has for its primary purpose the preservation of “the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of fact are to be determined by the jury under appropriate

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⁶It is simply noted in 1 Annals of Cong. 760 (1789), that on August 18 the House “considered and adopted” the committee version: “In suits at common law, the right of trial by jury shall be preserved.” On September 7, the Senate Journal states that this provision was adopted after insertion of “where the consideration exceeds twenty dollars.” 2 B. Schwartz, The Bill of Rights: A Documentary History 1150 (1971).


⁸Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).


¹⁰413 U.S. 149 (1973). Justices Marshall and Stewart dissented on constitutional and statutory grounds, id. at 166, while Justices Douglas and Powell relied only on statutory grounds without reaching the constitutional issue. Id. at 165, 188.

¹¹Id. at 155–56. The Court did not consider what number less than six, if any, would fail to satisfy the Amendment’s requirements. “What is required for a ‘jury’ is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals . . .” Id. at 160 n.16. Application of similar reasoning has led the Court to uphold elimination of the unanimity as well as the 12-person requirement for criminal trials. See Williams v. Florida, 399 U.S. 78 (1970) (jury size); Apodaca v. Oregon, 406 U.S. 404 (1972) (unanimity); and Sixth Amendment discussion supra “The Attributes of the Jury.”
instructions by the court." But it "does not exact the retention of old forms of procedure" nor does it "prohibit the introduction of new methods of ascertaining what facts are in issue" or new rules of evidence. Those matters which were tried by a jury in England in 1791 are to be so tried today and those matters which, as in equity, were tried by the judge in England in 1791 are to be so tried today, and when new rights and remedies are created the right of action should be analogized to its historical counterpart, at law or in equity, for the purpose of determining whether there is a right of jury trial," unless Congress has expressly prescribed the mode of trial.

Courts in Which the Guarantee Applies.—The Amendment governs only courts which sit under the authority of the United States, including courts in the territories and the District of Columbia, and does not apply generally to state courts. But when a state court is enforcing a federally created right, of which the right to jury trial is a substantial part, the States may not eliminate trial by jury as to one or more elements. Ordinarily, a federal court enforcing a state-created right will follow its own rules with regard to the allocation of functions between judge and jury, a rule the Court based on the "interests" of the federal court system, eschewing reliance on the Seventh Amendment but noting its influence. Where the "interests" of the state and federal sys-

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17 Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1851); Kennon v. Gilmer, 131 U.S. 22, 28 (1899).
18 Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).
20 Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1962). Four dissenters contended that the ruling was contrary to the unanimous decision in Bombolis.
systems can be reconciled, however, a court should endeavor to implement the rules of the state courts.  

Waiver of the Right.—Parties may enter into a stipulation waiving a jury and submitting the case to the court upon an agreed statement of facts, even without any legislative provision for waiver. Prior to adoption of the Federal Rules, Congress had, “by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing.” Under the Federal Rules of Civil Procedure, any party may make a timely demand for a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, and failure so to serve a demand constitutes a waiver of the right. However, a waiver is not to be implied from a request for a directed verdict.

Application of the Amendment

Cases “at Common Law”.—The coverage of the Amendment is “limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law.” The term “common law” was used in contradistinction to suits in which equitable rights alone were recognized at the time of the framing of the Amendment and equitable remedies were administered.

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22Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). In Gasperini, the Court examined whether New York state law, which required that state trial courts and courts of appeals review jury awards to determine if they “deviate materially from reasonable compensation,” should be applied by federal courts exercising diversity jurisdiction. The Court, in what has been characterized as a “state-friendly” decision, Leading Cases, 110 Harv. L. Rev. 266 (1996), found that absent inconsistent federal interests, the state standard of review should be applied by the federal courts. The Court held that a district court could apply such a standard consistent with Seventh Amendment precepts, but that the court of appeals could only review an award under an “abuse of discretion” standard. 518 U.S. at 434–35.


28Parsons v. Bedford, 28 U.S. (3 Pet.) 443, 447 (1830); Barton v. Barbour, 104 U.S. 126, 133 (1881). Formerly, it did not apply to cases where recovery of money damages was incidental to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325 (1886); Pease
trative of the Court’s course of decision on this subject are two unanimous decisions holding that civil juries were required, one in a suit by a landlord to recover possession of real property from a tenant allegedly behind on rent, the other in a suit for damages for alleged racial discrimination in the rental of housing in violation of federal law. In the former case, the Court reasoned that its Seventh Amendment precedents “require[d] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty.”

The statutory cause of action, the Court found, had several counterparts in the common law, all of which involved a right to trial by jury. In the latter case, the plaintiff had argued that the Amendment was inapplicable to new causes of action created by congressional action, but the Court disagreed. “The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.”

Omission of provision for a jury has been upheld in a number of other cases on the ground that the suit in question was not a suit at common law within the meaning of the Amendment, or that the issues raised were not peculiarly legal in their nature. Where

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31 Curtis v. Loether, 415 U.S. 189, 194 (1974). “A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants’ wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law.” Id. at 195. See also Chauffeurs, Teamsters and Helpers Local 391 v. Terry, 494 U.S. 558 (1990) (suit against union for back pay for breach of duty of fair representation is a suit for compensatory damages, hence plaintiff is entitled to a jury trial); Wooddell v. International Bhd. of Electrical Workers Local 71, 502 U.S. 93 (1991) (similar suit against union for money damages entitles union member to jury trial; a claim for injunctive relief was incidental to the damages claim). Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998) (jury trial required for copyright action with close analogue at common law, even though the relief sought is not actual damages but statutory damages based on what is “just”).

31 Among such actions or issues were, e.g., (1) enforcement of claims against the United States, McElrath v. United States, 102 U.S. 426, 440 (1880); see also Galloway v. United States, 319 U.S. 372, 388 (1943); (2) suit under a territorial statute authorizing a special nonjury tribunal to hear claims against a municipality having no legal obligation but based on moral obligation only, Guthrie Nat’l Bank v. Guthrie, 173 U.S. 528, 534 (1899); see also United States v. Realty Co., 163 U.S. 427, 439 (1896); New Orleans v. Clark, 95 U.S. 644, 653 (1877); (3) cancellation of a naturalization certificate for fraud, Luria v. United States, 231 U.S. 9, 27 (1913); (4) reversal of an order to deport an alien, Gee Wah Lee v. United States, 25 F.2d 107 (5th Cir. 1928), cert. denied, 277 U.S. 606 (1928); (5) damages for patent infringement, Filer & Stowell Co. v. Diamond Iron Works, 270 F. 489 (2d Cir. 1921), cert. denied, 256 U.S 691 (1921); (6) reversal of an award under the Longshoremen’s and Harbor Workers’ Compensation Act, Crowell v. Benson, 285 U.S. 22, 45 (1932); (7)
there is no direct historical antecedent dating to the adoption of the amendment, the court may also consider whether existing precedent and the sound administration of justice favor resolution by judges or juries. \textsuperscript{32}

The amendment does not apply to cases in admiralty and maritime jurisdiction, in which the trial is by a court without a jury, \textsuperscript{33} nor does it reach statutory proceedings unknown to the common law, such as an application to a court of equity to enforce an order of an administrative body. \textsuperscript{34} Thus, when Congress committed to administrative determination the finding of a violation of the Occupational Safety and Health Act with a discretion to fix a fine for a violation, the charged party being able to obtain judicial review of the administrative proceeding in a federal court of appeal and the fine being collectible in a suit in federal court, the argument that the absence of a jury trial in the process for a charged party violated the Seventh Amendment was unanimously rejected. “At least in cases in which ‘public rights’ are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.” \textsuperscript{35}

On the other hand, if Congress assigns such cases to Article III courts, a jury may be required. In \textit{Tull v. United States},\textsuperscript{36} the Court ruled that the Amendment requires trial by jury in civil actions to determine liability for civil penalties under the Clean Water Act, but not to assess the amount of penalty. The penal nature of the Clean Water Act’s civil penalty remedy distinguishes it from restitution-based remedies available in equity courts, and

\textsuperscript{32}Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) (interpretation and construction of terms underlying patent claims may be reserved entirely for the court).


\textsuperscript{36}481 U.S. 412 (1987).
therefore makes it a remedy of the type that could be imposed only by courts of law.\textsuperscript{37} On the other hand, a jury need not invariably determine the remedy in a trial in which it must determine liability. Because the Court viewed assessment of the amount of penalty as involving neither the “substance” nor a “fundamental element” of a common-law right to trial by jury, it held permissible the Act’s assignment of that task to the trial judge.

More recently still, the Court relied on a broadened concept of “public rights” to define the limits of congressional power to assign causes of action to tribunals in which jury trials are unavailable. In \textit{Granfinanciera, S.A. v. Nordberg},\textsuperscript{38} the Court declared that Congress “lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury.” The Seventh Amendment test, the Court indicated, is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal.\textsuperscript{39} As a general matter, “public rights” involve “the relationship between the Government and persons subject to its authority,” while “private rights” relate to “the liability of one individual to another.”\textsuperscript{40} While finding room for “some debate,” the Court determined that a bankruptcy trustee’s right to recover for a fraudulent conveyance “is more accurately characterized as a private rather than a public right,” at least

\begin{itemize}
  \item \textsuperscript{37} The statute itself specified only a maximum amount for the penalty; the Court derived its “punitive” characterization from indications in legislative history that Congress desired consideration of the need for retribution and deterrence as well as the need for restitution.
  \item \textsuperscript{38} 492 U.S. 33, 51–52 (1989).
  \item \textsuperscript{39} “[I]f a statutory cause of action . . . is not a ‘public right’ for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking ‘the essential attributes of the judicial power.’ And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties the right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” Id. at 53–54 (citation omitted).
  \item \textsuperscript{40} Id. at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22, 50, 51 (1932)). The Court qualified certain statements in \textit{Atlas Roofing} and in the process refined its definition of “public rights.” There are some “public rights” cases, the Court explained, in which “the Federal Government is not a party in its sovereign capacity,” but which involve “statutory rights that are integral parts of a public regulatory scheme.” It is in cases of this nature that Congress may “dispense with juries as factfinders through its choice of an adjudicative forum.” This does not mean, however, that Congress may assign “at least the initial factfinding in all cases involving controversies entirely between private parties to administrative tribunals or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts.” 492 U.S. at 55 n.10 (emphasis added).
\end{itemize}
when the defendant had not submitted a claim against the bankruptcy estate. 41

**The Continuing Law-Equity Distinction.**—The use of the term “common law” in the Amendment as indicating those cases in which the right to jury trial was to be preserved reflected, of course, the division of the English and United States legal systems into separate law and equity jurisdictions, in which actions cognizable in courts of law generally were triable to a jury while in equity there was no right to a jury. In the federal court system there were unitary courts having jurisdiction in both law and equity, but distinct law and equity procedures, including the use or nonuse of the jury. Adoption of the Federal Rules of Civil Procedure in 1938 merged law and equity into a single civil jurisdiction and established uniform rules of procedure. Legal and equitable claims which previously had to be brought as separate causes of action on different “sides” of the court could now be joined in a single action, and in some instances, such as compulsory counterclaims, had to be joined in one action. 42 But the traditional distinction between law and equity for purposes of determining when there was a constitutional right to trial by jury remained and led to some difficulty. 43

41 Id. at 55. On the other hand, a creditor who does submit a claim against the bankruptcy estate subjects himself to the bankruptcy court’s equitable power, and is not entitled to a jury trial when subsequently sued by the bankruptcy trustee to recover preferential monetary transfers. Langenkamp v. Culp, 498 U.S. 42 (1990).

42 5 J. Moore, Federal Practice §§ 38.01–38.05 (2d ed. 1971).

43 Under the old equity rules it had been held that the absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Hipp v. Babin, 60 U.S. (19 How.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid in the federal courts had to be sought in separate proceedings. Scott v. Neely, 140 U.S. 106, 109 (1891); Bennett v. Butterworth, 52 U.S. (11 How.) 669 (1850); Lewis v. Cocks, 90 U.S. (23 Wall.) 466, 470 (1874); Killian v. Ebbinghaus, 110 U.S. 568, 573 (1884); Buzard v. Houston, 119 U.S. 347, 351 (1886). Where an action at law evoked an equitable counterclaim the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, res judicata and collateral estoppel could operate so as to curtail the litigant’s right to a jury finding on factual issues common to both claims. But priority of scheduling was considered to be a matter of discretion. Federal statutes prohibiting courts of the United States from sustaining suits in equity where the remedy was complete at law served to guard the right of trial by jury and were liberally construed. Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932).

Nor was the distinction between law and equity to be obliterated by state legislation. Thompson v. Railroad Companies, 73 U.S. (6 Wall.) 134 (1868). So, where state law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it brought the case within the federal equity jurisdiction upon removal. Ascertainment of plaintiff’s demand being properly by action at law, however, the fact that the equity court had power to summon a jury on occasion did not afford an
This difficulty has been resolved by stressing the fundamental nature of the jury trial right and protecting it against diminution through resort to equitable principles. In *Beacon Theatres v. Westover*, the Court held that a district court erred in trying all issues itself in an action in which the plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it, and the defendant had filed a counterclaim alleging violation of the antitrust laws and asking for treble damages. It did not matter, the Court ruled, that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims. Subsequent jury trial of these issues would probably be precluded by collateral estoppel, hence "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." Then in *Dairy Queen v. Wood*, in which the plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried before

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45 Id. at 510–11.
a jury, because the primary rights being adjudicated were legal in character. Thus, the rule that emerged was that legal claims must be tried before equitable ones and before a jury if the litigant so wished.\textsuperscript{47}

In \textit{Ross v. Bernhard},\textsuperscript{48} the Court further held that the right to a jury trial depends on the nature of the issue to be tried rather than the procedural framework in which it is raised. The case involved a stockholder derivative action,\textsuperscript{49} which has always been considered to be a suit in equity. The Court agreed that the action was equitable but asserted that it involved two separable claims. The first, the stockholder’s standing to sue for a corporation, is an equitable issue; the second, the corporation’s claim asserted by the stockholder, may be either equitable or legal. Because the 1938 merger of law and equity in the federal courts eliminated any procedural obstacles to transferring jurisdiction to the law side once the equitable issue of standing was decided, the Court continued, if the corporation’s claim being asserted by the stockholder was legal in nature, it should be heard on the law side and before a jury.\textsuperscript{50} Whether this analysis will be followed in other areas so that the right to a jury trial extends to all legal issues in actions formerly within equity’s concurrent jurisdiction is a question now open.\textsuperscript{51}

\textsuperscript{47} If legal and equitable claims are joined, and the court erroneously dismisses the legal claims and decides common issues in the equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).

\textsuperscript{48} 396 U.S. 531 (1970).

\textsuperscript{49} The stockholders’ derivative action is a creation of equity made necessary by the traditional concept of “the corporate entity” or the “concept of separate personality.” That is, the corporation is an entity distinct and separate from its shareholders. Thus, while shareholders were relieved from unlimited liability for corporate liabilities, the complementary result was that harm to the corporation did not confer any right of action upon a shareholder to sue to right that harm. But if the harm were caused by the abuse of those who managed and controlled the corporation, the corporation naturally would not proceed against them and the common law courts would not allow the shareholders to bring an action running to the “separate personality” of the corporation; equity thus permitted a derivative action in which the shareholder is permitted to set in motion the adjudication of a cause of action belonging to the corporation. Prunty, \textit{The Shareholders’ Derivative Suit: Notes on Its Derivation}, 32 N.Y.U. L. Rev. 980 (1957).

\textsuperscript{50} Justices Stewart and Harlan and Chief Justice Burger dissented, arguing that the Seventh Amendment did not expand the right to a jury trial, that the Rules simply preserved the right as it had existed, and that it was error to think that the two could somehow “magically interact” to enlarge the right in a way that neither did alone. Ross v. Bernhard, 396 U.S. 531, 543 (1970).

\textsuperscript{51} Among the possibilities in which a legal right was enforceable in equity in the absence of an adequate remedy at law are suits to compel specific performance of a contract, suits for cancellation of a contract, and suits to enjoin tortious action. On \textit{Ross’} implications, see J. Moore, \textit{Federal Practice §§ 38.11[8-8], 38.11[9]} (2d ed. 1971).
Procedures Limiting Jury’s Role.—As was noted above, the primary purpose of the Amendment was to preserve the historic line separating the province of the jury from that of the judge, without at the same time preventing procedural improvement which did not transgress this line. Elucidating this formula, the Court has achieved the following results: it is constitutional for a federal judge, in the course of trial, to express his opinion upon the facts, provided all questions of fact are ultimately submitted to the jury, 52 to call the jury’s attention to parts of the evidence he deems of special importance, 53 being careful to distinguish between matters of law and matters of opinion in relation thereto, 54 to inform the jury when there is not sufficient evidence to justify a verdict, that such is the case, 55 to require a jury to answer specific interrogatories in addition to rendering a general verdict, 56 to direct the jury, after the plaintiff’s case is all in, to return a verdict for the defendant on the ground of the insufficiency of the evidence, 57 to set aside a verdict which in his opinion is against the law or the evidence, and order a new trial, 58 to refuse defendant a new trial on the condition, accepted by plaintiff, that the latter remit a portion of the damages awarded him, 59 but not, on the other hand, to deny plaintiff a new trial on the converse condition, although defendant accepted it. 60 Nor can a Court of Appeals reverse the jury’s finding on the issue of reasonableness of petitioner’s conduct, in an indemnity action for damages respondent had paid petitioner’s employee, on the ground that as a matter of law petitioner had not acted reasonably; “[u]nder the Seventh Amendment, that issue should have been left to the jury’s determination.” 61

58 Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1889).
59 Arkanaas Cattle Co. v. Mann, 130 U.S. 69, 74 (1899).
61 International Terminal Operating Co. v. N. V. Nederl. Amerik Stoomv. Maats., 393 U.S. 74, 75 (1968). But see Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967), where the Court held that the Seventh Amendment does not bar an appellate court from granting a judgment n. o. v. insofar as “there is no greater restriction on the province of the jury when an appellate court enters judg-
Directed Verdicts.—In 1913 the Court in Slocum v. New York Life Ins. Co.,62 held that a federal appeals court lacked authority to order the entry of a judgment contrary to the verdict in a case in which the federal trial court should have directed a verdict for one party, but the jury had found for the other party contrary to the evidence; the only course open to either court was to order a new trial. While plainly in accordance with the common law as it stood in 1791, the five-to-four decision was subjected to a heavy fire of professional criticism based on convenience and urging recognition of capacity for growth in the common law.63 Slocum was then impaired, if not completely undermined, by subsequent holdings.64

In the first of these cases, the Court held that a trial court had the right to enter a judgment for the plaintiff on the verdict of the jury after having reserved decision on a motion by the defendant for dismissal on the ground of insufficient evidence.65 The Court distinguished Slocum while noting that its ruling qualified some of its assertions in Slocum.66 In the second case67 the Court sustained a United States district court in rejecting the defendant’s motion for dismissal and in peremptorily directing a verdict for the plaintiff. The Supreme Court held that there was ample evidence to support the verdict and that the trial court, in following Arkansas procedure in the diversity action, had acted consistently with the Federal Conformity Act.68 In the third case,69 which involved

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62228 U.S. 364 (1913).
63But see Hetzel v. Prince William County, 523 U.S. 208 (1998) (when an appeals court affirms liability but orders the level of damages to be reconsidered, the plaintiff has a Seventh Amendment right either to accept the reduced award or to have a new trial).
65Lyon v. Mutual Benefit Ass’n, 305 U.S. 484 (1939).
67Galloway v. United States, 319 U.S. 372, 389 (1943), wherein the Court said “the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure,” citing Berry v. United States, 312 U.S. 450 (1941). In the latter case the Court remarked that the new rule has given “district judges, under certain circumstances, . . . the right (but not the mandatory duty) to enter a judgment contrary to the jury’s verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of facts—a jury being the constitutional tribunal provided for trying facts in courts of law.” Id. at 452–53.
an action against the Government for benefits under a war risk insurance policy which had been allowed to lapse, the trial court directed a verdict for the Government on the ground of the insufficiency of the evidence, and was sustained in so doing by both the appeals court and the Supreme Court. Three Justices, speaking by Justice Black, dissented in an opinion in which it is asserted that “today’s decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.”

That the Court should experience occasional difficulty in harmonizing the idea of preserving the historic common law covering the relations of judge and jury with the notion of a developing common law is not surprising.

Jury Trial Under the Federal Employers’ Liability Act.—
One aspect of the problem of delineating the respective provinces of judge and jury divided the Justices for a lengthy period but now appears quiescent—cases arising under the Federal Employers’ Liability Act. The argument was frequently couched by the majority in terms of protecting the function of the jury from usurpation by judges intent on subverting and limiting remedial legislation enacted by Congress, and by the minority in terms of the costs to the Supreme Court in time and effort spent in evaluating the quantum of evidence necessary to create a jury question.

Although the considerations present in the FELA cases were not inherently different from those in any civil case where the direction of a verdict or a decision of an issue by the court may raise sub silentio the issue whether the Seventh Amendment right to a

70. 319 U.S. 372, 397. The case, being a claim against the United States, need not have been tried by a jury except for the allowance of Congress.

71. See, e.g., Neely v. Martin K. Eby Construction Co., Inc., 386 U.S. 317 (1967), interpreting Rules 50(b), 50(c)(2) and 50(d) of the Federal Rules of Civil Procedure, as well as the Seventh Amendment.


jury trial has been impaired by court usurpation of the jury function, cases under the FELA, which retained the common-law requirements of negligence as a prerequisite to recovery, involved peculiarly difficult decisions as to the adequacy of proof of negligence. “Special and important reasons for the grant of certiorari in these cases are certainly present,” the Court wrote in a leading case, “when lower federal and state courts persistently deprive litigants of their right to a jury determination.”

The operating test was: “Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on ground of probability, attribute the result to other causes, including the employee’s contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.” Similar issues have arisen under such statutes as the Jones Act and the Safety Appliance Act.

“Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities.” A persistent dissent in the line of cases expressed the fear that in FELA cases “anything that a jury says goes, with the consequences that all meaningful judicial supervision over jury verdicts in such cases has been put at an end. . . If so, . . . the time has come when the Court should frankly say so. If not, then the Court should at least give expression to the standards by which the lower courts are to be guided in these cases.”

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Appeals From State Courts to the Supreme Court

The clause of the Amendment prohibiting the re-examination of any fact found by a jury is not restricted in its application to suits at common law tried before juries in courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court on appeal.\textsuperscript{79} Note, however, that the Court has frequently indicated that in cases involving a claim of a denial of constitutional rights it is free to examine and review the evidence upon which lower court conclusions are based, a position that under some circumstances could conflict with the principle of jury autonomy.\textsuperscript{80}


\textsuperscript{80} See Time, Inc. v. Pape, 401 U.S. 279, 284–92 (1971), and cases cited therein.
# EIGHTH AMENDMENT

## FURTHER GUARANTEES IN CRIMINAL CASES

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FURTHER GUARantees IN CRIMINAL CASES

Eighth Amendment

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

Excessive Bail

“This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. ‘... Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.’ “The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.” These two contrasting views of the “excessive bail” provision, uttered by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment.

The history of the bail controversy in England is crucial to understanding why the ambiguity exists. The Statute of Westminster the First of 1275 set forth a detailed enumeration of those offenses which were bailable and those which were not, and,
though supplemented by later statutes, it served for something like five-and-a-half centuries as the basic authority. 6 Darnel's Case, 7 in which the judges permitted the continued imprisonment of persons without bail merely upon the order of the King, was one of the moving factors in the enactment of the Petition of Right in 1628. 8 The Petition cited Magna Carta as proscribing the kind of detention that was permitted in Darnel's Case. The right to bail was again subverted a half-century later by various technical subterfuges by which petitions for habeas corpus could not be presented, 9 and Parliament reacted by enacting the Habeas Corpus Act of 1679, 10 which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set bail so high it could not be met, and Parliament responded by including in the Bill of Rights of 1689 11 a provision "that excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights, 12 was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention, 13 and was introduced verbatim by Madison in the House of Representatives. 14

Thus, in England the right to bail generally was conferred by the basic 1275 statute, as supplemented, the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679, and protection against abridgement through the fixing of an excessive bail was conferred by the Bill of Rights of 1689. In the United States, the Constitution protected habeas corpus in Article 1, § 9, but did not confer a right to bail. The question is, therefore, whether the First Congress in proposing the Bill of Rights knowingly sought to curtail excessive bail without guaranteeing a right

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7 3 How. St. Tr. 1 (1627).
8 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by Darnel's Case, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on habeas corpus to effectuation of the right to bail. Id. at 69.
11 1 W. & M. 2, ch. 2, clause 10.
13 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Constitution* 658 (2d ed. 1836).
14 1 *Annals of Congress* 438 (1789).
AMENDMENT 8—PUNISHMENT FOR CRIME

1567

to bail, or whether the phrase "excessive bail" was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States which had its origin in a provision of the Massachusetts Body of Liberties of 1641, guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions, this guarantee was contained in the Northwest Ordinance in 1787, along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789, enacted contemporaneously with the passage through Congress of the Bill of Rights. It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged.

Long unresolved was the issue of whether "preventive detention"—the denial of bail to an accused, unconvicted defendant because it is feared or it is found probable that if released he will be a danger to the community—is constitutionally permissible. Not until 1984 did Congress authorize preventive detention in federal criminal proceedings.

15 "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meantime, unlesse it be in Crimes Capital, and Contempts in open Court, and in such cases where some express act of Court doth allow it." Reprinted in I DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 79, 82 (Z. Chafee ed., 1951).

16 "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. Thorpe, The Federal and State Constitutions, H. Doc. No. 357, 59TH Congress, 2d Sess. 3061 (1909) (Pennsylvania, 1682). The 1776 Pennsylvania constitution contained the same clause in section 28, and in section 29 was a clause guaranteeing against excessive bail. Id. at 3089.

17 "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334 (1787), reprinted in 1 Stat. 50 n.

18 "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein...." 1 Stat. 91 § 33 (1789).

The Court first tested and upheld under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles.20 Then, in United States v. Salerno,21 the Court upheld application of preventive detention provisions of the Bail Reform Act of 1984 against facial challenge under the Eighth Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence. "[W]e reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."22 Instead, "the only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."23 Detention pending trial of "arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel" satisfies this requirement.24

Bail is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.25 If the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more."26 To challenge bail as excessive, one must move for a reduction, and if that motion is denied appeal to the Court of Appeals, and if unsuccessful then to the Supreme Court Justice sitting for that circuit.27 The Amendment is apparently inapplicable to postconviction release

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22 481 U.S. at 753.
23 481 U.S. at 754.
24 481 U.S. at 755. The Court also ruled that there was no violation of due process, the governmental objective being legitimate and there being a number of procedural safeguards (detention applies only to serious crimes, the arrestee is entitled to a prompt hearing; the length of detention is limited, and detainees must be housed apart from criminals).
25 Stack v. Boyle, 342 U.S. 1, 4-6 (1951).
26 United States v. Salerno, 481 U.S. at 754.
pending appeal, but the practice has apparently been to grant such releases.  

EXCESSIVE FINES

For years the Supreme Court had little to say about excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fines was apparent on the face of the record. Justice Brandeis once contended in dissent that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct, because it imposed additional mailing costs which grew day by day, amounted to an unlimited fine that was an “unusual” and “unprecedented” punishment proscribed by the Eighth Amendment. The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the equal protection clause, thus obviating any necessity to develop the meaning of “excessive fines” in relation to ability to pay. The Court has held the Clause inapplicable to civil jury awards of punitive damages in cases between private parties, “when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.” The Court based this conclusion on a review of the history and purposes of the Excessive Fines Clause. At the time the Eighth Amendment was adopted, the Court noted, “the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense.” The Eighth Amendment itself, as were antecedents of the Clause in the Virginia Declaration of Rights and in the English Bill of Rights of 1689, “clearly was adopted with the particular intent of placing limits on the powers of the new government.” Therefore, while leaving open the issues of whether the Clause has any applicability to civil penalties or to \textit{qui tam} actions, the Court determined that “the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.” The Court has held, however, that the excessive fines clause can be applied in civil forfeiture cases.

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28 Hudson v. Parker, 156 U.S. 277 (1895).
29 Ex parte Watkins, 32 U.S. (7 Pet.) 568, 574 (1833).
33 492 U.S. at 265.
34 492 U.S. at 266.
35 492 U.S. at 268.
36 In Austin v. United States, 509 U.S. 602 (1993), the Court noted that the application of the excessive fines clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be
In 1998, however, the Court injected vitality into the strictures of the clause. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”\(^\text{37}\) In *United States v. Bajakajian*, \(^\text{38}\) the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than $10,000 in currency out of the country forfeit the currency involved, which totaled $357,144. The Court held that the forfeiture \(^\text{39}\) in this particular case violated the Excessive Fines Clause because the amount forfeited was “grossly disproportionate to the gravity of defendant’s offense.” \(^\text{40}\) In determining proportionality, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense. \(^\text{41}\)

**CRUEL AND UNUSUAL PUNISHMENTS**

During congressional consideration of this provision one Member objected to “the import of [the words] being too indefinite” and another Member said: “No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this
kind.”42 It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants,43 but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.44 Though few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

**Style of Interpretation**

At first, the Court was inclined to an historical style of interpretation, determining whether or not a punishment was “cruel and unusual” by looking to see if it or a sufficiently similar variant was considered “cruel and unusual” in 1789.45 But in *Weems v. United States*46 it was concluded that the framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789, but had intended to prevent the authorization of “a coercive cruelty being exercised through other forms of punishment.” The Amendment therefore was of an “expansive and vital character”47 and, in the words of a later Court, “must draw its meaning from the evolving standards of decency that mark the

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42 1 ANNALS OF CONGRESS 754 (1789).
43 E.g., 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Constitution 111 (2d ed. 1836); 3 id. at 447–52.
44 See Granucci, ‘Nor Cruel and Unusual Punishments Inflicted’ : The Original Meaning, 57 CALIF. L. REV. 839 (1969). Disproportionality, in any event, was utilized by the Court in *Weems v. United States*, 217 U.S. 349 (1910). It is not clear what, if anything, the word “unusual” adds to the concept of “cruelty” (but see Furman v. Georgia, 408 U.S. 238, 276 n.20 (1972) (Justice Brennan concurring)), although it may have figured in *Weems*, 217 U.S. at 377, and in *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (plurality opinion), and it did figure in Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (“severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history”).
46 217 U.S. 349 (1910).
47 217 U.S. at 376–77.
progress of a maturing society.” 48 The proper approach to an interpretation of this provision has been one of the major points of difference among the Justices in the capital punishment cases. 49

Application and Scope

“Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture [such as drawing and quartering, embowelling alive, beheading, public dissecting, and burning alive], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.” 50

In upholding capital punishment inflicted by a firing squad, the Court not only looked to traditional practices but examined the history of executions in the territory concerned, the military practice, and current writings on the death penalty. 51 Relying on the Fourteenth Amendment’s Due Process Clause rather than the Eighth Amendment, the Court next approved electrocution as a permissible method of administering punishment. 52 Many years later, a divided Court, assuming the applicability of the Eighth Amendment to the States, held that a second electrocution following a mechanical failure at the first which injured but did not kill the condemned man did not violate the proscription. 53

Divestiture of the citizenship of a natural born citizen was held to be cruel and unusual punishment in Trop v. Dulles. 54 The Court viewed divestiture as a penalty more cruel and “more primitive

48 Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion). This oft-quoted passage was recently repeated, the Court adding that cruel and unusual punishment “is judged not by the standards that prevailed in 1685 … or when the Bill of Rights was adopted, but rather by those that currently prevail.” Atkins v. Virginia, 122 S. Ct. 2242, 2247 (2002).
50 Wilkerson v. Utah, 99 U.S. 130, 135 (1878).
51 Hanging was the other method of execution commonly used at the time, and implicitly approved by the Court.
52 In re Kemmler, 136 U.S. 436 (1890).
53 Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). Justice Frankfurter tested the issue by due process standards. Id. at 470 (concurring). Years earlier the Court, although recognizing that the Eight Amendment was then inapplicable to the states, opined in dictum that a fine and brief imprisonment for illegal sale of alcohol was not cruel and unusual punishment. Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475, 479–80 (1867).
54 356 U.S. 86 (1958). Again the Court was divided. Four Justices joined the plurality opinion while Justice Brennan concurred on the ground that the requisite relation between the severity of the penalty and legitimate purpose under the war power was not apparent. Id. at 114. Four Justices dissented, denying that denationalization was a punishment and arguing that instead it was merely a means by which Congress regulated discipline in the armed forces. Id. at 121, 124–27.
than torture,” inasmuch as it entailed statelessness or “the total destruction of the individual’s status in organized society.” “The question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.” A punishment must be examined “in light of the basic prohibition against inhuman treatment,” and the Amendment was intended to preserve the “basic concept … [of] the dignity of man” by assuring that the power to impose punishment is “exercised within the limits of civilized standards.”

**Capital Punishment**

The Court’s 1972 decision in *Furman v. Georgia*, finding constitutional deficiencies in the manner in which the death penalty was arrived at but not holding the death penalty unconstitutional *per se*, was a watershed in capital punishment jurisprudence. In the long run the ruling may have had only minor effect in determining who is sentenced to death and who is actually executed, but it had the indisputable effect of constitutionalizing capital sentencing law and of involving federal courts in extensive review of capital sentences. Prior to 1972, constitutional law governing capital punishment was relatively simple and straightforward. Capital punishment was constitutional, and there were few grounds for constitutional review. *Furman* and the five 1976 followup cases that reviewed state laws revised in light of *Furman* reaffirmed the constitutionality of capital punishment *per se*, but also opened up several avenues for constitutional review. Since 1976, the Court has issued a welter of decisions attempting to apply and reconcile the sometimes conflicting principles it had announced: that sentencing discretion must be confined through application of specific guidelines that narrow and define the category of death-eligible defendants and thereby prevent arbitrary imposition of the death penalty, but that jury discretion must also be preserved in order to weigh the mitigating circumstances of individual defendants who fall within the death-eligible class.

While the Court continues to tinker with application of these principles, it also has taken steps to attempt to reduce the many procedural and substantive opportunities for delay and defeat of
the carrying out of death sentences, and to give the states more leeway in administering capital sentencing. The early post-
Furman stage involving creation of procedural protections for capital defendants and premised on a “death is different” rationale, 58 gave way to increasing impatience with the delays made possible through procedural protections, especially those associated with federal habeas corpus review. 59 Having consistently held that capital punishment is not inherently unconstitutional, the Court seems bent on clarifying and even streamlining constitutionally required procedures so that those states that choose to impose capital punishment may do so without inordinate delays. In the habeas context, the interest in finality has trumped a death-is-different approach. 60 The writ has also been restricted statutorily. 61

Changed membership on the Court has had an effect. Gone from the Court are Justices Brennan and Marshall, whose belief that all capital punishment constitutes cruel and unusual punishment resulted in two automatic votes against any challenged death sentence. 62 Strong differences remain over such issues as the appropriate framework for consideration of aggravating and mitigating circumstances and the appropriate scope of federal review, but as of 2002 a Court majority still seemed committed to reducing

58 See, e.g., Gardner v. Florida, 430 U.S. 349, 357–58 (1977): “From the point of view of the defendant, [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”

59 See, e.g., Barefoot v. Estelle, 463 U.S. 880, 888 (1983): “unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit.” See also Gomez v. United States District Court, 503 U.S. 653 (1992) (vacating orders staying an execution, and refusing to consider, because of “abusive delay,” a claim that “could have been brought more than a decade ago”—that California’s method of execution (cyanide gas) constitutes cruel and unusual punishment).

60 In Herrera v. Collins, 506 U.S. 390, 405 (1993), the Court rejected the position that “the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus,” and also declared that, because of “the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, . . . the threshold showing for such an assumed right would necessarily be extraordinarily high.” Id. at 417.


62 Gone too is Justice Blackmun, whose early support for capital punishment gave way near the end of his career to a belief that the Court’s effort to reconcile the twin goals of fairness to the individual defendant and consistency and rationality of sentencing had failed, and that the death penalty “as currently administered, is unconstitutional.” Callins v. Collins, 510 U.S. 1141, 1159 (1994) (dissenting from denial of cert.)
obstacles created by federal review of death sentences imposed under state laws that have been upheld as constitutional.

**General Validity and Guiding Principles.**—In *Trop v. Dulles*, the majority refused to consider “the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment ... the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.” But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, and the Court eventually confronted the issues involved. The answers were not, it is fair to say, consistent.

A series of cases testing the means by which the death penalty was imposed culminated in what appeared to be a decisive rejection of the attack in *McGautha v. California*. Nonetheless, the Court then agreed to hear a series of cases directly raising the question of the validity of capital punishment under the cruel and unusual punishments clause, and, to considerable surprise, the Court held in *Furman v. Georgia* that the death penalty, at least as administered, did violate the Eighth Amendment. There was no unifying opinion of the Court in *Furman*; the five Justices in the majority each approached the matter from a different angle in a separate concurring opinion. Two Justices concluded that the death penalty was “cruel and unusual” *per se* because the imposition of death sentences imposed under state laws that have been upheld as constitutional.

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65. 402 U.S. 183 (1971). *McGautha* was decided in the same opinion with *Crampton v. Ohio*. *McGautha* raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the due process clause; *Crampton* raised the question whether due process was violated when both the issue of guilt or innocence and the issue of whether to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; while bifurcated proceedings might be desirable, they were not required by due process.
66. 408 U.S. 238 (1972). The change in the Court’s approach was occasioned by the shift of Justices Stewart and White, who had voted with the majority in *McGautha*. 
capital punishment “does not comporte with human dignity”\textsuperscript{67} or because it is “morally unacceptable” and “excessive.”\textsuperscript{68} One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment.\textsuperscript{69} Two Justices concluded that capital punishment was both “cruel” and “unusual” because it was applied in an arbitrary, “wanton,” and “freakish” manner\textsuperscript{70} and so infrequently that it served no justifying end.\textsuperscript{71}

Because only two of the Furman Justices thought the death penalty to be invalid in all circumstances, those who wished to re-instate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opinions.\textsuperscript{72} Enactment of death penalty statutes by 35 States following Furman led to renewed litigation, but not to the elucidation one might expect from a series of opinions.\textsuperscript{73} Instead, while the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state’s taking of human life,\textsuperscript{74} it chose several different

\textsuperscript{67} 408 U.S. at 257 (Justice Brennan).
\textsuperscript{68} 408 U.S. at 314 (Justice Marshall).
\textsuperscript{69} 408 U.S. at 240 (Justice Douglas).
\textsuperscript{70} 408 U.S. at 306 (Justice Stewart).
\textsuperscript{71} 408 U.S. at 310 (Justice White). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not “cruel and unusual” when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered “cruel and unusual.” Id. at 375 (Chief Justice Burger), 405 (Justice Blackmun), 414 (Justice Powell), 465 (Justice Rehnquist). Each of the dissenters joined each of the opinions of the others.
\textsuperscript{72} Collectors of judicial “put downs” of colleagues should note Justice Rehnquist’s characterization of the many expressions of faults in the system and their correction as “glossolalia.” Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).
\textsuperscript{73} Justice Frankfurter once wrote of the development of the law through “the process of litigating elucidation.” International Ass’n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. \textit{See}, e.g., Chief Justice Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) (“The signals from this Court have not … always been easy to decipher”); Justice White, id. at 622 (“The Court has now completed its about-face since \textit{Furman}”) (concurring in result); and Justice Rehnquist, id. at 629 (dissenting) (“the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed”), and id. at 632 (“I am frank to say that I am uncertain whether today’s opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years”).
\textsuperscript{74} On crimes not involving the taking of life or the actual commission of the killing by a defendant, \textit{see} Coker v. Georgia, 433 U.S. 584 (1977) (rape); Enmund v.
paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not per se cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in Furman. 75 Divisions among the Justices, however, made it difficult to ascertain the form which permissible statutory schemes may take. 76

Inasmuch as the three Justices in the majority in Furman who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition, 77 legislatures turned to enactment of statutes that purported to do away with these difficulties. One approach was to provide for automatic imposition of the death penalty upon conviction for certain forms of murder. More commonly, states established special procedures to follow in capital cases, and specified aggravating and mitigating factors that the sentencing authority must consider in imposing sentence. In five cases in 1976, the Court rejected automatic sentencing, but approved other statutes specifying factors for jury consideration. 78

Florida, 458 U.S. 782 (1982) (felony murder committed by confederate). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court’s narrowing of the crimes for which capital punishment may be imposed. The federal hijacking law, 49 U.S.C. § 1472, imposes death only when death occurs during commission of the hijacking. But the treason statute does not require a death to occur and represents a situation in which great and fatal danger might be presented. 18 U.S.C. § 2381.


77 Thus, Justice Douglas thought the penalty had been applied discriminatorily, Furman v. Georgia, 408 U.S. 238 (1972), Justice Stewart thought it had been applied in an arbitrary, “wanton,” and “freakish” manner, id. at 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. at 313.

78 The principal opinion was in Gregg v. Georgia, 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other States were similarly sustained, Proffitt v. Florida, 428 U.S. 242 (1976) (statute generally similar to Georgia’s, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggra-
First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. While there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur in the position that reenactment of capital punishment statutes by 35 States precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people. Rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, to rule that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as all other statutes, comes before the courts bearing a presumption of validity which can be overcome only upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does, and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Neither is the punishment of death disproportionate to the crime being punished, murder.

Second, a different majority, however, concluded that statutes mandating the imposition of death for crimes classified as first-degree murder violate the Eighth Amendment. A review of history, traditional usage, legislative enactments, and jury determinations led the plurality to conclude that mandatory death sentences had been rejected by contemporary standards. Moreover, mandatory sentencing precludes the individualized "consideration of the character and record of the . . . offender and the circumstances of the
particular offense” that “the fundamental respect for humanity underlying the Eighth Amendment” requires in capital cases.\(^80\)

A third principle established by the 1976 cases was that the procedure by which a death sentence is imposed must be so structured as to reduce arbitrariness and capriciousness as much as possible.\(^81\) What emerged from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or judge,\(^82\) be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;\(^83\) (2) that to prevent jury prejudice on the issue of guilt there be a sepa-

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\(^81\)Here adopted is the constitutional analysis of the Stewart plurality of three. “[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds,” Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976), a comment directed to the Furman opinions but equally applicable to these cases and to Lockett. See Marks v. United States, 430 U.S. 188, 192–94 (1977).

\(^82\)The Stewart plurality noted its belief that jury sentencing in capital cases performs an important societal function in maintaining a link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. Gregg v. Georgia, 428 U.S. 153, 190 (1976). A definitive ruling came in Spaziano v. Florida, 468 U.S. 447 (1984), upholding a provision under which the judge can override a jury’s advisory life imprisonment sentence and impose the death sentence. “[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.” Id. at 462–63. Consequently, a judge may be given significant discretion to override a jury sentencing recommendation, as long as the court’s decision is adequately channeled to prevent arbitrary results. Harris v. Alabama, 513 U.S. 504 (1995) (Eighth Amendment not violated where judge is only required to “consider” a capital jury’s sentencing recommendation). The Sixth Amendment right to jury trial is violated, however, if the judge makes factual findings (e.g., as to the existence of aggravating circumstances) on which a death sentence is based. Ring v. Arizona, 122 S. Ct. 2258 (2002).

rate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, will be presented; 84 (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was in fact fairly imposed both on the facts of the individual case and by comparison with the penalties imposed in similar cases. 85 The Court later ruled, however, that proportionality review is not constitutionally required. 86 Gregg, Proffitt, and Jurek did not require such comparative proportionality review, the Court noted, but merely suggested that proportionality review is one means by which a state may “safeguard against arbitrarily imposed death sentences.” 87

The Court added a fourth major guideline in 2002, holding that the Sixth Amendment right to trial by jury comprehends the right to have a jury make factual determinations on which a sentencing increase is based. 88 This means that capital sentencing schemes are unconstitutional if judges are allowed to make factual findings as to the existence of aggravating circumstances that are prerequisites for imposition of a death sentence.

Implementation of Procedural Requirements.—Most states responded to the 1976 requirement that the sentencing authority’s discretion be narrowed by enacting statutes spelling out “aggravating” circumstances, and providing that at least one such aggravating circumstance must be found to be present before the death penalty may be imposed. The Court has required that the standards be relatively precise and instructive so as to minimize the risk of arbitrary and capricious action by the sentencer, the desired result being a principled way to distinguish cases in which the death penalty should be imposed from other cases in which it should not be. Thus, the Court invalidated a capital sentence based upon a

87 465 U.S. at 50.
jury finding that the murder was “outrageously or wantonly vile, horrible, and inhuman,” reasoning that “a person of ordinary sensibility could fairly [so] characterize almost every murder.”\textsuperscript{89} Similarly, an “especially heinous, atrocious or cruel” aggravating circumstance was held to be unconstitutionally vague.\textsuperscript{90} The “especially heinous, cruel or depraved” standard is cured, however, by a narrowing interpretation requiring a finding of infliction of mental anguish or physical abuse before the victim’s death.\textsuperscript{91}

The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of first-degree murder of a police officer,\textsuperscript{92} and for prison inmates convicted of murder while serving a life sentence without possibility of parole.\textsuperscript{93} On the other hand, if actual sentencing authority is conferred on the trial judge, it is not unconstitutional for a statute to require a jury to return a death “sentence” upon convicting for specified crimes.\textsuperscript{94} Flaws related to those attributed to mandatory sentencing statutes were found in a state’s structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when that would be justified by the evidence.\textsuperscript{95} Because the jury had to

\textsuperscript{90} Maynard v. Cartwright, 486 U.S. 356 (1988). But see Tuilaepa v. California, 512 U.S. 967 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant’s prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).
\textsuperscript{92} Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant than the first Roberts v. Louisiana case, 428 U.S. 325 (1976)).
\textsuperscript{94} Baldwin v. Alabama, 472 U.S. 372 (1985) (mandatory jury death sentence saved by requirement that trial judge independently weigh aggravating and mitigating factors and determine sentence). The constitutionality of this approach has been brought into question, however, by the Court’s decision in Ring v. Arizona, 122 S. Ct. 2258 (2002) that a judge’s finding of facts constituting aggravating circumstances violates the defendant’s right to trial by jury.
\textsuperscript{95} Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination “depend . . . on the jury’s feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue.” Id. at 640. Cf. Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses
choose between conviction or acquittal, the statute created the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concentrate on determining whether the prosecution had proved defendant's guilt beyond a reasonable doubt. 96

The overarching principle of Furman and of the Gregg series of cases was that the jury should not be 'without guidance or direction' in deciding whether a convicted defendant should live or die. The jury's attention was statutorily 'directed to the specific circumstances of the crime ... and on the characteristics of the person who committed the crime.' 97 Discretion was channeled and rationalized. But in Lockett v. Ohio, 98 a Court plurality determined that a state law was invalid because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law. In other words, the jury's discretion was curbed too much. "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any as-

96 See Spaziano v. Florida, 468 U.S. 447 (1984). See Hopkins v. Reeves, 524 U.S. 88 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses). See also Schad v. Arizona, 501 U.S. 624 (1991) (first-degree murder defendant, who received instruction on lesser included offense of second-degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In Schad the Court also upheld Arizona's characterization of first degree murder as a single crime encompassing two alternatives, premeditated murder and felony-murder, and not requiring jury agreement on which alternative had occurred.

97 Also impermissible as distorting a jury's role are prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. Compare Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) with California v. Ramos, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole). See also Lowenfield v. Phelps, 484 U.S. 231 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole); Romano v. Oklahoma, 512 U.S. 1 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment); Jones v. United States, 527 U.S. 373 (1999) (court's refusal to instruct the jury on the consequences of deadlock did not violate Eighth Amendment, even though court's actual instruction was misleading as to range of possible sentences).

pect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”

Similarly, the reason that a three-justice plurality viewed North Carolina’s mandatory death sentence for persons convicted of first degree murder as invalid was that it failed “to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant.”

*Locockett* and *Woodson* have since been endorsed by a Court majority.

Thus, a great measure of discretion was again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.

The Court has explained this apparent contradiction as constituting recognition that “individual culpability is not always measured by the category of crime committed,” and as the product of an attempt to pursue the “twin objectives” of “measured, consistent

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99 438 U.S. at 604 (plurality).
102  Justice White, dissenting in *Lockett* from the Court’s holding on consideration of mitigating factors, wrote that he “greatly fear[ed] that the effect of the Court’s decision today will be to compel constitutionally a restoration of the state of affairs at the time Furman was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that ‘its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’” *Woodson*, 438 U.S. at 623. More recently, Justice Scalia voiced similar misgivings. “Shortly after introducing our doctrine requiring constraints on the sentencer’s discretion to impose the death penalty, the Court began developing a doctrine forbidding constraints on the sentencer’s discretion to decline to impose it. This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of ‘guided discretion’ once had. . . . In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required.” *Walton v. Arizona*, 497 U.S. 639, 661–62 (1990) (concurring in the judgment). For a critique of these criticisms of *Lockett*, see Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).
application” of the death penalty and “fairness to the accused.” 104 The requirement that aggravating circumstances be spelled out by statute serves a narrowing purpose that helps consistency of application; absence of restriction on mitigating evidence helps promote fairness to the accused through an “individualized” consideration of his circumstances. In the Court’s words, statutory aggravating circumstances “play a constitutionally necessary function at the stage of legislative definition [by] circumscribing the class of persons eligible for the death penalty,” 105 while consideration of all mitigating evidence requires focus on “the character and record of the individual offender and the circumstances of the particular offense” consistent with “the fundamental respect for humanity underlying the Eighth Amendment.” 106 As long as the defendant’s crime falls within the statutorily narrowed class, the jury may then conduct “an individualized determination on the basis of the character of the individual and the circumstances of the crime.” 107

So far, the Justices who favor abandonment of the Lockett and Woodson approach have not prevailed. The Court has, however, given states greater leeway in fashioning procedural rules that have the effect of controlling how juries may use mitigating evidence that must be admitted and considered. 108 States may also cure some constitutional errors on appeal through operation of “harmless error” rules and reweighing of evidence by the appellate court. 109 Also, the Court has constrained the use of federal habeas corpus to review state court judgments. As a result of these trends, the Court recognizes a significant degree of state autonomy in capital sentencing in spite of its rulings on substantive Eighth Amendment law.

While holding fast to the Lockett requirement that sentencers be allowed to consider all mitigating evidence, 110 the Court has

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105 Zant v. Stephens, 462 U.S. 862, 878 (1983). This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating circumstance justifying capital punishment duplicates an element of the offense of first-degree murder does not render the procedure invalid. Lowenfield v. Phelps, 484 U.S. 231 (1988).
108 See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987) (instruction limiting jury to consideration of mitigating factors specifically enumerated in statute is invalid); Penry v. Lynaugh, 492 U.S. 302 (1989) (jury must be permitted to give effect to de-
AMENDMENT 8—PUNISHMENT FOR CRIME

upheld state statutes that control the relative weight that the
sentencer may accord to aggravating and mitigating evidence.111
“The requirement of individualized sentencing is satisfied by allow-
ing the jury to consider all relevant mitigating evidence”; there is
no additional requirement that the jury be allowed to weigh the
severity of an aggravating circumstance in the absence of any miti-
gating factor.112 So too, the legislature may specify the con-
sequences of the jury’s finding an aggravating circumstance; it may
mandate that a death sentence be imposed if the jury unanimously
finds at least one aggravating circumstance and no mitigating cir-
cumstance,113 or if the jury finds that aggravating circumstances
outweigh mitigating circumstances.114 And a court may instruct
that the jury “must not be swayed by mere sentiment, conjecture,
sympathy, passion, prejudice, public opinion, or public feeling,”
since in essence the instruction merely cautions the jury not to
base its decision “on factors not presented at the trial.”115 However,
a jury instruction that can be interpreted as requiring jury
unanimity on the existence of each mitigating factor before that
factor may be weighed against aggravating factors is invalid as in
effect allowing one juror to veto consideration of any and all miti-
gating factors. Instead, each juror must be allowed to give effect to
what he or she believes to be established mitigating evidence.116
Due process considerations can also come into play; if the state
argues for the death penalty based on the defendant’s future dan-
gerousness, due process requires that the jury be informed if the

111 Neither Lockett nor Eddings establishes the weight which must be given
to any particular mitigating evidence, or the manner in which it must be considered;
they simply condemn any procedure in which such evidence has no weight at all.”
Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Justice Stevens concurring in judg-
ment).
113 494 U.S. at 307.
114 Boyd v. California, 494 U.S. 370 (1990). A court is not required give a jury
instruction expressly directing the jury to consider mitigating circumstance, as long
as the instruction actually given affords the jury the discretion to take such evi-
token, a court did not offend the Constitution by directing the jury’s attention to
a specific paragraph of a constitutionally sufficient instruction in response to the
jury’s question about proper construction of mitigating circumstances. Weeks v.
alternative to a death sentence is a life sentence without possibility of parole. 117

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury’s consideration of an aggravating factor later found to be invalid, 118 or on a trial judge’s consideration of improper aggravating circumstances. 119 In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment, and in Zant evidence relating to the invalid factor was nonetheless admissible on another basis. 120 Even in states that require the jury to weigh statutory aggravating and mitigating circumstances (and even in the absence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through a reweighing of the aggravating and mitigating evidence. 121 By contrast, where there is a possibility that the jury’s reliance on a “totally irrelevant” factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand in spite of the presence of other aggravating factors. 122

Focus on the character and culpability of the defendant led the Court initially to hold that introduction of evidence about the character of the victim or the amount of emotional distress caused to the victim’s family or community was inappropriate because it “creates an impermissible risk that the capital sentencing decision will

120 In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was “harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.” Sochor v. Florida, 504 U.S. 527, 540 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 516 U.S. 10 (1995).
be made in an arbitrary manner.”\textsuperscript{123} Changed membership on the Court resulted in overruling of these decisions, however, and a holding that “victim impact statements” are not barred from evidence by the Eighth Amendment.\textsuperscript{124} “A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.”\textsuperscript{125} In the view of the Court majority, admissibility of victim impact evidence was necessary in order to restore balance to capital sentencing. Exclusion of such evidence had “unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering ‘a glimpse of the life’ which a defendant ‘chose to extinguish,’ or demonstrating the loss to the victim’s family and to society which has resulted from the defendant’s homicide.”\textsuperscript{126}

Limitations on Capital Punishment: Proportionality.—In \textit{Coker v. Georgia},\textsuperscript{127} the Court held that the state may not impose a death sentence upon a rapist who did not take a human life.\textsuperscript{128}
The Court announced that the standard under the Eighth Amendment was that punishments are barred when they are “excessive” in relation to the crime committed. A “punishment is ‘excessive’ and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.” In order that judgment not be or appear to be the subjective conclusion of individual Justices, attention must be given to objective factors, predominantly “to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions. . . .” While the Court thought that the death penalty for rape passed the first test, it felt it failed the second. Georgia was the sole State providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder “in terms of moral depravity and of injury to the person and the public.”

Applying the Coker analysis, the Court ruled in Enmund v. Florida that death is an unconstitutional penalty for felony murder if the defendant did not himself kill, or attempt to take life, or intend that anyone be killed. While a few more States imposed capital punishment in felony murder cases than had imposed it for rape, nonetheless the weight was heavily against the practice, and the evidence of jury decisions and other indicia of a modern consensus similarly opposed the death penalty in such circumstances. Moreover, the Court determined that death was a disproportionate sentence for one who neither took life nor intended to do so. Because the death penalty is a likely deterrent only when murder is the result of premeditation and deliberation, and because the justification of retribution depends upon the degree of the defendant’s culpability, the imposition of death upon one who participates in a crime in which a victim is murdered by one of his confederates and

ordinarily disproportionate for the rape of an adult woman, but that some rapes might be so brutal or heinous as to justify it. Id. at 601.

129 433 U.S. at 592.
130 433 U.S. at 592
131 433 U.S. at 598.
132 458 U.S. 782 (1982). Justice White wrote the opinion of the Court and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, with Justices Powell and Rehnquist and Chief Justice Burger, dissented. Id. at 801. Accord, Cabana v. Bullock, 474 U.S. 376 (1986) (also holding that the proper remedy in a habeas case is to remand for state court determination as to whether Enmund findings have been made).
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not as a result of his own intention serves neither of the purposes underlying the penalty.\textsuperscript{133} In \textit{Tison v. Arizona}, however, the Court eased the “intent to kill” requirement, holding that, in keeping with an “apparent consensus” among the states, “major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the \textit{Enmund} culpability requirement.”\textsuperscript{134} A few years earlier, \textit{Enmund} had also been weakened by the Court’s holding that the factual finding of requisite intent to kill need not be made by the guilt/innocence factfinder, whether judge or jury, but may be made by a state appellate court.\textsuperscript{135}

\textbf{Limitations on Capital Punishment: Diminished Capacity.}—The Court has recently grappled with several cases involving application of the death penalty to persons of diminished capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in \textit{Ford v. Wainwright}\textsuperscript{136} that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of execution-time sanity must be determined in a proceeding satisfying the minimum requirements of due process.\textsuperscript{137} The Court noted that execution of the insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and con-

\textsuperscript{133} Justice O'Connor thought the evidence of contemporary standards did not support a finding that capital punishment was not appropriate in felony murder situations. 458 U.S. at 816–23. She also objected to finding the penalty disproportionate, first because of the degree of participation of the defendant in the underlying crime, id. at 823–26, but also because the Court appeared to be constitutionalizing a standard of intent required under state law.

\textsuperscript{134} 481 U.S. 137, 158 (1987). The decision was 5–4. Justice O'Connor's opinion for the Court viewed a “narrow” focus on intent to kill as “a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers,” id. at 157, and concluded that “reckless disregard for human life” may be held to be “implicit in knowingly engaging in criminal activities known to carry a grave risk of death.” Id.

\textsuperscript{135} Cabana v. Bullock, 474 U.S. 376 (1986). Moreover, an appellate court's finding of culpability is entitled to a presumption of correctness in federal habeas review, a habeas petitioner bearing a “heavy burden of overcoming the presumption.” Id. at 387–88. \textit{See also} Pulley v. Harris, 465 U.S. 37 (1984) (Eighth Amendment does not invariably require comparative proportionality review by a state appellate court).

\textsuperscript{136} 477 U.S. 399 (1986).

\textsuperscript{137} There was an opinion of the Court only on the first issue, that the Eighth Amendment creates a right not to be executed while insane. Justice Marshall’s opinion to that effect was joined by Justices Brennan, Blackmun, Stevens, and Powell. The Court’s opinion did not attempt to define insanity; Justice Powell’s concurring opinion would have held the prohibition applicable only for “those who are unaware of the punishment they are about to suffer and why they are to suffer it.” 477 U.S. at 422.
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138 There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that “the ascertainment of a prisoner's sanity ... calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.” 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding “far less formal than a trial,” that the state “should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel.” Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell’s opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court’s holding.

139 Penry v. Lynaugh, 492 U.S. 302, 335 (1989). While unwilling to conclude that execution of a mentally retarded person is “categorically prohibited by the Eighth Amendment,” the Court did point out that, due to the requirement of individualized consideration of culpability, a retarded defendant is entitled to an instruction that the jury may consider and give mitigating effect to evidence of retardation or a background of abuse. Id. at 328.

140 122 S. Ct. 2242 (2002). Atkins was a 6–3 decision. Justice Stevens’ opinion of the Court was joined by Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

141 122 S. Ct. at 2249.

142 122 S. Ct. at 2249.

When first confronted with the issue of whether execution of the mentally retarded is constitutional, the Court in 1989 found “insufficient evidence of a national consensus against executing mentally retarded people.” In 2002, however, the Court determined in Atkins v. Virginia that “much ha[d] changed” since 1989, that the practice had become “truly unusual,” and that it was “fair to say” that a “national consensus” had developed against it. In 1989, only two states and the Federal Government prohibited execution of the mentally retarded while allowing executions generally. By 2002, an additional 16 states had prohibited execution of the mentally retarded, and no states had reinstated the power. But the important element of consensus, the Court explained, was “not so much the number” of states that had acted, but instead “the consistency of the direction of change.” The Court’s “own evaluation of the issue” reinforced the consensus. Neither of the two generally recognized justifications for the death penalty—retribution and deterrence—apply with full force to mentally retarded offenders. Retribution necessarily depends on the culpability of the offender, yet mental retardation reduces culpa-

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141 122 S. Ct. at 2249.

142 122 S. Ct. at 2249.
bility. Deterrence is premised on the ability of offenders to control their behavior, yet “the same cognitive and behavioral impairments that make these defendants less morally culpable ... also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information.”

So far the Court has not imposed a categorical prohibition on execution of juveniles. A closely divided Court has invalidated one statutory scheme which permitted capital punishment to be imposed for crimes committed before age 16, but has upheld other statutes authorizing capital punishment for crimes committed by 16 and 17 year olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes. While four Justices favored a flat ruling that execution of anyone younger than 16 at the time of his offense is barred by the Eighth Amendment, concurring Justice O’Connor found Oklahoma’s scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty. The following year Justice O’Connor again provided the decisive vote when the Court in Stanford v. Kentucky held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17. Like Oklahoma, neither Kentucky nor Missouri directly specified a minimum age for the death penalty. To Justice O’Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on 16 or 17-year-old murderers, whereas there was such a consensus against execution of 15 year olds.

This lack of consensus apparently continued in 2002. In At-
kins v. Virginia, the Court contrasted the national consensus said to have developed against executing the mentally retarded with the situation regarding execution of juvenile offenders over age 15, and noted that only two state legislatures had raised the threshold age. 149

The Stanford Court was split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia’s plurality would focus almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 150 The Stanford dissenters would have broadened this inquiry with a proportionality review that considers the defendant’s culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 151 As indicated above, the Atkins majority adopted the approach of the Stanford dissenters, conducting a proportionality review that brought their own “evaluation” into play along with their analysis of consensus on the issue of executing the mentally retarded.

Limitations on Capital Punishment: Equality of Application.—One of the principal objections to imposition of the death penalty, voiced by Justice Douglas in his concurring opinion in Furman, was that it was not being administered fairly—that the capital sentencing laws vesting “practically untrammeled discretion” in juries were being used as vehicles for racial discrimination, and that “discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on

149 122 S. Ct. at 2249 n.18. Only two months after the Atkins decision, Justice Stevens, author of the Court’s opinion in Atkins, asserted that the Court should reconsider the issue of execution of juvenile offenders, “[g]iven the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender.” Patterson v. Texas, 536 U.S. 984 (2002) (dissenting from denial of stay of execution). Justice Ginsburg, joined by Justice Breyer, also dissented from the stay denial, asserting that Atkins had made it “tenable for a petitioner to urge reconsideration of Stanford v. Kentucky,” but the petition for a stay was rejected by 6–3 vote.

150 “A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.” 492 U.S. at 377.

151 492 U.S. at 394–96. Justice O’Connor, while recognizing the Court’s “constitutional obligation to conduct proportionality analysis,” did not believe that such analysis can resolve the underlying issue of the constitutionally required minimum age. 492 U.S. at 382.
‘cruel and unusual’ punishments.” This argument has not carried the day. Although the Court has acknowledged the possibility that the death penalty may be administered in a racially discriminatory manner, it has made proof of such discrimination quite difficult.

A measure of protection against jury bias was provided by the Court’s holding that “a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.”

Proof of prosecution bias is another matter. The Court ruled in McCleskey v. Kemp that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but “at most show only a likelihood that a particular factor entered into some decisions.” Just as important to the outcome, however, was the Court’s application of the two overarching principles of prior capital punishment cases: that a state’s system must narrow a sentencer’s discretion to impose the death penalty (e.g., by carefully defining “aggravating” circumstances), but must not constrain a sentencer’s discretion to consider mitigating factors relating to the character of the defendant. While the dissenter saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty, the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a prima facie case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors “focus their collective judgment on the unique characteristics of a particular criminal defendant”—a focus that can result in “final and unreviewable” leniency.

Limitations on Habeas Corpus Review of Capital Sentences.—The Court’s rulings limiting federal habeas corpus review

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152 408 U.S. at 248, 257.
155 481 U.S. at 308.
156 481 U.S. at 339–40 (Brennan), 345 (Blackmun), 366 (Stevens).
157 481 U.S. at 311. Concern for protecting “the fundamental role of discretion in our criminal justice system” also underlay the Court’s rejection of an equal protection challenge in McCleskey. See discussion of “Capital Punishment” under the Fourteenth Amendment, infra. See also United States v. Bass, 122 S. Ct. 2389 (2002) (per curiam), requiring a threshold evidentiary showing before a defendant claiming selective prosecution on the basis of race is entitled to a discovery order that the Government provide information on its decisions to seek the death penalty.
of state convictions, reinforced by the Antiterrorism and Effective Death Penalty Act of 1996,¹⁵⁸ may be expected to reduce significantly the amount of federal court litigation over state imposition of capital punishment. In the habeas context, the Court has flatly rejected the “death is different” approach by applying to capital cases the same rules that limit federal petitions in non-capital cases.¹⁵⁹

The Court held in *Penry v. Lynaugh*¹⁶⁰ that its *Teague v. Lane*¹⁶¹ rule of nonretroactivity applies to capital sentencing challenges. Under *Teague*, “new rules” of constitutional interpretation announced after a defendant’s conviction has become final will not be applied in habeas cases unless one of two exceptions applies. The exceptions will rarely apply. One exception is for decisions placing certain conduct or defendants beyond the reach of the criminal law, and the other is for decisions recognizing a fundamental procedural right “without which the likelihood of an accurate conviction is seriously diminished.”¹⁶² Further restricting the availability of federal habeas review is the Court’s definition of “new rule.” Interpretations that are a logical outgrowth or application of an earlier rule are nonetheless “new rules” unless the result was “dictated” by that precedent.¹⁶³ While in *Penry* itself the Court determined that the requested rule (requiring an instruction that the jury consider mitigating evidence of the defendant’s mental retardation and abused childhood) was not a “new rule” because it was dictated by *Eddings* and *Lockett*, in subsequent habeas capital

¹⁵⁹ Herrera v. Collins, 506 U.S. 390, 405 (1993) (“we have ‘refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus’”) (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989)).
¹⁶¹ 489 U.S. 288 (1989). The “new rule” limitation was suggested in a plurality opinion in *Teague*. A Court majority in *Penry* and later cases has adopted it.
¹⁶² 489 U.S. at 313. The second exception was at issue in Sawyer v. Smith, 497 U.S. 227 (1990); there the Court held the exception inapplicable to the *Caldwell v. Mississippi* rule that the Eighth Amendment is violated by prosecutorial misstatements characterizing the jury’s role in capital sentencing as merely recommendatory. It is “not enough,” the *Sawyer* Court explained, “that a new rule is aimed at improving the accuracy of a trial... A rule that qualifies under this exception must not only improve accuracy, but also ‘alter our understanding of the bedrock procedural elements’ essential to the fairness of a proceeding.” Id. at 242.
¹⁶³ *Penry*, 492 U.S. at 314. Put another way, it is not enough that a decision is “within the logical compass” of an earlier decision, or indeed that it is ‘controlled’ by a prior decision.” A decision announces a “new rule” if its result “was susceptible to debate among reasonable minds” or if it would not have been “an illogical or even a grudging application” of the prior decision to hold it inapplicable. Butler v. Mckellar, 494 U.S. 407, 415 (1990).
sentencing cases the Court has found substantive review barred by the “new rule” limitation. 164

A second restriction on federal habeas review also has ramifications for capital sentencing review. Claims that state convictions are unsupported by the evidence are weighed by a “rational factfinder” inquiry: “viewing the evidence in the light most favorable to the prosecution, [could] any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt.” 165

This same standard for reviewing alleged errors of state law, the Court determined, should be used by a federal habeas court to weigh a claim that a generally valid aggravating factor is unconstitutional as applied to the defendant. 166 In addition, the Court has held that, absent an independent constitutional violation, habeas corpus relief for prisoners who assert innocence based on newly discovered evidence should generally be denied. 167 While a majority of the Justices accepted the general principle that execution of the innocent is unconstitutional, 168 the different five-Justice majority that determined the outcome in the case indicated that the “traditional remedy” has been executive clemency. 169

164 See, e.g., Butler v. McKellar, 494 U.S. 407 (1990) (1988 ruling in Arizona v. Roberson, that the Fifth Amendment bars police-initiated interrogation following a suspect’s request for counsel in the context of a separate investigation, announced a “new rule” not dictated by the 1981 decision in Edwards v. Arizona that police must refrain from all further questioning of an in-custody accused who invokes his right to counsel); Saffle v. Parks, 494 U.S. 484 (1990) (habeas petitioner’s request that capital sentencing be reversed because of an instruction that the jury “avoid any influence of sympathy” is a request for a new rule not “compelled” by Eddings and Lockett, which governed what mitigating evidence a jury must be allowed to consider, not how it must consider that evidence); Sawyer v. Smith, 497 U.S. 227 (1990) (1985 ruling in Caldwell v. Mississippi, although a “predictable development in Eighth Amendment law,” established a “new rule” that false prosecutorial comment on jurors’ responsibility can violate the Eighth Amendment by creating an unreasonable risk of arbitrary imposition of the death penalty, since no case prior to Caldwell had invalidated a prosecutorial comment on Eighth Amendment grounds). But see Stringer v. Black, 503 U.S. 222 (1992) (neither Maynard v. Cartwright, 486 U.S. 356 (1988), nor Clemons v. Mississippi, 494 U.S. 738 (1990), announced a “new rule”).


166 Lewis v. Jeffers, 497 U.S. 764, 780–84 (1990). The lower court erred, therefore, in conducting a comparative review to determine whether application in the defendant’s case was consistent with other applications.

167 Herrera v. Collins, 506 U.S. 390 (1993) (holding that a petitioner would have to meet an “extraordinarily high” threshold of proof of innocence to warrant federal habeas relief).

168 Dissenting Justices Blackmun, Stevens, and Souter (506 U.S. at 430); and concurring Justices O’Connor, Kennedy (id. at 419) and White (id. at 429).

169 Chief Justice Rehnquist’s opinion of the Court was joined by Justices O’Connor, Scalia, Kennedy, and Thomas. The Court distinguished Ford v. Wainwright, 477 U.S. 399 (1986) (minimal requirements of due process—i.e., the right to be heard—must be accorded to an insane prisoner in a proceeding in which the governor determines whether execution is to go forward), as involving “a matter of
Third, a different harmless error rule is applied when constitutional errors are alleged in habeas proceedings. The Chapman v. California rule applicable on direct appeal, requiring the State to prove beyond a reasonable doubt that a constitutional error is harmless, is inappropriate for habeas review, the Court concluded, given the “secondary and limited” role of federal habeas proceedings. The appropriate test is that previously used only for non-constitutional errors: “whether the error has substantial and injurious effect or influence in determining the jury’s verdict.”

A fourth rule was devised to prevent successive “abusive” or defaulted habeas petitions. Federal courts are barred from hearing such claims unless the defendant can show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty under applicable state law.

The Antiterrorism and Effective Death Penalty Act prohibits federal habeas relief based on claims that were adjudicated on the merits in state court unless the state decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” The Court’s decision in Bell v. Cone, rejecting a claim that an attorney’s failure to present mitigating evidence during the capital sentencing phase of a trial and his waiver of a closing argument at sentencing should entitle a condemned prisoner to relief, illustrates how these restrictions can operate to defeat challenges to state-imposed death sentences.

punishment” rather than guilt or innocence. The guilt or innocence determination allegedly “becomes more uncertain with time for evidentiary reasons.” 506 U.S. at 406.

170 386 U.S. 18 (1967).
173 Sawyer v. Whitley, 505 U.S. 333 (1992). The focus on eligibility limits inquiry to elements of the crime and to aggravating factors, and thereby prevents presentation of mitigating evidence. Here the court was barred from considering an allegation of ineffective assistance of counsel for failure to introduce the defendant’s mental health records as a mitigating factor at sentencing.
175 122 S. Ct. 1843 (2002).
176 The state court’s decision, which applied the rule from Strickland v. Washington, 466 U.S. 668 (1984), rather than the rule from United States v. Cronic, 466 U.S. 646 (1984), to hold that the attorney’s performance was not constitutionally inadequate, was not “contrary to” clearly established law. Cronic had held that there are some situations, e.g., when counsel “entirely fails to subject the prosecution’s case to meaningful adversarial testing,” so presumptively unfair as to obviate the need to show actual prejudice to the defendant’s case. The Bell v. Cone Court em-
The Court has also ruled that a death row inmate has no constitutional right to an attorney to help prepare a petition for state collateral review. 177

Proportionality

Justice Field in O'Neil v. Vermont 178 argued in dissent that in addition to prohibiting punishments deemed barbarous and inhumane the Eighth Amendment also condemned "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." In Weems v. United States, 179 this view was adopted by the Court in striking down a sentence in the Philippine Islands of 15 years incarceration at hard labor with chains on the ankles, loss of all civil rights, and perpetual surveillance, for the offense of falsifying public documents. The Court compared the sentence with those meted out for other offenses and concluded: "This contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." 180

Punishments as well as fines, therefore, can be condemned as excessive. 181

In Robinson v. California 182 the Court carried the principle to new heights, setting aside a conviction under a law making it a crime to "be addicted to the use of narcotics." The statute was unconstitutional because it punished the "mere status" of being an ad-

phrased the word "entirely," noting that the petitioner challenged the defense attorney's performance only "at specific points" in the process. Nor was the second statutory test met. Strickland, a "highly deferential" test asking whether an attorney's performance fell below an "objective standard of reasonableness," was not "unreasonably applied." The attorney could reasonably have concluded that evidence presented during the guilt phase of the trial was still "fresh" to the jury, and that repetition through the presentation of mitigating evidence and/or through a closing statement was unnecessary to counter the state's presentation of aggravating circumstances justifying a death sentence.

177 Murray v. Giarratano, 492 U.S. 1 (1989) ("unit attorneys" assigned to prisons were available for some advice prior to filing a claim).
179 217 U.S. 349 (1910). The Court was here applying not the Eighth Amendment but a statutory bill of rights applying to the Philippines which it interpreted as having the same meaning. Id. at 367.
180 217 U.S. at 381.
181 "The Eighth Amendment succinctly prohibits 'excessive' sanctions." Atkins v. Virginia, 122 S. Ct. 2242, 2247 (2002) (applying proportionality review to determine whether execution of the mentally retarded is cruel and unusual). Proportionality in the context of capital punishment is considered supra under "Limitations on Capital Punishment: Proportionality."
dict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction of the State or had committed any act at all within the State's power to proscribe, and because addiction is an illness which—however it is acquired—physiologically compels the victim to continue using drugs. The case could stand for the principle, therefore, that one may not be punished for a status in the absence of some act, 183 or it could stand for the broader principle that it is cruel and unusual to punish someone for conduct he is unable to control, a holding of far-reaching importance. 184 In Powell v. Texas, 185 a majority of the Justices took the latter view of Robinson, but the result, because of a view of the facts held by one Justice, was a refusal to invalidate a conviction of an alcoholic for public drunkenness. Whether the Eighth Amendment or the due process clauses will govern the requirement of the recognition of capacity defenses to criminal charges, or whether either will, remains to be decided in future cases.

The Court has gone back and forth in its acceptance of proportionality analysis in noncapital cases. It appeared that such anal-

183 A different approach to essentially the same problem was Thompson v. Louisville, 362 U.S. 199 (1960), in which a conviction for loitering and disorderly conduct was set aside as being supported by “no evidence whatever” that defendant had done anything. Cf. Johnson v. Florida, 391 U.S. 596 (1968) (no evidence that the defendant was “wandering or strolling around” in violation of vagrancy law).

184 Fully applied, the principle would raise to constitutional status the concept of mens rea, and it would thereby constitutionalize some form of insanity defense as well as other capacity defenses. For a somewhat different approach, see Lambert v. California, 355 U.S. 225 (1957) (due process denial for city to apply felon registration requirement to someone present in city but lacking knowledge of requirement). More recently, this controversy has become a due process matter, with the holding that the due process clause requires the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the crime charged, Mullaney v. Wilbur, 421 U.S. 684 (1975), raising the issue of the insanity defense and other such questions. See Rivera v. Delaware, 429 U.S. 877 (1976), Patterson v. New York, 432 U.S. 197, 202–05 (1977). In Solem v. Helm, 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case, the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes had been influenced by his alcohol use, was “unlikely to advance the goals of our criminal justice system in any substantial way.”

185 392 U.S. 514 (1968). The plurality opinion by Justice Marshall, joined by Justices Black and Harlan and Chief Justice Warren, interpreted Robinson as prescribing only punishment of “status,” and not punishment for “acts,” and expressed a fear that a contrary holding would impel the Court into constitutional definitions of such matters as actus reus, mens rea, insanity, mistake, justification, and duress. Id. at 532–37. Justice White concurred, but only because the record did not show that the defendant was unable to stay out of public; like the dissent, Justice White was willing to hold that if addiction as a status may not be punished neither can the yielding to the compulsion of that addiction, whether to narcotics or to alcohol. Id. at 548. Dissenting Justices Fortas, Douglas, Brennan, and Stewart wished to adopt a rule that “[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.” That is, one under an irresistible compulsion to drink or to take narcotics may not be punished for those acts. Id. at 554, 567.
ysis had been closely cabined in *Rummel v. Estelle*,**186** upholding a mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant’s three nonviolent felonies had netted him a total of less than $230. The Court reasoned that the unique quality of the death penalty rendered capital cases of limited value, and *Weems* was distinguished on the basis that the length of the sentence was of considerably less concern to the Court than were the brutal prison conditions and the post-release denial of significant rights imposed under the peculiar Philippine penal code. Thus, in order to avoid improper judicial interference with state penal systems, Eighth Amendment judgments must be informed by objective factors to the maximum extent possible. But when the challenge to punishment goes to the length rather than the seriousness of the offense, the choice is necessarily subjective. Therefore, the *Rummel* rule appeared to be that States may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter legislative grace.**187** The Court dismissed as unavailing the factors relied on by the defendant. First, the fact that the nature of the offense was nonviolent was found not necessarily relevant to the seriousness of a crime, and the determination of what is a “small” amount of money, being so subjective, was a legislative task. In any event, the State could focus on recidivism, not the specific acts. Second, the comparison of punishment imposed for the same offenses in other jurisdictions was found unhelpful, differences and similarities being more subtle than gross, and in any case in a federal system one jurisdiction would always be more severe than the rest. Third, the comparison of punishment imposed for other offenses in the same State ignored the recidivism aspect.**188**

*Rummel* was distinguished in *Solem v. Helm*,**189** the Court stating unequivocally that the cruel and unusual punishments clause “prohibits not only barbaric punishments, but also sentences

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186 445 U.S. 263 (1980). The opinion, by Justice Rehnquist, was concurred in by Chief Justice Burger and Justices Stewart, White, and Blackmun. Dissenting were Justices Powell, Brennan, Marshall, and Stevens. Id. at 285.

187 In *Hutto v. Davis*, 454 U.S. 370 (1982), on the authority of *Rummel*, the Court summarily reversed a decision holding disproportionate a prison term of 40 years and a fine of $20,000 for defendant’s possession and distribution of approximately nine ounces of marijuana said to have a street value of about $200.

188 *Rummel*, 445 U.S. at 275–82. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. Id. at 285, 295–303.

189 463 U.S. 277 (1983). The case, as *Rummel*, was decided by 5–4 vote, with the *Rummel* dissenters, joined by Justice Blackmun from the *Rummel* majority, composing the majority, and with Justice O’Connor taking Justice Stewart’s place in opposition to holding the sentence invalid. Justice Powell wrote the opinion of the Court in *Helm*, and Chief Justice Burger wrote the dissent.
that are disproportionate to the crime committed,” and that “[t]here is no basis for the State’s assertion that the general principle of proportionality does not apply to felony prison sentences.”

Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money. The difference was that Helm’s sentence of life imprisonment without possibility of parole was viewed as “far more severe than the life sentence we described in Rummel.” Rummel, the Court pointed out, had been eligible for parole after 12 years’ imprisonment, while Helm had only the possibility of executive clemency, characterized by the Court as “nothing more than a hope for ‘an ad hoc exercise of clemency’.” In Helm the Court also spelled out the “objective criteria” by which proportionality issues should be judged: “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.” Measured by these criteria Helm’s sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnapping, and arson. In only one other state could he have received so harsh a sentence, and in no other state was it mandated.

The Court remained closely divided in holding in Harmelin v. Michigan that a mandatory term of life imprisonment without possibility of parole was not cruel and unusual as applied to the crime of possession of more than 650 grams of cocaine. There was an opinion of the Court on the issue of the mandatory nature of the penalty, the Court rejecting an argument that sentencers in non-capital cases must be allowed to hear mitigating evidence.

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190 463 U.S. at 284, 288.
191 The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as “relatively minor.” 463 U.S. at 296–97.
192 463 U.S. at 297.
193 463 U.S. at 303.
194 463 U.S. at 292.
195 For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homosexual conduct, see Justice Powell’s concurring opinion in Bowers v. Hardwick, 478 U.S. 186, 197 (1986).
197 “Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense,” 501 U.S. at 994. The Court’s opinion, written by Justice Scalia, then elaborated an understanding of “unusual”—set forth elsewhere in a part of his opinion subscribed to only by Chief Justice Rehnquist—that denies the possibility of proportionality review altogether. Mandatory penalties are not unusual
As to the length of sentence, three majority Justices—Kennedy, O'Connor, and Souter—would recognize a narrow proportionality principle, but considered Harmelin's crime severe and by no means grossly disproportionate to the penalty imposed. 198

Prisons and Punishment

“It is unquestioned that ‘[c]onfinement’ in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards.” 199 “Conditions in prison must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions . . . , alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.” 200 These general principles apply both to the treatment of individuals 201 and to the creation or maintenance of prison conditions that are inhumane to inmates generally. 202 Ordinarily there is both a subjective and an objective inquiry. Before conditions of confinement not formally meted out as punishment by the statute or sentencing judge can qualify as “punishment,” there must be a
culpable, “wanton” state of mind on the part of prison officials. In the context of general prison conditions, this culpable state of mind is “deliberate indifference”; in the context of emergency actions, e.g., actions required to suppress a disturbance by inmates, only a malicious and sadistic state of mind is culpable. When excessive force is alleged, the objective standard varies depending upon whether that force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically to cause harm. In the good-faith context, there must be proof of significant injury. When, however, prison officials “mali-
iously and sadistically use force to cause harm, contemporary standards of decency are always violated,” and there is no need to prove that “significant injury” resulted.

Beginning with Holt v. Sarver, federal courts found prisons or entire prison systems violative of the cruel and unusual punishments clause, and broad remedial orders directed to improving prison conditions and ameliorating prison life were imposed in more than two dozen States. But while the Supreme Court expressed general agreement with the thrust of the lower court actions, it set aside two rather extensive decrees and cautioned the federal courts to proceed with deference to the decisions of state legislatures and prison administrators. In both cases, the pris-
sons involved were of fairly recent vintage and the conditions, while harsh, did not approach the conditions described in many of the lower court decisions that had been left undisturbed. Thus, con-

\begin{footnotesize}
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\item 501 U.S. at 303. Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires a finding that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994).
\item Whitley v. Albers, 475 U.S. 312 (1986) (arguably excessive force in sup-
pressing prison uprising did not constitute cruel and unusual punishment).
\item Hudson v. McMillian, 503 U.S. 1, 9 (1992) (beating of a shackled prisoner re-
sulted in bruises, swelling, loosened teeth, and a cracked dental plate).
\item Rhodes v. Chapman, 452 U.S. 337, 353–54 n.1 (1981) (Justice Brennan con-
\item See, e.g., Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (describing conditions of “horrendous overcrowding,” inadequate sanitation, infested food, and “ramp-
ant violence”); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1981) (describing conditions “unfit for human habitation”). The primary issue in both Wolfish and Chapman was that of “double-celling,” the confinement of two or more prisoners in a cell designed
\end{enumerate}
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cerns of federalism and of judicial restraint apparently actuated the Court to begin to curb the lower federal courts from ordering remedial action for systems in which the prevailing circumstances, given the resources States choose to devote to them, “cannot be said to be cruel and unusual under contemporary standards.”

Congress initially encouraged litigation over prison conditions by enactment in 1980 of the Civil Rights of Institutionalized Persons Act, but then in 1996 added restrictions through enactment of the Prison Litigation Reform Act. The Court upheld the latter law's provision for an automatic stay of prospective relief upon the filing of a motion to modify or terminate that relief, ruling that separation of powers principles were not violated.

Limitation of the Clause to Criminal Punishments

The Eighth Amendment deals only with criminal punishment, and has no application to civil processes. In holding the Amendment inapplicable to the infliction of corporal punishment upon schoolchildren for disciplinary purposes, the Court explained that the cruel and unusual punishments clause “circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such.” These limitations, the Court thought, should not be extended outside the criminal process.

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for one. In both cases, the Court found the record did not support orders ending the practice.

211 Rhodes v. Chapman, 452 U.S. 337, 347 (1981). See also Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1991) (allowing modification, based on a significant change in law or facts, of a 1979 consent decree that had ordered construction of a new jail with single-occupancy cells; modification was to depend upon whether the upsurge in jail population was anticipated when the decree was entered, and whether the decree was premised on the mistaken belief that single-celling is constitutionally mandated).


215 Ingraham v. Wright, 430 U.S. 651, 667 (1977) (citations omitted). Constitutional restraint on school discipline, the Court ruled, is to be found in the due process clause if at all.
UNENUMERATED RIGHTS

NINTH AMENDMENT

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

RIGHTS RETAINED BY THE PEOPLE

Aside from contending that a bill of rights was unnecessary, the Federalists responded to those opposing ratification of the Constitution because of the lack of a declaration of fundamental rights by arguing that inasmuch as it would be impossible to list all rights it would be dangerous to list some because there would be those who would seize on the absence of the omitted rights to assert that government was unrestrained as to those. 1 Madison adverted to this argument in presenting his proposed amendments to the House of Representatives. “It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.” 2 It is clear from its text and from Madison’s statement that the Amendment states but a rule of construction, making clear that a Bill of Rights might not by implication be taken to increase the powers of the national government in areas

1The Federalist No. 84 (Modern Library ed. 1937).
21 Annals of Congress 439 (1789). Earlier, Madison had written to Jefferson: “My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.” 5 Writings of James Madison, 271-72 (G. Hunt ed., 1904). See also 3 J. Story, Commentaries on the Constitution of the United States 1898 (1833).
not enumerated, and that it does not contain within itself any
guarantee of a right or a proscription of an infringement. 3

Recently, however, the Amendment has been construed to be positive
affirmation of the existence of rights which are not enumerated but
which are nonetheless protected by other provisions.

The Ninth Amendment had been mentioned infrequently in deci-
sions of the Supreme Court 4 until it became the subject of some
exegesis by several of the Justices in Griswold v. Connecticut. 5

There a statute prohibiting use of contraceptives was voided as an
infringement of the right of marital privacy. Justice Douglas, writ-
ing the opinion of the Court, asserted that the “specific guarantees
in the Bill of Rights have penumbras, formed by emanations from
those guarantees that help give them life and substance.” 6 Thus,
while privacy is nowhere mentioned, it is one of the values served
and protected by the First Amendment through its protection of
associational rights, and by the Third, the Fourth, and the Fifth
Amendments as well. The Justice recurred to the text of the Ninth
Amendment, apparently to support the thought that these penum-
bral rights are protected by one Amendment or a complex of
Amendments despite the absence of a specific reference. Justice
Goldberg, concurring, devoted several pages to the Amendment.

“The language and history of the Ninth Amendment reveal
that the Framers of the Constitution believed that there are addi-
tional fundamental rights, protected from governmental infringe-
ment, which exist alongside those fundamental rights specifically
mentioned in the first eight constitutional amendments. . . . To
hold that a right so basic and fundamental and so deep-rooted in
our society as the right of privacy in marriage may be infringed be-
cause that right is not guaranteed in so many words by the first
eight amendments to the Constitution is to ignore the Ninth

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3To some extent, the Ninth and Tenth Amendments overlap with respect to the
question of unenumerated powers, one of the two concerns expressed by Madison,
more clearly in his letter to Jefferson but also in his introductory speech.

4In United Public Workers v. Mitchell, 330 U.S. 75, 94-95 (1947), upholding the
Hatch Act, the Court said: “We accept appellant’s contention that the nature of pol-
itical rights reserved to the people by the Ninth and Tenth Amendments [is] in-
volved. The right claimed as inviolate may be stated as the right of a citizen to act
as a party official or worker to further his own political views. Thus we have a
measure of interference by the Hatch Act and the Rules with what otherwise would
be the freedom of the civil servant under the First, Ninth, and Tenth Amendments.”
See Ashwander v. TVA, 297 U.S. 288, 300-11 (1936), and Tennessee Electric Power
Co. v. TVA, 306 U.S. 118, 143-44 (1939). See also Justice Chase’s opinion in Calder
v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798), and Justice Miller for the Court in Loan
Ass’n v. Topeka, 87 U.S. (20 Wall.) 665, 662-63 (1875).

5381 U.S. 479 (1965).

6Id. at 484. The opinion was joined by Chief Justice Warren and by Justices
Clark, Goldberg, and Brennan.
Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . . Nor do I mean to state that the Ninth Amendment constitutes an independent source of right protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution’s authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.”

While, therefore, neither opinion sought to make of the Ninth Amendment a substantive source of constitutional guarantees, both did read it as indicating a function of the courts to interpose a veto over legislative and executive efforts to abridge other fundamental rights. In this case, both opinions seemed to concur that the fundamental right claimed and upheld was derivative of several express rights and in this case, really, the Ninth Amendment added almost nothing to the argument. But if there is a claim of a fundamental right which cannot reasonably be derived from one of the provisions of the Bill of Rights, even with the Ninth Amendment, how is the Court to determine, first, that it is fundamental, and second, that it is protected from abridgment? 8

7 Id. at 488, 491, 492. Chief Justice Warren and Justice Brennan joined this opinion. Justices Harlan and White concurred id. at 499, 502, without alluding to the Ninth Amendment, but instead basing their conclusions on substantive due process, finding that the state statute “violates basic values implicit in the concept of ordered liberty,” (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Id. at 500. It would appear that the source of the fundamental rights to which Justices Douglas and Goldberg referred must be found in a concept of substantive due process, despite the former’s express rejection of this ground. Id. at 481-82. Justices Black and Stewart dissented. Justice Black viewed the Ninth Amendment ground as essentially a variation of the due process argument under which Justices claimed the right to void legislation as irrational, unreasonable, or offensive, without finding any violation of an express constitutional provision.

8 As Justice Scalia recently observed, “the [Ninth Amendment’s] refusal to ‘deny or disparage’ other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.” Troxel v. Granville, 530 U.S. 57, 91 (2000), (dissenting from recognition of due-process-derived parental right to direct the upbringing of their children).

on the Ninth Amendment, see The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed., 1989).
# TENTH AMENDMENT

## RESERVED POWERS

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RESERVED POWERS

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

RESERVED POWERS

Scope and Purpose

“The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified.”

1 “The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.”

2 That this provision was not conceived to be a yardstick for measuring the powers granted to the Federal Government or reserved to the States was firmly settled by the refusal of both Houses of Congress to insert the word “expressly” before the word “delegated,” and was confirmed by Madison’s remarks in the course of the debate, which took place while the proposed amendment was pending, concerning Hamilton’s plan to establish a national bank. “Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not

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2 United States v. Darby, 312 U.S. 100, 124 (1941). “While the Tenth Amendment has been characterized as a ‘truism,’ stating merely that ‘all is retained which has not been surrendered,’ [citing Darby], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States’ integrity or their ability to function effectively in a federal system.” Fry v. United States, 421 U.S. 542, 547 n.7 (1975). This policy was effectuated, at least for a time, in National League of Cities v. Usery, 426 U.S. 833 (1976).
given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States.” 4 Nevertheless, for approximately a century, from the death of Marshall until 1937, the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate commerce, to enforce the Fourteenth Amendment, and to lay and collect taxes.

In McCulloch v. Maryland, 5 Marshall rejected the proffer of a Tenth Amendment objection and offered instead an expansive interpretation of the necessary and proper clause 6 to counter the argument. The counsel for the State of Maryland cited fears of opponents of ratification of the Constitution about the possible swallowing up of states’ rights and referred to the Tenth Amendment to allay these apprehensions, all in support of his claim that the power to create corporations was reserved by that Amendment to the States. 7 Stressing the fact that the Amendment, unlike the cognate section of the Articles of Confederation, omitted the word “expressly” as a qualification of granted powers, Marshall declared that its effect was to leave the question “whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument.” 8

**Effect of Provision on Federal Powers**

**Federal Taxing Power.**—Not until after the Civil War was the idea that the reserved powers of the States comprise an independent qualification of otherwise constitutional acts of the Federal Government actually applied to nullify, in part, an act of Congress. This result was first reached in a tax case, Collector v. Day. 9 Holding that a national income tax, in itself valid, could not be constitutionally levied upon the official salaries of state officers, Justice Nelson made the sweeping statement that “the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, ‘reserved,’ are as independent of the general government as that government within its sphere is independent of the

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4 2 Annals of Congress 1897 (1791).
5 17 U.S. (4 Wheat.) 316 (1819).
6 See discussion under “Necessary and Proper Clause,” supra.
8 Id. at 406. “From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.” United States v. Darby, 312 U.S. 100, 124 (1941).
9 78 U.S. (11 Wall.) 113 (1871).
States.” In 1939, Collector v. Day was expressly overruled. Nevertheless, the problem of reconciling state and national interest still confronts the Court occasionally, and was elaborately considered in New York v. United States, where, by a vote of six-to-two, the Court upheld the right of the United States to tax the sale of mineral waters taken from property owned by a State. Speaking for four members of the Court, Chief Justice Stone justified the tax on the ground that “[t]he national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it.” Justices Frankfurter and Rutledge found in the Tenth Amendment “no restriction upon Congress to include the States in levying a tax equally from private persons upon the same subject matter.” Justices Douglas and Black dissented, saying: “If the power of the federal government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have.”

**Federal Police Power.**—A year before Collector v. Day was decided, the Court held invalid, except as applied in the District of Columbia and other areas over which Congress has exclusive authority, a federal statute penalizing the sale of dangerous illuminating oils. The Court did not refer to the Tenth Amendment. Instead, it asserted that the “express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.” Similarly, in the Employers’ Liability Cases, an act of Congress making every carrier engaged in interstate commerce liable to “any” employee, including those whose activities related solely to intrastate activities, for injuries caused by negligence, was held unconstitutional by a

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10 Id. at 124.
11 Graves v. New York ex rel. O’Keefe, 306 U.S. 466 (1939). The Internal Revenue Service is authorized to sue a state auditor personally and recover from him an amount equal to the accrued salaries which, after having been served with notice of levy, he paid to state employees delinquent in their federal income tax. Sims v. United States, 359 U.S. 108 (1959).
13 Id. at 589.
14 Id. at 584.
15 Id. at 595. Most recently, the issue was canvassed, but inconclusively, in Massachusetts v. United States, 435 U.S. 444 (1978).
17 Id. at 44.
closely divided Court, without explicit reliance on the Tenth Amendment. Not until it was confronted with the Child Labor Law, which prohibited the transportation in interstate commerce of goods produced in establishments in which child labor was employed, did the Court hold that the state police power was an obstacle to adoption of a measure which operated directly and immediately upon interstate commerce. In *Hammer v. Dagenhart*, five members of the Court found in the Tenth Amendment a mandate to nullify this law as an unwarranted invasion of the reserved powers of the States. This decision was expressly overruled in *United States v. Darby*.

During the twenty years following *Hammer v. Dagenhart*, a variety of measures designed to regulate economic activities, directly or indirectly, were held void on similar grounds. Excise taxes on the profits of factories in which child labor was employed, on the sale of grain futures on markets which failed to comply with federal regulations, on the sale of coal produced by nonmembers of a coal code established as a part of a federal regulatory scheme, and a tax on the processing of agricultural products, the proceeds of which were paid to farmers who complied with production limitations imposed by the Federal Government, were all found to invade the reserved powers of the States. In *Schechter Corp. v. United States*, the Court, after holding that the commerce power did not extend to local sales of poultry, cited the Tenth Amendment to refute the argument that the existence of an economic emergency justified the exercise of what Chief Justice Hughes called "extraconstitutional authority."

In 1941, the Court came full circle in its exposition of this Amendment. Having returned four years earlier to the position of John Marshall when it sustained the Social Security Act and National Labor Relations Act, it explicitly restated Marshall's thesis in upholding the Fair Labor Standards Act in *United States v. Darby*. Speaking for a unanimous Court, Chief Justice Stone
wrote: “The power of Congress over interstate commerce ‘is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.’ . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attended the exercise of the police power of the states. . . . Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered.”

But even prior to 1937 not all measures taken to promote objectives which had traditionally been regarded as the responsibilities of the States had been held invalid. In *Hamilton v. Kentucky Distilleries Co.*, a unanimous Court, speaking by Justice Brandeis, upheld “War Prohibition,” saying: “That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power.” And in a series of cases, which today seem irreconcilable with *Hammer v. Dagenhart*, it sustained federal laws penalizing the interstate transportation of lottery tickets, of women for immoral purposes, of stolen automobiles, and of tick-infected cattle, as well as a statute prohibiting the mailing of obscene matter. It affirmed the power of Congress to punish the forgery of bills of lading purporting to cover interstate shipments of merchandise, to subject prison-made goods moved from one State to another to the laws of the receiving State, to regulate prescriptions for the medicinal use of liquor as an appropriate measure for the enforcement of the Eighteenth Amendment, and to control extortionate means of collecting and attempting to collect payments on loans, even when all aspects of the credit transaction took place within one

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31 251 U.S. 146 (1919).
32 Id. at 156.
33 Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
34 Hoke v. United States, 227 U.S. 308 (1913).
State’s boundaries. More recently, the Court upheld provisions of federal surface mining law that could be characterized as “land use regulation” traditionally subject to state police power regulation.

Reversing this trend, the Court in 1995 in *United States v. Lopez* struck down a statute prohibiting possession of a gun at or near a school, rejecting an argument that possession of firearms in school zones can be punished under the Commerce Clause because it impairs the functioning of the national economy. Acceptance of this rationale, the Court said, would eliminate “any distinction between what is truly national and what is truly local,” would convert Congress’ commerce power into “a general police power of the sort retained by the States,” and would undermine the “first principle” that the Federal Government is one of enumerated and limited powers. Application of the same principle led five years later to the Court’s decision in *United States v. Morrison* invalidating a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Congress may not regulate “non-economic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce,” the Court concluded. “[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”

Notwithstanding these federal inroads into powers otherwise reserved to the States, the Court has held that Congress could not itself undertake to punish a violation of state law; in *United States v. Constantine*, a grossly disproportionate excise tax imposed on retail liquor dealers carrying on business in violation of local law was held unconstitutional. However, Congress does not contravene reserved state police powers when it levies an occupation tax on all

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46 529 U.S. at 617.
47 296 U.S. 287 (1935). The Civil Rights Act of 1875, which made it a crime for one person to deprive another of equal accommodations at inns, theaters or public conveyances was found to exceed the powers conferred on Congress by the Thirteenth and Fourteenth Amendments and hence to be an unlawful invasion of the powers reserved to the States by the Tenth Amendment. Civil Rights Cases, 109 U.S. 3, 15 (1883). Congress has now accomplished this end under its commerce powers, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964), but it is clear that the rationale of the Civil Rights Cases has been greatly modified if not severely impaired. Cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (13th Amendment); Griffin v. Breckenridge, 403 U.S. 88 (1971) (13th Amendment); United States v. Guest, 383 U.S. 745 (1966) (14th Amendment).
persons engaged in the business of accepting wagers regardless of whether those persons are violating state law, and imposes severe penalties for failure to register and pay the tax. 48

**Federal Regulations Affecting State Activities and Instrumentalities.**—Since the mid-1970s, the Court has been closely divided over whether the Tenth Amendment or related constitutional doctrine constrains congressional authority to subject state activities and instrumentalities to generally applicable requirements enacted pursuant to the commerce power. 49 Under *Garcia v. San Antonio Metropolitan Transit Authority*, 50 the Court’s most recent ruling directly on point, the Tenth Amendment imposes practically no judicially enforceable limit on generally applicable federal legislation, and states must look to the political process for redress. *Garcia*, however, like *National League of Cities v. Usery*, 51 the case it overruled, was a 5-4 decision, and there are recent indications that the Court may be ready to resurrect some form of Tenth Amendment constraint on Congress.

In *National League of Cities v. Usery*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was “undoubtedly within the scope of the Commerce Clause,” 52 but it cautioned that “there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.” 53 The Court approached but did not reach the conclusion that the Tenth Amendment was the prohibition here, not that it directly interdicted federal power because power which is delegated is not reserved, but that it implicitly embodied a policy against impairing the States’ integrity or ability to function. 54 But, in the end, the Court held that the legislation was invalid, not because it violated a prohibition found in the Tenth Amendment or elsewhere, but because the law was “not within the authority granted Congress.” 55 In subsequent cases applying or distinguishing *National League of Cities*, the Court and

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49 The matter is discussed more fully under “Supremacy Clause Versus the Tenth Amendment,” supra.
52 Id. at 841.
53 Id. at 845.
54 Id. at 843.
55 Id. at 852.
dissenters wrote as if the Tenth Amendment was the prohibition.\textsuperscript{56} Whatever the source of the constraint, it was held not to limit the exercise of power under the Reconstruction Amendments.\textsuperscript{57}

The Court overruled \textit{National League of Cities} in \textit{Garcia v. San Antonio Metropolitan Transit Auth.}\textsuperscript{58} Justice Blackmun's opinion for the Court in \textit{Garcia} concluded that the \textit{National League of Cities} test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren," and that the Court in 1976 had "tried to repair what did not need repair."\textsuperscript{59} With only passing reference to the Tenth Amendment the Court nonetheless clearly reverted to the Madisonian view of the Amendment reflected in \textit{Unites States v. Darby}.\textsuperscript{60} States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."\textsuperscript{61} The principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment or in the Commerce Clause itself, but in the structure of the Federal Government and in the political processes.\textsuperscript{62} "Freestanding conceptions of state sovereignty" such as the \textit{National League of Cities} test subvert the federal system by "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."\textsuperscript{63} While continuing to recognize that "Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards

\textsuperscript{56}E.g., FERC v. Mississippi, 456 U.S. 742, 771 (1982) (Justice Powell dissenting); id. at 775 (Justice O'Connor dissenting); EEOC v. Wyoming, 460 U.S. 226 (1983). The EEOC Court distinguished \textit{National League of Cities}, holding that application of the Age Discrimination in Employment Act to state fish and game wardens did not directly impair the state's ability to structure integral operations in areas of traditional governmental function, since the state remained free to assess each warden's fitness on an individualized basis and retire those found unfit for the job.


\textsuperscript{58}469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun's qualified acceptance of the \textit{National League of Cities} approach having changed to complete rejection.

\textsuperscript{59}Id. at 557.

\textsuperscript{60}312 U.S. 100, 124 (1941), discussed supra. Madison's views were quoted by the Court in \textit{Garcia}, 469 U.S. at 549.

\textsuperscript{61}469 U.S. at 549.

\textsuperscript{62}"Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited the role of states in selecting the President, and the equal representation of states in the Senate. Id. at 551.

\textsuperscript{63}469 U.S. at 550, 546.
Act minimum wage and overtime provisions to state employment does not require identification of these “affirmative limits.” In sum, the Court in *Garcia* seems to have said that most but not necessarily all disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions. What it would take for legislation to so threaten the “special and specific position” that states occupy in the constitutional system as to require judicial rather than political resolution was not delineated.

The first indication was that it would take a very unusual case indeed. In *South Carolina v. Baker* the Court expansively interpreted *Garcia* as meaning that there must be an allegation of “some extraordinary defects in the national political process” before the Court will apply substantive judicial review standards to claims that Congress has regulated state activities in violation of the Tenth Amendment. A claim that Congress acted on incomplete information would not suffice, the Court noting that South Carolina had “not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.” Thus, the general rule was that “limits on Congress’ authority to regulate state activities . . . are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”

Later indications are that the Court may be looking for ways to back off from *Garcia*. One device is to apply a “clear statement” rule requiring unambiguous statement of congressional intent to displace state authority. After noting the serious constitutional issues that would be raised by interpreting the Age Discrimination in Employment Act to apply to appointed state judges, the Court in *Gregory v. Ashcroft* explained that, because *Garcia* “con-

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64 469 U.S. at 556.
65 485 U.S. 505, 512 (1988). Justice Scalia, in a separate concurring opinion, objected to this language as departing from the Court’s assertion in *Garcia* that the “constitutional structure” imposes some affirmative limits on congressional action. Id. at 528.
66 Id. at 513.
67 Id. at 512.
68 501 U.S. 452, 464 (1991). The Court left no doubt that it considered the constitutional issue serious. “[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at ‘the heart of representative government’ [and] is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause],” Id. at 463. In the latter context the Court’s opinion by Justice O’Connor cited Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). See also McConnell, Federalism: Evaluating
strained” consideration of “the limits that the state-federal balance places on Congress’ powers,” a plain statement rule was all the more necessary. “[I]nasmuch as this Court in Garcia has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.”

The Court’s 1992 decision in New York v. United States,69 may portend a more direct retreat from Garcia. The holding in New York, that Congress may not “commandeer” state regulatory processes by ordering states to enact or administer a federal regulatory program, applied a limitation on congressional power previously recognized in dictum70 and in no way inconsistent with the holding in Garcia. Language in the opinion, however, sounds more reminiscent of National League of Cities than of Garcia. First, the Court’s opinion by Justice O’Connor declares that it makes no difference whether federalism constraints derive from limitations inherent in the Tenth Amendment, or instead from the absence of power delegated to Congress under Article I; “the Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.”71 Second, the Court, without reference to Garcia, thoroughly repudiated Garcia’s “structural” approach requiring states to look primarily to the political processes for protection. In rejecting arguments that New York’s sovereignty could not have been infringed because its representatives had participated in developing the compromise legislation and had consented to its enactment, the Court declared that “[t]he Constitution does not protect the sovereignty of States for the benefit of the States or State governments, [but instead] for the protection of individuals.” Consequently, “State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.”72 The stage appears to be set, therefore, for some relaxation of Garcia’s obstacles to federalism-based challenges to legislation enacted pursuant to the commerce power.

Extending the principle applied in New York, the Court in Printz v. United States73 held that Congress may not “circumvent”

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71 505 U.S. at 157.
72 Id. at 2431-32.
the prohibition on commandeering a state’s regulatory processes “by conscripting the State's officers directly.” Struck down in Printz were interim provisions of the Brady Handgun Violence Protection Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers. “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”

In Reno v. Condon, the Court distinguished New York and Printz in upholding the Driver’s Privacy Protection Act of 1994 (DPPA), a federal law that restricts the disclosure and resale of personal information contained in the records of state motor vehicles departments. The Court returned to a principle articulated in South Carolina v. Baker that distinguishes between laws which improperly seek to control the manner in which States regulate private parties, and those which merely regulate state activities directly. Here, the Court found that the DPPA “does not require the States in their sovereign capacities to regulate their own citizens,” but rather “regulates the States as the owners of databases.” The Court saw no need to decide whether a federal law may regulate the states exclusively, since the DPPA is a law of general applicability that regulates private resellers of information as well as states.

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74 521 U.S. at 935.
75 Id.
76 528 U.S. 141 (2000).
78 528 U.S. at 151.
79 Id.
# ELEVENTH AMENDMENT

## SUITS AGAINST STATES

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Suits Against States

Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

State Sovereign Immunity

Purpose and Early Interpretation

Eleventh Amendment jurisprudence has become over the years esoteric and abstruse and the decisions inconsistent. At the same time, it is a vital element of federal jurisdiction that "go[es] to the very heart of [the] federal system and affect[s] the allocation of power between the United States and the several states." Because of the centrality of the Amendment at the intersection of federal judicial power and the accountability of the States and their officers to federal constitutional standards, it has occasioned considerable dispute within and without the Court.

The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another State in 1793 provoked such angry reaction in Georgia and such anxieties in other States that at the first meeting of Congress following the decision the Eleventh Amendment was proposed by an overwhelming vote of both Houses and ratified with, what was for that day, "vehement

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3 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
speed.” 4 Chisholm had been brought under that part of the jurisdictional provision of Article III that authorized cognizance of “controversies ... between a State and Citizens of another State.” At the time of the ratification debates, opponents of the proposed Constitution had objected to the subject of a State to suits in federal courts and had been met with conflicting responses—on the one hand, an admission that the accusation was true and that it was entirely proper so to provide, and, on the other hand, that the accusation was false and the clause applied only when a State was the party plaintiff. 5 So matters stood when Congress, in enacting the Judiciary Act of 1789, without recorded controversy gave the Supreme Court original jurisdiction of suits between States and citizens of other States. 6 Chisholm v. Georgia was brought under this jurisdictional provision to recover under a contract for supplies executed with the State during the Revolution. Four of the five Justices agreed that a State could be sued under this Article III jurisdictional provision and that under section 13 the Supreme Court properly had original jurisdiction. 7

The Amendment proposed by Congress and ratified by the States was directed specifically toward overturning the result in Chisholm and preventing suits against States by citizens of other States or by citizens or subjects of foreign jurisdictions. It did not, as other possible versions of the Amendment would have done, altogether bar suits against States in the federal courts. 8 That is, it

4 The phrase is Justice Frankfurter’s, from Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (dissenting), a federal sovereign immunity case. The amendment was proposed on March 4, 1794, when it passed the House; ratification occurred on February 7, 1795, when the twelfth State acted, there then being fifteen States in the Union. 5 The Convention adopted this provision largely as it came from the Committee on Detail, without recorded debate. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 423–25 (rev. ed. 1937). In the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution, objected to making States subject to suit, 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (1836), but both Madison and John Marshall (the latter had not been a delegate at Philadelphia) denied States could be made party defendants, id. at 533, 555–56, while Randolph (who had been a delegate, as well as a member of the Committee on Detail) granted that States could be and ought to be subject to suit. Id. at 573. James Wilson, a delegate and member of the Committee on Detail, seemed to say in the Pennsylvania ratifying convention that States would be subject to suit. 2 id. at 491. See Hamilton, in THE FEDERALIST No. 84 (Modern Library ed. 1937), also denying state suability. See Fletcher, supra at 1045–53 (discussing sources and citing other discussions). 6 Ch. 20, § 13, 1 Stat. 80 (1789). See also Fletcher, supra, at 1053–54. For a thorough consideration of passage of the Act itself, see J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. 1, ANTECEDENTS AND BEGINNINGS TO 1801 457–508 (1971). 7 Id. at 723–34; Fletcher, supra, at 1054–58. 8 Id. at 1058–63; Goebel, supra, at 736.
barred suits against States based on the status of the party plaintiff and did not address the instance of suits based on the nature of the subject matter. The early decisions seemed to reflect this understanding of the Amendment, although the point was not necessary to the decisions and thus the language is dictum. In *Cohens v. Virginia*, Chief Justice Marshall ruled for the Court that the prosecution of a writ of error to review a judgment of a state court alleged to be in violation of the Constitution or laws of the United States did not commence or prosecute a suit against the State but was simply a continuation of one commenced by the State, and thus could be brought under § 25 of the Judiciary Act of 1789. But in the course of the opinion, the Chief Justice attributed adoption of the Eleventh Amendment not to objections to subjecting States to suits *per se* but to well-founded concerns about creditors being able to maintain suits in federal courts for payment, and stated his view that the Eleventh Amendment did not

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9 Party status is one part of the Article III grant of jurisdiction, as in diversity of citizenship of the parties; subject matter jurisdiction is the other part, as in federal question or admiralty jurisdiction.

10 One square holding, however, was that of Justice Washington, on Circuit, in United States v. Bright, 24 Fed. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647), that the Eleventh Amendment’s reference to “any suit in law or equity” excluded admiralty cases, so that States were subject to suits in admiralty. This understanding, see Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 124 (1828); 3 J. Story, Commentaries on the Constitution of the United States 560–61 (1833), did not receive a holding of the Court during this period, see Georgia v. Madrazo, supra; United States v. Peters, 9 U.S. (5 Cr.) 115 (1809); Ex parte Madrazo, 32 U.S. (7 Pet.) 627 (1833), and was held to be in error in Ex parte New York (No. 1), 256 U.S. 490 (1921).

11 19 U.S. (6 Wheat.) 264 (1821).

12 1 Stat. 73, 85.

13 "It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were prohibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.” 19 U.S. at 406-07.
bar suits against the States under federal question jurisdiction and did not in any case reach suits against a State by its own citizens.\footnotereference{15}

In \textit{Osborn v. Bank of the United States},\footnotereference{16} the Court, again through Chief Justice Marshall, held that the Bank of the United States could sue the Treasurer of Ohio, over Eleventh Amendment objections, because the plaintiff sought relief against a state officer rather than against the State itself. This ruling embodied two principles, one of which has survived and one of which the Marshall Court itself soon abandoned. The latter holding was that a suit is not one against a State unless the State is a named party of record. The former holding, the primary rationale through which the strictures of the Amendment are escaped, is that a state official possesses no official capacity when acting illegally and thus

\footnoteresize{footnotesize}{14}“The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. \ldots [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.” 19 U.S. at 382-83.

\footnoteresize{footnotesize}{15}“If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted ‘by a citizen of another state, or by a citizen or subject of any foreign state.’ It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.” 19 U.S. at 412.

\footnoteresize{footnotesize}{16}22 U.S. (9 Wheat.) 738 (1824).

\footnoteresize{footnotesize}{17}The Bank of the United States was treated as if it were a private citizen, rather than as the United States itself, and hence a suit by it was a diversity suit by a corporation, as if it were a suit by the individual shareholders. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809).

\footnoteresize{footnotesize}{18}22 U.S. at 850-58. For a reassertion of the Chief Justice’s view of the limited effect of the Amendment, see id. at 857–58. \textit{But compare} id. at 849. The holding was repudiated in Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), in which it was conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. It is now well settled that in determining whether a suit is prosecuted against a State “the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit.” In re Ayers, 123 U.S. 443, 487 (1887).
can derive no protection from an unconstitutional statute of a State. 19

Expansion of the Immunity of the States.—Until the period following the Civil War, Chief Justice Marshall’s understanding of the Amendment generally prevailed. But in the aftermath of that conflict, Congress for the first time effectively gave the federal courts general federal question jurisdiction, 20 and a large number of States in the South defaulted upon their revenue bonds in violation of the Contracts Clause of the Constitution. 21 As bondholders sought relief in federal courts, the Supreme Court gradually worked itself into the position of holding that the Eleventh Amendment, or more properly speaking the principles “of which the Amendment is but an exemplification,” 22 is a bar not only of suits against a State by citizens of other States, but also of suits brought by citizens of that State itself. 23

Expansion as a formal holding occurred in Hans v. Louisiana, 24 a suit against the State by a resident of that State brought in federal court under federal question jurisdiction, alleging a violation of the Contracts Clause in the State’s repudiation of its obligation to pay interest on certain bonds. Admitting that the Amendment on its face prohibited only the entertaining of a suit against a State by citizens of another State, or citizens or subjects of a foreign state, the Court nonetheless thought the literal language was an insufficient basis for decision. Rather, wrote Justice Bradley for the Court, the Eleventh Amendment was a result of the “shock of surprise throughout the country” at the Chisholm decision and reflected the determination that the decision was wrong and that federal jurisdiction did not extend to making defendants of unwilling States. 25

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19 22 U.S. at 858-59, 868. For the flowering of the principle, see Ex parte Young, 209 U.S. 123 (1908).
22 Ex parte New York (No. 1), 256 U.S. 490, 497 (1921).
23 E.g., In re Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); The Virginia Coupon Cases, 114 U.S. 269 (1885); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Louisiana v. Jumel, 107 U.S. 711 (1882). In Antoni v. Greenbow, 107 U.S. 769, 783 (1883), three concurring Justices propounded the broader reading of the Amendment which soon prevailed.
24 134 U.S. 1 (1890).
25 134 U.S. at 11.
Under this view, the amendment reversed an erroneous decision and restored the proper interpretation of the Constitution. The views of the opponents of subjecting States to suit “were most sensible and just” and those views “apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of.”

“The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law.”

Thus, while the literal terms of the Amendment did not so provide, “the manner in which [Chisholm] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing,” led the Court unanimously to hold that States could not be sued by their own citizens on grounds arising under the Constitution and laws of the United States.

Then, in *Ex parte New York (No. 1)*, the Court held that, absent consent to suit, a State was immune to suit in admiralty, the Eleventh Amendment’s reference to “any suit in law or equity” notwithstanding. “That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification. . . . It is true the Amendment speaks only of suits in law or equity; but this is because . . . the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia* . . . from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case.”

Just as *Hans v. Louisiana* had demonstrated the “impropriety of construing the Amendment” so as to permit federal question suits against a State, so “it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its
citizens or not.” 31 An in rem admiralty action may be brought, however, if the State is not in possession of the res. 32

And in extending protection against suits brought by foreign governments, the Court made clear the immunity flowed not from the Eleventh Amendment but from concepts of state sovereign immunity generally. “Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been ‘a surrender of this immunity in the plan of the convention.’” 33

In the 1980s four Justices, led by Justice Brennan, argued that Hans was incorrectly decided, that the Amendment was intended only to deny jurisdiction against the States in diversity cases, and that Hans and its progeny should be overruled. 34 But the remaining five Justices adhered to Hans and in fact stiffened it with a rule of construction quite severe in its effect. 35 The Hans interpretation was further solidified with the Court’s ruling in Seminole...
Tribe of Florida v. Florida,\textsuperscript{36} that Congress lacks the power under Article I to abrogate state immunity under the Eleventh Amendment, and with its ruling in \textit{Alden v. Maine}\textsuperscript{37} that the broad principle of sovereign immunity reflected in the Eleventh Amendment bars suits against states in state courts as well as federal.

Having previously reserved the question of whether federal statutory rights could be enforced in state courts,\textsuperscript{38} the Court in \textit{Alden v. Maine}\textsuperscript{39} held that states could also assert Eleventh Amendment “sovereign immunity” in their own courts. Recognizing that the application of the Eleventh Amendment, which limits only the federal courts, was a “misnomer”\textsuperscript{40} as applied to state courts, the Court nonetheless concluded that the principles of common law sovereign immunity applied absent “compelling evidence” that the States had surrendered such by the ratification of the Constitution. Although this immunity is subject to the same limitations as apply in federal courts, the Court’s decision effectively limited the application of significant portions of federal law to state governments. Both \textit{Seminole Tribe} and \textit{Alden} were also 5–4 decisions with the four dissenting Justices maintaining that \textit{Hans} was wrongly decided.\textsuperscript{41}

This now institutionalized 5-4 split continued with the Court’s ruling in \textit{Federal Maritime Commission v. South Carolina State Ports Authority},\textsuperscript{42} which held that state sovereign immunity also applies to quasi-judicial proceedings in federal agencies. The operator of a cruise ship devoted to gambling had been denied entry to the Port of Charleston, and subsequently filed a complaint with the Federal Maritime Commission, alleging a violation of the Shipping Act of 1984.\textsuperscript{43} Justice Breyer, writing for the four dissenting justices, emphasized the executive (as opposed to judicial nature) of such agency adjudications, and pointed out that the ultimate enforcement of such proceedings in federal court was exercised by a

\textsuperscript{36}517 U.S. 44 (1996).
\textsuperscript{37}527 U.S. 706 (1999).
\textsuperscript{40}527 U.S. at 713.
\textsuperscript{41}Chief Justice Rehnquist wrote the opinion of the Court in \textit{Seminole Tribe}, joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Justice Stevens dissented, as did Justice Souter, whose opinion was joined by Justices Ginsburg and Breyer. In \textit{Alden}, Justice Kennedy wrote the opinion of the Court, joined by the Chief Justice, and by Justices O’Connor, Scalia, and Thomas. Justice Souter’s dissenting opinion was joined by Justices Stevens, Ginsburg, and Breyer.
\textsuperscript{42}122 S. Ct. 1864 (2002). Justice Breyer’s dissenting opinion describes a need for “continued dissent” of the majority’s sovereign immunity holdings. 122 S. Ct. at 1889.
federal agency (as is allowed under the doctrine of sovereign immunity). The majority, however, while admitting to a "relatively barren historical record," presumed that when a proceeding was "unheard of" at the time of the founding of the Constitution, it could not subsequently be applied in derogation of a "State's dignity" within our system of federalism. 44

The Nature of the States' Immunity

A great deal of the difficulty in interpreting and applying the Eleventh Amendment stems from the fact that the Court has not been clear, or at least has not been consistent, with respect to what the Amendment really does and how it relates to the other parts of the Constitution. One view of the Amendment, set out above in the discussion of Hans v. Louisiana, Ex parte New York, and Principality of Monaco, is that Chisholm was erroneously decided and that the Amendment's effect, its express language notwithstanding, was to restore the "original understanding" that Article III's grants of federal court jurisdiction did not extend to suits against the States. That view finds present day expression. 45 It explains the decision in Edelman v. Jordan,46 in which the Court held that a State could properly raise its Eleventh Amendment defense on appeal after having defended and lost on the merits in the trial court. "[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." 47 But that the bar is not wholly jurisdictional seems established as well. 48

Moreover, if under Article III there is no jurisdiction of suits against States, the settled principle that States may consent to suit 49 becomes conceptually difficult, inasmuch as it is not possible

44 122 S. Ct. at 1872, 1874.
47 415 U.S. at 678. The Court relied on Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), where the issue was whether state officials who had voluntarily appeared in federal court had authority under state law to waive the State's immunity. Edelman has been followed in Sosna v. Iowa, 419 U.S. 393, 396 n.2 (1975); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977), with respect to the Court's responsibility to raise the Eleventh Amendment jurisdictional issue on its own motion.
48 See Patsy v. Florida Board of Regents, 457 U.S. 496, 515–16 n.19 (1982), in which the Court bypassed the Eleventh Amendment issue, which had been brought to its attention, because of the interest of the parties in having the question resolved on the merits. See id. at 520 (Justice Powell dissenting).
to confer jurisdiction where it is lacking through the consent of the parties. 50 And there is jurisdiction under Article III of some suits against States, such as those brought by the United States or by other States. 51 And, furthermore, Congress is able in at least some instances to legislate away state immunity, 52 although it may not enlarge Article III jurisdiction. 53 The Court has recently declared that “the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III,” but almost in the same breath has acknowledged that “[a] sovereign’s immunity may be waived.” 54

Another explanation of the Eleventh Amendment is that it recognizes the doctrine of sovereign immunity, which was clearly established at the time: a state was not subject to suit without its consent. 55 This view also has support in modern case law: “the State’s immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ” 56 The Court in dealing with questions of governmental immunity from suit has traditionally treated interchangeably precedents dealing with state immunity and those dealing with federal governmental immunity. 57 Viewing the Amendment and its radiations into Article III in this way provides a consistent explanation of the consent to suit as a waiver. 58 The limited effect of the doctrine in this context in federal court arises

51 See, e.g., the Court’s express rejection of the Eleventh Amendment defense in these cases. United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904).
53 The principal citation is, of course, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).
55 As Justice Holmes explained, the doctrine is based “on the logical and practical ground that there can be no legal right against the authority that makes the law on which the right depends.” Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is “the authority that makes the law” creating the right of action. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 154 (1996) (Justice Souter dissenting). On the sovereign immunity of the United States, see supra pp. 746–48. For the history and jurisprudence, see Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1 (1963).
from the fact that traditional sovereign immunity arose in a unitary state, barring unconsented suit against a sovereign in its own courts or the courts of another sovereign. But upon entering the Union the States surrendered their sovereignty to some undetermined and changing degree to the national government, a sovereign that does not have plenary power over them but which is more than their coequal. 59

Thus, outside the area of federal court jurisdiction, there is the case of Nevada v. Hall, 60 which perfectly illustrates the difficulty. The case arose when a California resident sued a Nevada state agency in a California court because one of the agency’s employees negligently injured him in an automobile accident in California. While recognizing that the rule during the framing of the Constitution was that a State could not be sued without its consent in the courts of another sovereign, the Court discerned no evidence in the federal constitutional structure, in the specific language, or in the intention of the Framers that would impose a general, federal constitutional constraint upon the action of a State in authorizing suit in its own courts against another State. The Court did imply that in some cases a “substantial threat to our constitutional system of cooperative federalism” might arise and occasion a different result, but this was not such a case. 61

Within the area of federal court jurisdiction, the issue becomes the extent to which the States upon entering the Union gave up their immunity to suit in federal court. Chisholm held, and the Eleventh Amendment reversed the holding, that the States had given up their immunity to suit in diversity cases based on common law or state law causes of action; Hans v. Louisiana and subsequent cases held that the Amendment in effect codified an understanding of broader immunity to suits based on federal causes of action. 62 Other cases have held that the States did give up their immunity to suits by the United States or by other States and that subjection to suit continues. 63

59 See Fletcher, supra.
61 440 U.S. at 424 n.24. The Court looked to the full faith and credit clause as a possible constitutional limitation. The dissent would have found implicit constitutional assurance of state immunity as an essential component of federalism. Id. at 427 (Justice Blackmun), 432 (Justice Rehnquist).
Still another view of the Eleventh Amendment is that it embodies a state sovereignty principle limiting the power of the Federal Government. In this respect, the federal courts may not act without congressional guidance in subjecting States to suit, and Congress, which can act to the extent of its granted powers, is constrained by judicially-created doctrines requiring it to be explicit when it legislates against state immunity.

**Suits Against States**

Aside from suits against States by the United States and by other States, there are permissible suits by individuals against States upon federal constitutional and statutory grounds and indeed upon grounds expressly covered by the Eleventh Amendment in somewhat fewer circumstances.

**Consent to Suit and Waiver.**—The immunity of a State from suit is a privilege which it may waive at its pleasure. It may do so by a law specifically consenting to suit in the federal courts, but the conclusion that there has been consent or a waiver is not lightly inferred; the Court strictly construes statutes alleged to consent to suit. Thus, a State may waive its immunity in its own courts without consenting to suit in federal court, and a general authorization “to sue and be sued” is ordinarily insufficient to constitute consent. “The Court will give effect to a State’s waiver of Eleventh Amendment immunity ‘only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.’ . . .

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A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts . . . and ‘[t]hus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State’s intention to subject itself to suit in federal court.’”

Thus, in *Port Authority Trans-Hudson Corp. v. Feeney*, an expansive consent “to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . .” was deemed too “ambiguous and general” to waive immunity in federal court, since it might be interpreted to reflect only a State’s consent to suit in its own courts. But when combined with language specifying that consent was conditioned on venue being laid “within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District,” waiver was effective.

While the Court in a few cases has found a waiver by implication, the current vitality of these cases is questionable. Thus, in *Parden v. Terminal Railway*, the Court ruled that employees of a state-owned railroad could sue the State for damages under the Federal Employers’ Liability Act. One of the two primary grounds for finding lack of immunity was that by taking control of a railroad which was subject to the FELA, enacted some 20 years previously, the State had effectively accepted the imposition of the Act and consented to suit. Distinguishing *Parden* as involving a proprietary activity, the Court subsequently refused to find any implied consent to suit by States participating in federal spending programs; participation was insufficient, and only when waiver has been “stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction,” will it be found. This aspect of

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69 Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305–06 (1990) (internal citations omitted; emphasis in original).
72 377 U.S. 184 (1964). The alternative but interwoven ground had to do with Congress’ power to withdraw immunity. See also Petty v. Tennessee-Missouri Bridge Comm’n, 359 U.S. 275 (1959).
74 Edelman v. Jordan, 415 U.S. 651 (1974) (quoting id. at 673, Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1919)); Florida Dep’t of Health v. Florida Nursing Home Ass’n, 450 U.S. 147 (1981). Of the four *Edelman* dissenters, Justices Marshall and Blackmun found waiver through knowing participation, 415 U.S. at 688. In *Florida Dep’t*, Justice Stevens noted he would have agreed with them had he been on the Court at the time but that he would now adhere to *Edelman*. Id. at 151.
Parden has now been overruled, a plurality of the Court emphasizing that congressional abrogation of immunity must be express and unmistakable.75

Similarly, a State may waive its immunity by initiating or participating in litigation. In Clark v. Barnard,76 the State had filed a claim for disputed money deposited in a federal court, and the Court held that the State could not thereafter complain when the court awarded the money to another claimant. However, the Court is loath to find a waiver simply because of the decision of an official or an attorney representing the State to litigate the merits of a suit, so that a State may at any point in litigation raise a claim of immunity based on whether that official has the authority under state law to make a valid waiver.77 However, this argument is only available when the State is brought into federal court involuntarily. If a State voluntarily agrees to removal of a state action to federal court, the Court has held it may not then invoke a defense of sovereign immunity and thereby gain an unfair tactical advantage.78

With respect to governmental entities that derive their authority from the State, but are not the State, the Court closely examines state law to determine what the nature of the entity is, whether it is an arm of the State or whether it is to be treated like a municipal corporation or other political subdivision. An arm of the State has immunity: “agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself.”79 Municipal corporations, though they partake under state law of the State’s immunity, do not have immunity in federal court and the

75Welch v. Texas Dep’t of Highways and Pub. Transp., 483 U.S. 468 (1987). Justice Powell’s plurality opinion was joined by Chief Justice Rehnquist and by Justices White and O’Connor. Justice Scalia, concurring, thought Parden should be overruled because it must be assumed that Congress enacted the FELA and other statutes with the understanding that Hans v. Louisiana shielded states from immunity. Id. at 495.
76108 U.S. 436 (1883).
States may not confer it.\textsuperscript{80} Entities created through interstate compacts (subject to congressional approval) generally also are subject to suit.\textsuperscript{81}

\textbf{Congressional Withdrawal of Immunity.}—The Constitution grants to Congress power to legislate in ways that affect the States. At least in some instances when Congress does so, it may subject the States themselves to suit at the initiation of individuals to implement the legislation. The clearest example arises from the Reconstruction Amendments, which are direct restrictions upon state powers and which expressly provide for congressional implementing legislation.\textsuperscript{82} Thus, “the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment.”\textsuperscript{83} Dwelling on the fact that the Fourteenth Amendment was ratified after the Eleventh became part of the Constitution, the Court implied that earlier grants of legislative power to Congress in the body of the Constitution might not contain a similar power to authorize suits against the States.\textsuperscript{84} The power to enforce the Civil War Amendments is substantive, however, not being limited to remedying judicially cognizable violations of the amendments, but extending as well to measures that in Congress’ judgment will promote compliance.\textsuperscript{85} The principal judicial brake on this power to abrogate state immunity has been application of a

\textsuperscript{80} Lincoln County v. Luning, 133 U.S. 529 (1890); Chicot County v. Sherwood, 148 U.S. 529 (1893); Workman v. City of New York, 179 U.S. 552 (1900); Moor v. County of Alameda, 411 U.S. 693 (1973); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Notice that in National League of Cities v. Usery, 426 U.S. 833 (1976), the Court extended the state immunity from regulation in that case to political subdivisions as well.


\textsuperscript{84} 427 U.S. at 456 (under the Fourteenth Amendment, Congress may “provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”)

\textsuperscript{85} In Maher v. Gagne, 448 U.S. 122 (1980), the Court found that Congress could validly authorize imposition of attorneys’ fees on the State following settlement of a suit based on both constitutional and statutory grounds, even though settlement had prevented determination that there had been a constitutional violation. Maine v. Thiboutot, 448 U.S. 1 (1980), held that § 1983 suits could be premised on federal statutory as well as constitutional grounds. Other cases in which attorneys’ fees were awarded against States are Hutto v. Finney, 437 U.S. 678 (1978); and New York Gaslight Club v. Carey, 447 U.S. 54 (1980).
clear statement rule requiring that congressional intent to subject States to suit must be clearly expressed.\footnote{86}

In the 1989 case of Pennsylvania v. Union Gas Co.,\footnote{87} the Court—temporarily at least—ended years of uncertainty by holding expressly that Congress acting pursuant to its Article I powers may abrogate the Eleventh Amendment immunity of the states, so long as it does so with sufficient clarity. Twenty five years earlier the Court had stated that same principle,\footnote{88} but only as an alternative holding, and a later case had set forth a more restrictive rule.\footnote{89} The premises of Union Gas were that by consenting to ratification of the Constitution, with its Commerce Clause and other clauses empowering Congress and limiting the states, the states had implicitly authorized Congress to divest them of immunity, that the Eleventh Amendment was a restraint upon the courts and not similarly upon Congress, and that the exercises of Congress’ powers under the Commerce Clause and other clauses would be incomplete without the ability to authorize damage actions against the

\footnote{86}Even prior to the recent tightening of the rule to require clear expression in the statutory language itself (see n. and accompanying text, infra), application of the rule curbed congressional enforcement. Fitzpatrick v. Bitzer, 427 U.S. 445 451–53 (1976); Hutto v. Finney, 437 U.S. 678, 693–98 (1978). Because of its rule of clear statement, the Court in Quern v. Jordan, 440 U.S. 332 (1979), held that in enacting 42 U.S.C. § 1983, Congress had not intended to include States within the term “person” for the purpose of subjecting them to suit. The question arose after Monell v. New York City Dept of Social Services, 436 U.S. 658 (1978), reinterpreted “person” to include municipal corporations. Cf. Alabama v. Pugh, 438 U.S. 781 (1978). The Court has reserved the question whether the Fourteenth Amendment itself, without congressional action, modifies the Eleventh Amendment to permit suits against States, Milliken v. Bradley, 433 U.S. 267, 290 n.23 (1977), but the result in Milliken, holding that the Governor could be enjoined to pay half the cost of providing compensatory education for certain schools, which would come from the state treasury, and in Scheuer v. Rhodes, 416 U.S. 232 (1974), permitting imposition of damages upon the governor, which would come from the state treasury, is suggestive. But see Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976) (refusing money damages under the Fourteenth Amendment), appeal dismissed sub nom. Rabinovitch v. Nyquist, 433 U.S. 901 (1977). The Court declined in Ex parte Young, 209 U.S. 123, 150 (1908), to view the Eleventh Amendment as modified by the Fourteenth.

\footnote{87}491 U.S. 1 (1989). The plurality opinion of the Court was by Justice Brennan and was joined by the three other Justices who believed Hans was incorrectly decided. See id. at 23 (Justice Stevens concurring). The fifth vote was provided by Justice White, id. at 45, 55–56 (Justice White concurring), although he believed Hans was correctly decided and ought to be maintained and although he did not believe Congress had acted with sufficient clarity in the statutes before the Court to abrogate immunity. Justice Scalia thought the statutes were express enough but that Congress simply lacked the power. Id. at 29. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined relevant portions of both opinions finding lack of power and lack of clarity.


states to enforce congressional enactments. The dissenters denied each of these strands of the argument, and, while recognizing the Fourteenth Amendment abrogation power, would have held that none existed under Article I.

_Seminole Tribe of Florida v. Florida_ lasted less than seven years before the Court overruled it in _Seminole Tribe of Florida v. Florida_. Chief Justice Rehnquist, writing for a 5–4 majority, concluded that there is "no principled distinction in favor of the States to be drawn between the Indian Commerce Clause [at issue in _Seminole Tribe_] and the Interstate Commerce Clause [relied upon in _Union Gas_]." In the majority's view, _Union Gas_ had deviated from a line of cases tracing back to _Hans v. Louisiana_ that viewed the Eleventh Amendment as implementing the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III." Because "the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Subsequent cases have confirmed this interpretation.

Section 5 of the Fourteenth Amendment, of course, is another matter. _Fitzpatrick v. Bitzer_, "based upon a rationale wholly inapplicable to the Interstate Commerce Clause, _viz._, that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power

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517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

517 U.S. at 63.

134 U.S. 1 (1890).


517 U.S. at 72-73. Justice Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in _Hans v. Louisiana_ was a common law concept that "had no constitutional status and was subject to congressional abrogation." 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This "imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty." Id. at 160.


achieved by Article III and the Eleventh Amendment,” remains good law.\textsuperscript{97}

At the same time as these developments, however, a different majority secured a victory in circumscribing the manner in which Congress could express its decision to abrogate state immunity. Henceforth, and even with respect to statutes that were enacted prior to promulgation of the judicial rule of construction, “Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute” itself.\textsuperscript{98} This means that no legislative history will suffice at all.\textsuperscript{99} Indeed, at one time a plurality of the Court was of the apparent view that only if Congress refers specifically to state sovereign immunity and the Eleventh Amendment will its language be unmistakably clear.\textsuperscript{100} Thus, the Court held in \textit{Atascadero} that general language subjecting to suit in federal court “any recipient of Federal assistance” under the Rehabilitation Act was deemed insufficient to satisfy this test, not because of any question about whether States are “recipients” within the meaning of the provision but because “given their constitutional role, the States are not like any other class of recipients of federal aid.”\textsuperscript{101} As a result of these rulings, Congress began to utilize the “magic words” the Court appeared to insist on.\textsuperscript{102} More recently, however, the Court has accepted less precise language.\textsuperscript{103}

\textsuperscript{97}517 U.S. at 65-66.


\textsuperscript{100}Justice Kennedy for the Court in \textit{Dellmuth}, 491 U.S. at 231, expressly noted that the statute before the Court did not demonstrate abrogation with unmistakably clarity because, inter alia, it “makes no reference whatsoever to either the Eleventh Amendment or the States’ sovereign immunity.” Justice Scalia, one of four concurring Justices, expressed an “understanding” that the Court’s reasoning would allow for clearly expressed abrogation of immunity “without explicit reference to state sovereign immunity or the Eleventh Amendment.” Id. at 233.


\textsuperscript{103}Kimel v. Florida Board of Regents, 528 U.S. 62, 74-78 (2000). In \textit{Kimel}, statutory language authorized age discrimination suits “against any employer (including a public agency),” and a “public agency” was defined to include “the government of a State or political subdivision thereof.” The Court found this language to be suffi-
Although acknowledging that the Eleventh Amendment was not an issue because the § 1983 suit had been pursued in state court, nonetheless the Court applied its strict rule of construction, requiring “unmistakable clarity” by Congress in order to subject States to suit, in holding that States and state officials sued in their official capacity could not be made defendants in § 1983 actions in state courts. While the Court is willing to recognize exceptions to the clear statement rule when the issue involves subject- 

ion of states to suit in state courts, the Court will normally opt for “symmetry” that treats the states’ liability or immunity the same in both state and federal courts.

Suits Against State Officials

Mitigation of the wrongs possible when the State is immune from suit has been achieved under the doctrine that sovereign immunity, either of the States or of the Federal Government, does not ordinarily prevent a suit against an official to restrain him from commission of a wrong, even though the government is thereby restrained. The doctrine is built upon a double fiction: that for purposes of the sovereign’s immunity, a suit against the official is not a suit against the government, but for the purpose of finding state action to which the Constitution applies, the official’s conduct is that of the State. The doctrine preceded but is most noteworthy associated with the decision in Ex parte Young, a case truly deserving the overworked adjective, seminal.

Young arose when a state legislature passed a law reducing railroad rates and providing severe penalties for any railroad that failed to comply with the law. Plaintiff railroad stockholders brought an action to enjoin Young, the state attorney general, from enforcing the law, alleging that it was unconstitutional and that

106 See, e.g., Larson v. Domestic and Foreign Corp., 337 U.S. 682 (1949), where the majority and dissenting opinions utilize both federal and Eleventh Amendment cases in a suit against a federal official. See also Tindal v. Wesley, 167 U.S. 204, 213 (1897), applying to the States the federal rule of United States v. Lee, 106 U.S. 196 (1882).
they would suffer irreparable harm if he were not prevented from acting. An injunction was granted forbidding Young from acting on the law, an injunction he violated by bringing an action in state court against noncomplying railroads; for this action he was adjudged in contempt. If the Supreme Court had held that the injunction was not impermissible, because the suit was one against the State, there would have been no practicable way for the railroads to attack the statute without placing themselves in great danger. They could have disobeyed it and alleged its unconstitutionality in the enforcement proceedings, but if they were wrong about the statute’s validity the penalties would have been devastating. In the modern context, the effectuation of federal constitutional rights against state action often depends upon the imposition of affirmative obligations through injunctions, and this relief would be impossible if such an injunction were in effect a suit against a State.

In deciding Young, the Court was confronted with inconsistent lines of cases, including numerous precedents for permitting suits against state officers. Chief Justice Marshall had begun the process in Osborn by holding that suit was barred only when the State was formally named a party, although he was presently required to modify that decision and preclude suit when an official, the governor of a State, was sued in his official capacity. Relying on Osborn and reading Madrazo narrowly, the Court, seeming to treat the barrier to suit as common-law sovereign immunity, held in a series of cases that an official of a State could be sued to prevent him from executing a state law in conflict with the Constitution or a law of the United States, and the fact that the officer may be acting on behalf of the State or in response to a statutory obligation of the State does not make the suit one against the State. Soon, however, the Court began developing a more expansive concept of the Eleventh Amendment and sovereign immunity, beginning with the first case in which the sovereign immunity of the United States was claimed and rejected and the Hans v. Louisiana decision

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109 In fact, the statute was eventually held to be constitutional. Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352 (1913).


113 United States v. Lee, 106 U.S. 196 (1882). See “Suits Against United States Officials” under Article III. The Court sustained the suit against the federal officers by only a 5-to-4 vote, the dissent presenting the arguments that were soon to inform Eleventh Amendment cases.
reading broadly the effect of the adoption of the Eleventh Amendment.\footnote{114}{134 U.S. 1 (1890).}

The two leading cases, as were many cases of this period, were suits attempting to prevent Southern States from defaulting on bonds.\footnote{115}{See Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Re-interpretation, 83 Colum. L. Rev. 1889, 1968–2003 (1983); Orth, The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423.} In \textit{Louisiana v. Jumel},\footnote{116}{107 U.S. 711 (1882).} a Louisiana citizen sought to compel the state treasurer to apply a sinking fund that had been created under the earlier constitution for the payment of the bonds after a subsequent constitution had abolished this provision for retiring the bonds. The proceeding was held to be a suit against the State.\footnote{117}{In \textit{In re Ayers},\footnote{118}{123 U.S. 443 (1887).} purported to supply a rationale for the cases permitting the issuance of mandamus or injunctive relief against state officers in a way that would have severely curtailed federal judicial power. Suit against a state officer was not barred when his action, aside from any official authority claimed as its justification, was a wrong simply as an individual act, such as a trespass, but if the act of the officer did not constitute an individual wrong and was something that only a State, through its officers, could do, the suit was in actuality a suit against the State and was barred.\footnote{119}{That is, the unconstitutional nature of the state statute under which the officer acted stripped him of the State's shield against suit, but it did not itself constitute a private cause of action. For that, one must be able to point to an independent violation of a common law right.\footnote{120}{Ayers was a suit by plaintiffs seeking to enjoin state officials from bringing suit under an allegedly unconstitutional statute purporting to overturn a contract between the State and the bondholders to receive the bond coupons for tax payments. The Court asserted that the State's contracts impliedly contained the State's immunity from suit, so that express withdrawal of a supposed consent to be sued was not a violation of the contract; but, in any event, inasmuch as any violation of the assumed contract was an act of the State, to which the officials were not parties, their actions as individuals in bringing suit did not breach the contract. 123 U.S. at 503, 505-06. The rationale had been asserted by a four-Justice concurrence in \textit{Antoni v. Greenhow}, 107 U.S. 769, 783 (1882). See also \textit{Cunningham v. Macon & Brunswick R.R.}, 109 U.S. 446 (1883); \textit{Hagood v. Southern}, 117 U.S. 52 (1886); North reading broadly the effect of the adoption of the Eleventh Amendment.\footnote{114}{134 U.S. 1 (1890).}}}}
Although Ayers was in all relevant points on all fours with Young,\textsuperscript{121} the Young Court held that the injunction had properly issued against the state attorney general, even though the State was in effect restrained as well. “The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official, in attempting by the use of the name of the state to enforce a legislative enactment which is void, because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct.”\textsuperscript{122} Justice Harlan was the only dissenter, arguing that in law and fact the suit was one only against the State and that the suit against the individual was a mere “fiction.”\textsuperscript{123}

The “fiction” remains a mainstay of our jurisprudence.\textsuperscript{124} It accounts for a great deal of the litigation brought by individuals to

\textsuperscript{121}Ayers “would seem to be decisive of the Young litigation.” C. Wright, The Law of Federal Courts § 48 at 288 (4th ed. 1983). The Young Court purported to distinguish and to preserve Ayers but on grounds that either were irrelevant to Ayers or that had been rejected in the earlier case. Ex parte Young, 209 U.S. 123, 151, 167 (1908). Similarly, in a later case, the Court continued to distinguish Ayers but on grounds that did not in fact distinguish it from the case before the Court, in which it permitted a suit against a state revenue commissioner to enjoin him from collecting allegedly unconstitutional taxes. Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

\textsuperscript{122}Ex parte Young, 209 U.S. 123, 159–60 (1908). The opinion did not address the issue of how an officer “stripped of his official . . . character” could violate the Constitution, inasmuch as the Constitution restricts only “state action,” but the double fiction has been expounded numerous times since. Thus, for example, it is well settled that an action unauthorized by state law is state action for purposes of the Fourteenth Amendment. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). The contrary premise of Barney v. City of New York, 193 U.S. 430 (1904), though eviscerated by Home Tel. & Tel. was not expressly disavowed until United States v. Raines, 362 U.S. 17, 25–26 (1960).

\textsuperscript{123}Ex parte Young, 209 U.S. 123, 173–74 (1908). In the process of limiting application of Young, a Court majority has recently referred to “the Young fiction.” Idaho v. Cœur d’Alene Tribe, 521 U.S. 261, 281 (1997).

\textsuperscript{124}E.g., Ray v. Atlantic Richfield Co., 435 U.S. 151, 156 n.6 (1978) (rejecting request of state officials being sued to restrain enforcement of state statute as preempted by federal law that Young be overruled); Florida Dep’t of State v. Treasure Salvors, 458 U.S. 670, 685 (1982).
challenges the carrying out of state policies. Thus, suits against state officers alleging that they are acting pursuant to an unconstitutional statute are the standard device by which to test the validity of state legislation in federal courts prior to enforcement and thus interpretation in the state courts. Similarly, suits to restrain state officials from taking certain actions in contravention of federal statutes or to compel the undertaking of affirmative obligations imposed by the Constitution or federal laws are common. For years, moreover, the accepted rule was that suits prosecuted against state officials in federal courts upon grounds that they are acting in excess of state statutory authority or that they are not doing something required by state law are not precluded by the Eleventh Amendment or its emanations of sovereign immunity, provided only that there are grounds to obtain federal jurisdiction.

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125 See, e.g., Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Truax v. Raich, 239 U.S. 33 (1915); Cavanaugh v. Looney, 248 U.S. 525 (1919); Terrace v. Thompson, 263 U.S. 197 (1923); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Massachusetts State Grange v. Benton, 272 U.S. 526 (1926); Hawks v. Hamill, 288 U.S. 52 (1933). See also Graham v. Richardson, 403 U.S. 365 (1971) (enjoining state welfare officials from denying welfare benefits to otherwise qualified recipients because they were aliens); Goldberg v. Kelly, 397 U.S. 254 (1970) (enjoining city welfare officials from following state procedures for termination of benefits); Milliken v. Bradley, 433 U.S. 267 (1977) (imposing half the costs of mandated compensatory education programs upon State through order directed to governor and other officials). On injunctions against governors, see Continental Baking Co. v. Woodring, 286 U.S. 352 (1932); Sterling v. Constantin, 287 U.S. 378 (1932). Applicable to suits under this doctrine are principles of judicial restraint, constitutional, statutory, and prudential, discussed under Article III.


128 E.g., Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Scully v. Bird, 209 U.S. 481 (1908); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1917); Louisvile & Nashville R.R. v. Greene, 244 U.S. 522 (1917). Property held by state officials on behalf of the State under claimed state authority may be recovered in suits against the officials, although the court may not conclusively resolve the State's claims against it in such a suit. South Carolina v. Wesley, 155 U.S. 542 (1895); Tindal v. Wesley, 167 U.S. 204 (1897); Hopkins v. Clemson College, 221 U.S. 636 (1911). See also Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), in which the eight Justices agreeing the Eleventh Amendment applied divided 4-to-4 over the proper interpretation.


130 Typically, the plaintiff would be in federal court under diversity jurisdiction, cf. Martin v. Lankford, 245 U.S. 547, 551 (1918), perhaps under admiralty jurisdiction, Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), or under federal question jurisdiction. Verizon Md. Inc. v. Public Serv. Comm'n of Md., 122 S. Ct. 1753 (2002). In the last instance, federal courts are obligated first to consider
However, in *Pennhurst State School & Hosp. v. Halderman*, the Court, five-to-four, held that *Young* did not permit suits in federal courts against state officers alleging violations of *state* law. In the Court's view, *Young* was necessary to promote the supremacy of federal law, a basis that disappears if the violation alleged is of state law. The Court also still adheres to the doctrine, first pronounced in *Madrazo*, that some suits against officers are “really” against the State and are barred by the State's immunity, such as when the suit involves state property or asks for relief which clearly calls for the exercise of official authority, such as paying money out of the treasury to remedy past harms.

For example, a suit to prevent tax officials from collecting death taxes arising from the competing claims of two States as being the last domicile of the decedent floundered upon the conclusion that there could be no credible claim of violation of the Constitution or federal law; state law imposed the obligation upon the officials and “in reality” the action was against the State. Suits against state officials to recover taxes have also been made increasingly difficult to maintain. Although the Court long ago held that the sovereign immunity of the State prevented a suit to recover money in the state treasury, it also held that a suit would lie against a revenue officer to recover tax moneys illegally collected and still in his possession. Beginning, however, with *Great Northern Life Ins. Co. v. Read*, the Court has held that this kind of suit cannot be maintained unless the State expressly consents to suits in the federal courts. In this case, the state statute provided for the payment of taxes under protest and for suits afterward whether the issues presented may be decided on state law grounds before reaching federal constitutional grounds, and thus relief may be afforded on state law grounds solely. Cf. *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909); *Hagans v. Lavine*, 415 U.S. 528, 546–47 & n.12 (1974). In a case removed from state court, presence of a claim barred by the Eleventh Amendment does not destroy jurisdiction over non-barred claims. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998).

135 *Smith v. Reeves*, 178 U.S. 436 (1900).
137 322 U.S. 47 (1944).
against state tax collection officials for the recovery of taxes illegally collected, which revenues were required to be kept segregated.

In *Edelman v. Jordan*, the Court appeared to begin to lay down new restrictive interpretations of what the Eleventh Amendment proscribed. The Court announced that a suit “seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.”

What the Court actually held, however, was that it was permissible for federal courts to require state officials to comply in the future with claims payment provisions of the welfare assistance sections of the Social Security Act, but that they were not permitted to hear claims seeking, or issue orders directing, payment of funds found to be wrongfully withheld.

Conceding that some of the characteristics of prospective and retroactive relief would be the same in their effects upon the state treasury, the Court nonetheless believed that retroactive payments were equivalent to the imposition of liabilities which must be paid from public funds in the treasury, and that this was barred by the Eleventh Amendment. The spending of money from the state treasury by state officials shaping their conduct in accordance with a prospective-only injunction is “an ancillary effect” which “is a permissible and often an inevitable consequence” of *Ex parte Young*, whereas “payment of state funds ... as a form of compensation” to those wrongfully denied the funds in the past “is in practical effect indistinguishable in many aspects from an award of damages against the State.”

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140 415 U.S. at 663.

141 415 U.S. at 667-68. Where the money at issue is not a State’s, but a private party’s, then the distinction between retroactive and prospective obligations is not important. In Verizon Md. Inc. v. Public Serv. Comm’n of Md., 122 S. Ct. 1753 (2002), the Court held that a challenge to a State agency decision regarding a private party’s past and future contractual liabilities does not violate the Eleventh Amendment. Id. at 1760. In fact, three judges questioned whether the Eleventh Amendment is even implicated where there is a challenge to a state’s determination of liability between private parties. Id. at 1762-63 (Souter, J., concurring).

142 415 U.S. at 668. See also *Quern v. Jordan*, 440 U.S. 332 (1979) (reaffirming *Edelman*, but holding that state officials could be ordered to notify members of the class that had been denied retroactive relief in that case that they might seek back benefits by invoking state administrative procedures; the order did not direct the payment but left it to state discretion to award retroactive relief). *But cf.* Green v. Mansour, 474 U.S. 64 (1985). “Notice relief” permitted under *Quern v. Jordan* is consistent with the Eleventh Amendment only insofar as it is ancillary to valid prospective relief designed to prevent ongoing violations of federal law. Thus, where
That *Edelman* in many instances will be a formal restriction rather than an actual one is illustrated by *Milliken v. Bradley*, in which state officers were ordered to spend money from the state treasury in order to finance remedial educational programs to counteract the effects of past school segregation; the decree, the Court said, “fits squarely within the prospective-compliance exception reaffirmed by *Edelman*,” Although the payments were a result of past wrongs, of past constitutional violations, the Court did not view them as “compensation,” inasmuch as they were not to be paid to victims of past discrimination but rather used to better conditions either for them or their successors. The Court also applied *Edelman* in *Papasan v. Allain*, holding that a claim against a state for payments representing a continuing obligation to meet trust responsibilities stemming from a 19th century grant of public lands for benefit of education of the Chickasaw Indian Nation is barred by the Eleventh Amendment as indistinguishable from an action for past loss of trust corpus, but that an Equal Protection claim for present unequal distribution of school land funds is the type of ongoing violation for which the Eleventh Amendment does not bar redress.

In *Idaho v. Coeur d'Alene Tribe*, the Court further narrowed *Ex parte Young*. The implications of the case are difficult to predict, due to the narrowness of the Court’s holding, the closeness of the vote (5–4), and the inability of the majority to agree on a rationale. The holding was that the Tribe’s suit against state officials for a declaratory judgment and injunction to establish the Tribe’s ownership and control of the submerged lands of Lake Coeur d’Alene is barred by the Eleventh Amendment. The Tribe’s claim was based on federal law—Executive Orders issued in the 1870s, prior to Idaho Statehood. The portion of Justice Kennedy’s opinion that represented the opinion of the Court concluded that the Tribe’s “unusual” suit was “the functional equivalent of a quiet title action which implicates special sovereignty interests.” The case was “unusual” because state ownership of submerged lands traces to the Constitution through the “equal footing doctrine,” and because

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144 433 U.S. at 289.
147 521 U.S. at 281.
navigable waters “uniquely implicate sovereign interests.”\(^{149}\) This was therefore no ordinary property dispute in which the State would retain regulatory control over land regardless of title. Rather, grant of the “far-reaching and invasive relief” sought by the Tribe “would diminish, even extinguish, the State’s control over a vast reach of lands and waters long . . . deemed to be an integral part of its territory.”\(^{150}\)

A separate part of Justice Kennedy’s opinion, joined only by Chief Justice Rehnquist, advocated more broadscale diminishment of *Young*. The two would apply case-by-case balancing, taking into account the availability of a state court forum to resolve the dispute and the importance of the federal right at issue. Concurring Justice O’Connor, joined by Justices Scalia and Thomas, rejected such balancing. *Young* was inapplicable, Justice O’Connor explained, because “it simply cannot be said” that a suit to divest the State of all regulatory power over submerged lands “is not a suit against the State.”\(^{151}\)

Thus, as with the cases dealing with suits facially against the States themselves, the Court’s recent greater attention to state immunity in the context of suits against state officials has resulted in a mixed picture, of some new restrictions, of the lessening of others. But a number of Justices have resorted to the Eleventh Amendment increasingly, as one means of reducing federal-state judicial conflict.\(^{152}\) One may, therefore, expect this to be a continuously contentious area.

**Tort Actions Against State Officials.**—In *Tindal v. Wesley*,\(^{153}\) the Court adopted the rule of *United States v. Lee*,\(^{154}\) a tort suit against federal officials, to permit a tort action against state officials to recover real property held by them and claimed by the State and to obtain damages for the period of withholding. The immunity of a State from suit has long been held not to extend to actions against state officials for damages arising out of willful and negligent disregard of state laws.\(^{155}\) The reach of the rule is evident in *Scheuer v. Rhodes*,\(^{156}\) in which the Court held that plain-
These suits, like suits against local officials and municipal corporations, are typically brought pursuant to 42 U.S.C. § 1983 and typically involve all the decisions respecting liability and immunities thereunder. On the scope of immunity of federal officials, see “Suits Against United States Officials,” supra.
ELECTION OF PRESIDENT

TWELFTH AMENDMENT

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the
Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ELECTION OF PRESIDENT

This Amendment,¹ which supersedes clause 3 of § 1 of Article II, was adopted so as to make impossible the situation occurring after the election of 1800 in which Jefferson and Burr received tie votes in the electoral college, thus throwing the selection of a President into the House of Representatives, despite the fact that the electors had intended Jefferson to be President and Burr to be Vice-President.² The difference between the procedure which it defines and that which was laid down originally is in the provision it makes for a separate designation by the electors of their choices for President and Vice-President, respectively. As a consequence of the disputed election of 1870, Congress has enacted a statute providing that if the vote of a State is not certified by the governor under seal, it shall not be counted unless both Houses of Congress concur.³

¹A number of provisions of the Amendment have been superseded by the Twentieth Amendment.
THIRTEENTH AMENDMENT

SLAVERY AND IN VOLUNTARY SERVITUDE

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SLAVERY AND INVOLUNTARY SERVITUDE

THIRTEENTH AMENDMENT

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ABOLITION OF SLAVERY

Origin and Purpose

In 1863, President Lincoln issued an Emancipation Proclamation declaring, based on his war powers, that within named States and parts of States in rebellion against the United States "all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; . . . ." The Proclamation did not allude to slaves held in the loyalist States, and moreover, there were questions about the Proclamation's validity. Not only was there doubt concerning the President's power to issue his order at all, but also there was a general conviction that its effect would not last beyond the restoration of the seceded States to the Union. Because the power of Congress was similarly deemed not to run to legislative extirpation of the "peculiar institution," a constitutional amendment was then sought. After first failing to muster a two-thirds vote in the House of Representatives, the amendment was forwarded to the States on February 1, 1865, and ratified by the following December 18.

In selecting the text of the Amendment, Congress "reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory, and gave them unrestricted application

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1 12 Stat. 1267.
2 The legal issues were surveyed in Welling, The Emancipation Proclamation, 130 No. Amer. Rev. 163 (1880). See also J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 371–404 (rev. ed. 1951).
4 The congressional debate on adoption of the Amendment is conveniently collected in 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES—CIVIL RIGHTS 25–96 (1970).
within the United States.”\textsuperscript{5} By its adoption, Congress intended, said Senator Trumbull, one of its sponsors, to “take this question [of emancipation] entirely away from the politics of the country. We relieve Congress of sectional strife...”\textsuperscript{6} An early Supreme Court decision, rejecting a contention that the Amendment reached servitudes on property as it did on persons, observed in dicta that the “word servitude is of larger meaning than slavery, ... and the obvious purpose was to forbid all shades and conditions of African slavery.”

While the Court was initially in doubt whether persons other than African Americans could share in the protection afforded by the Amendment, it did continue to say that although “[N]egro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.”\textsuperscript{7}

“This Amendment... is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom.”\textsuperscript{8} These words of the Court in 1883 have generally been noncontroversial and have evoked little disagreement in the intervening years. The “force and effect” of the Amendment itself has been invoked only a few times by the Court to strike down state legislation which it considered to have reintroduced servitude of persons, and the Court has not used section 1 of the Amendment against private parties.\textsuperscript{9} In 1968, however, the Court overturned almost century-old precedent and held that Congress may regulate private activity in exercise of its section 2 power to enforce section 1 of the Amendment.

\textsuperscript{5} Bailey v. Alabama, 219 U.S. 219, 240 (1911). During the debate, Senator Howard noted that the language was “the good old Anglo-Saxon language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals...” CONG. GLOBE, 38th Cong., 1st Sess. 1489 (1864).

\textsuperscript{6} CONG. GLOBE at 1313-14.

\textsuperscript{7} Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69, 71–72 (1873). This general applicability was again stated in Hodges v. United States, 203 U.S. 1, 16–17 (1906), and confirmed by the result of the peonage cases, discussed under the next topic.

\textsuperscript{8} Civil Rights Cases, 109 U.S. 3, 20 (1883).

\textsuperscript{9} In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968), the Court left open the question whether the Amendment itself, unaided by legislation, would reach the “badges and incidents” of slavery not directly associated with involuntary servitude, and it continued to reserve the question in City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981). See Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Justice Harlan dissenting). The Court drew back from the possibility in Palmer v. Thompson, 403 U.S. 217, 226–27 (1971).
Certain early cases suggested broad congressional powers, but the *Civil Rights Cases* of 1883 began a process, culminating in *Hodges v. United States*, which substantially curtailed these powers. In the former decision, the Court held unconstitutional an 1875 law guaranteeing equality of access to public accommodations. Referring to the Thirteenth Amendment, the Court conceded that “legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.” Appropriate legislation under the Amendment, the Court continued, could go beyond nullifying state laws establishing or upholding slavery, because the Amendment “has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States,” and thereby empowering Congress “to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”

These badges and incidents as perceived by the Court, however, were those which Congress had in its 1866 legislation sought “to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.” But the Court could not see that the refusal of accommodations at an inn or a place of public amusement, without any sanction or support from any state law, could inflict upon such person any manner of servitude or form of slavery, as those terms were commonly understood. “It would be running the slavery argu-

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United States v. Rhodes, 27 F. Cas. 785 (No. 16,151) (C.C. Ky. 1866) (Justice Swayne on circuit); United States v. Cruikshank, 25 F. Cas. 707 (No. 14,897) (C.C. La. 1874) (Justice Bradley on circuit), aff’d on other grounds, 92 U.S. 542 (1876); United States v. Harris, 106 U.S. 629, 640 (1883); Blyew v. United States, 80 U.S. 581, 601 (1871) (dissenting opinion, majority not addressing the issue).

109 U.S. 3 (1883).


Ch. 114, 18 Stat. 335.


Ch. 31, 14 Stat. 27 (1886), now 42 U.S.C. §§ 1981–82.

Civil Rights Cases, 109 U.S. 3, 22 (1883).
ment into the ground to make it apply to every act of discrimina-
tion which a person may see fit to make..."

Then in Hodges v. United States, the Court set aside the con-
victions of three men for conspiring to drive several African Amer-
cans from their employment in a lumber mill. The Thirteenth
Amendment operated to abolish, and to authorize Congress to legis-
late to enforce abolition of, conditions of enforced compulsory ser-
vices of one to another, and no attempt to analogize a private impair-
ment of freedom to a disability of slavery would suffice to give the
Federal Government jurisdiction over what was constitutionally a
matter of state remedial law.

Hodges was overruled by the Court in a far-reaching decision
in which it concluded that the 1866 congressional enactment, far
from simply conferring on all persons the capacity to buy and sell
property, also prohibited private denials of the right through refus-
als to deal, and that this statute was fully supportable by the
Thirteenth Amendment. “Surely Congress has the power under the
Thirteenth Amendment rationally to determine what are the
badges and the incidents of slavery, and the authority to translate
that determination into effective legislation. Nor can we say that
the determination Congress has made is an irrational one... Just
as the Black Codes, enacted after the Civil War to restrict the free
exercise of those rights, were substitutes for the slave system, so
the exclusion of Negroes from white communities became a sub-
stitute for the Black Codes. And when racial discrimination herds
men into ghettos and makes their ability to buy property turn on
the color of their skin, then it too is a relic of slavery... At the
very least, the freedom that Congress is empowered to secure
under the Thirteenth Amendment includes the freedom to buy
whatever a white man can buy, the right to live wherever a white
man can live. If Congress cannot say that being a free man means
at least this much, then the Thirteenth Amendment made a prom-
ise the Nation cannot keep.”

17 109 U.S. at 24.
18 203 U.S. 1 (1906), overruled by Jones v. Alfred H. Mayer Co., 392 U.S. 409,
441 n.78 (1968).
19 Ch. 31, 14 Stat. 27 (1866). The portion at issue is now 42 U.S.C. § 1982.
and White dissented from the Court’s interpretation of the statute. Id. at 449. Chief
Justice Burger joined their dissent in Sullivan v. Little Hunting Park, 396 U.S. 229,
241 (1969). The 1968 Civil Rights Act forbidding discrimination in housing on the
basis of race was enacted a brief time before the Court’s decision. Pub. L. No. 90–
21 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–43 (1968). See also City of
The Thirteenth Amendment, then, could provide the constitutional support for the various congressional enactments against private racial discrimination which Congress had previously based on the commerce clause. Because the 1866 Act contains none of the limitations written into the modern laws, it has a vastly extensive application. Whether the Court will yet carry its interpretation of the statute to the fullest extent possible is, of course, not now knowable.

**Peonage**

Notwithstanding its early acknowledgment in the *Slaughter-House Cases* that peonage was comprehended within the slavery and involuntary servitude proscribed by the Thirteenth Amendment, the Court has had frequent occasion to determine whether state legislation or the conduct of individuals has contributed to re-establishment of that prohibited status. Defined as a condition of enforced servitude by which the servitor is compelled to labor against his will in liquidation of some debt or obligation, either real or pretended, peonage was found to have been unconstitutionally sanctioned by an Alabama statute, directed at defaulting sharecroppers, which imposed a criminal liability and subjected to imprisonment farm workers or tenants who abandoned their employment, breached their contracts, and exercised their legal right to enter into employment of a similar nature with another person. The clear purpose of such a statute was declared to be the coercion

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22 *E.g.*, federal prohibition of racial discrimination in public accommodations, found lacking in constitutional basis under the Thirteenth and Fourteenth Amendments in the Civil Rights Cases, 109 U.S. 3 (1883), was upheld as an exercise of the commerce power in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1965), and *Katzenbach v. McClung*, 379 U.S. 294 (1965).

23 The 1968 statute on housing and the 1866 act are compared in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413–17 (1968). The expansiveness of the 1866 statute and of congressional power is shown by *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) (1866 law protects share in neighborhood recreational club which ordinarily went with the lease or ownership of house in area); *Runyon v. McCrary*, 427 U.S. 160 (1976) (guarantee that all persons shall have the same right to make and enforce contracts as is enjoyed by white persons protects the right of black children to gain admission to private, commercially operated, nonsectarian schools); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459–60 (1975) (statute affords a federal remedy against discrimination in private employment on the basis of race); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285–96 (1976) (statute protects against racial discrimination in private employment against whites as well as non-whites). *See also* *Tillman v. Wheaton-Haven Recreation Ass’n*, 410 U.S. 431 (1973). The Court has also concluded that pursuant to its Thirteenth Amendment powers Congress could provide remedial legislation for African Americans deprived of their rights because of their race. *Griffin v. Breckenridge*, 403 U.S. 88, 104–05 (1971). Conceivably, the reach of the 1866 law could extend to all areas in which Congress has so far legislated and to other areas as well, justifying legislative or judicial enforcement of the Amendment itself in such areas as school segregation.

24 83 U.S. (16 Wall.) 36 (1873).
of payment, by means of criminal proceedings, of a purely civil liability arising from breach of contract.\textsuperscript{25}

Several years later, in Bailey \textit{v. Alabama},\textsuperscript{26} the Court voided another Alabama statute which made the refusal without just cause to perform the labor called for in a written contract of employment, or to refund the money or pay for the property advanced thereunder, \textit{prima facie} evidence of an intent to defraud, and punishable as a criminal offense, and which was enforced subject to a local rule of evidence which prevented the accused, for the purpose of rebutting the statutory presumption, from testifying as to his “uncommunicated motives, purpose, or intention.” Inasmuch as a state “may not compel one man to labor for another in payment of a debt by punishing him as a criminal if he does not perform the service or pay the debt,” the Court refused to permit it “to accomplish the same result [indirectly] by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction.”\textsuperscript{27}

In 1914, in \textit{United States v. Reynolds},\textsuperscript{28} a third Alabama enactment was condemned as conducive to peonage through the permission it accorded to persons, fined upon conviction for a misdemeanor, to confess judgment with a surety in the amount of the fine and costs, and then to agree with said surety, in consideration of the latter’s payment of the confessed judgment, to reimburse him by working for him upon terms approved by the court, which, the Court pointed out, might prove more onerous than if the convict had been sentenced to imprisonment at hard labor in the first place. Fulfillment of such a contract with the surety was viewed as being virtually coerced by the constant fear it induced of rearrest, a new prosecution, and a new fine for breach of contract, which new penalty the convicted person might undertake to liquidate in a similar manner attended by similar consequences.

\textit{Bailey v. Alabama} was followed in Taylor \textit{v. Georgia}\textsuperscript{29} and Pollock \textit{v. Williams},\textsuperscript{30} in which statutes of Georgia and Florida, not materially different from that voided in the \textit{Bailey} case, were found

\textsuperscript{25} Peonage Cases, 123 F. 671 (M.D. Ala. 1903).
\textsuperscript{26} 219 U.S. 219 (1911). Justice Holmes, joined by Justice Lurton, dissented on the ground that a State was not forbidden by this Amendment from punishing a breach of contract as a crime. “Compulsory work for no private master in a jail is not peonage.” Id. at 247.
\textsuperscript{27} 219 U.S. at 244.
\textsuperscript{28} 235 U.S. 133 (1914).
\textsuperscript{29} 315 U.S. 25 (1942).
\textsuperscript{30} 222 U.S. 4 (1944). Justice Reed, with Chief Justice Stone concurring, contended in a dissenting opinion that a State is not prohibited by the Thirteenth Amendment from “punishing the fraudulent procurement of an advance in wages.” Id. at 27.
to be unconstitutional. Although the Georgia statute prohibited the defendant from testifying under oath, it did not prevent him from entering an unsworn denial both of the contract and of the receipt of any cash advancement thereunder, a factor which, the Court emphasized, was no more controlling than the customary rule of evidence in *Bailey*. In the Florida case, notwithstanding the fact that the defendant pleaded guilty and accordingly obviated the necessity of applying the *prima facie* presumption provision, the Court reached an identical result, chiefly on the ground that the presumption provision, despite its nonapplication, “had a coercive effect in producing the plea of guilty.”

Pursuant to its section 2 enforcement powers, Congress enacted a statute by which it abolished peonage and prohibited anyone from holding, arresting, or returning, or causing or aiding in the arresting or returning, of a person to peonage.31

The Court looked to the meaning of the Thirteenth Amendment in interpreting two enforcement statutes, one prohibiting conspiracy to interfere with exercise or enjoyment of constitutional rights, 32 the other prohibiting the holding of a person in a condition of involuntary servitude. 33 For purposes of prosecution under these authorities, the Court held, “the term ‘involuntary servitude’ necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.” 34

**Situations in Which the Amendment Is Inapplicable**

The Thirteenth Amendment has been held inapplicable in a wide range of situations. Thus, under a rubric of “services which have from time immemorial been treated as exceptional,” the Court held that contracts of seamen, involving to a certain extent the surrender of personal liberty, may be enforced without regard to the Amendment. 35 Similarly, enforcement of those duties which individuals owe the government, such as service in the military and on

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34 United States v. Kozinski, 487 U.S. 931 (1988). Compulsion of servitude through “psychological coercion,” the Court ruled, is not prohibited by these statutes.

juries, is not covered. A state law requiring every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation was sustained. A Thirteenth Amendment challenge to conscription for military service was summarily rejected. A state law making it a misdemeanor for a lessor, or his agent or janitor, intentionally to fail to furnish such water, heat, light, elevator, telephone, or other services as may be required by the terms of the lease and necessary to the proper and customary use of the building was held not to create an involuntary servitude. A federal statute making it unlawful to coerce, compel, or constrain a communications licensee to employ persons in excess of the number of the employees needed to conduct his business was held not to implicate the Amendment. Injunctions and cease and desist orders in labor disputes requiring return to work do not violate the Amendment.

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38 Selective Draft Law Cases, 245 U.S. 366 (1918). The Court’s analysis, in full, of the Thirteenth Amendment issue raised by a compulsory military draft was the following: “As we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.” Id. at 390.

While the Supreme Court has never squarely held that conscription need not be premised on a declaration of war, indications are that the power is not constrained by the need for a formal declaration of war by “the great representative body of the people.” During the Vietnam War (an undeclared war) the Court, upholding a conviction for burning a draft card, declared that the power to classify and conscript manpower for military service was “beyond question.” United States v. O’Brien, 391 U.S. 367, 377 (1968). See also United States v. Holmes, 387 F.2d 781, 784 (7th Cir. 1968) (“the power of Congress to raise armies and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment or the absence of a military emergency”), cert. denied 391 U.S. 956.

41 UAW v. WERB, 336 U.S. 245 (1949).
FOURTEENTH AMENDMENT

RIGHTS GUARANTEED
PRIVILEGES AND IMMUNITIES OF CITIZENSHIP,
DUE PROCESS AND EQUAL PROTECTION

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RIGHTS GUARANTEED

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE FOURTEENTH AMENDMENT AND STATES’ RIGHTS

Amendment of the Constitution during the post-Civil War Reconstruction period resulted in a fundamental shift in the relationship between the Federal Government and the States. The Civil War had been fought over issues of States’ rights, including the right to control the institution of slavery. In the wake of the war, the Congress submitted, and the States ratified, the Thirteenth Amendment (making slavery illegal), the Fourteenth Amendment (defining and granting broad rights of national citizenship), and the Fifteenth Amendment (forbidding racial discrimination in elections). The Fourteenth Amendment was the most controversial and far-reaching of the three “Reconstruction Amendments.”

CITIZENS OF THE UNITED STATES

The citizenship provisions of the Fourteenth Amendment may be seen as a repudiation of one of the more politically divisive cases of the nineteenth century. Under common law, free persons born within a State or nation were citizens thereof. In the Dred Scott Case, however, Chief Justice Taney, writing for the Court, ruled that this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of individuals: (1) white persons born in the United States as descendants

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1 Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, which this case stirred and still stirs, is exemplified and analyzed in the material collected in S. Kutler, The Dred Scott Decision: Law or Politics? (1967).
of “persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States and [who] became also citizens of this new political body,” the United States of America, and (2) those who, having been “born outside the dominions of the United States,” had migrated thereto and been naturalized therein. Freed slaves fell into neither of these categories.

The Court further held that, although a State could confer state citizenship upon whomever it chose, it could not make the recipient of such status a citizen of the United States. Thus, the “Negro,” as an enslaved race, was ineligible to attain United States citizenship, either from a State or by virtue of birth in the United States. Even a free man descended from a Negro residing as a free man in one of the States at the date of ratification of the Constitution was held ineligible for citizenship. Congress subsequently repudiated this concept of citizenship, first in section 1 of the Civil Rights Act of 1866 and then in section 1 of the Fourteenth Amendment. In doing so, Congress set aside the Dred Scott holding, and restored the traditional precepts of citizenship by birth.

Based on the first sentence of section 1, the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizenship. The requirement that a person be “subject to the jurisdiction thereof,” however, excludes its application to children born of diplomatic representatives of a foreign state, children born of alien enemies in hostile occupation, or children of members of Indian tribes subject to tribal laws. In addition, the citizenship of children born on vessels in United States territorial waters or on the

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3 “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] . . . .” Ch. 31, 14 Stat. 27.
4 Congress subsequently repudiated this concept of citizenship, first in section 1 of the Civil Rights Act of 1866 and then in section 1 of the Fourteenth Amendment. In doing so, Congress set aside the Dred Scott holding, and restored the traditional precepts of citizenship by birth.
5 Based on the first sentence of section 1, the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizenship. The requirement that a person be “subject to the jurisdiction thereof,” however, excludes its application to children born of diplomatic representatives of a foreign state, children born of alien enemies in hostile occupation, or children of members of Indian tribes subject to tribal laws. In addition, the citizenship of children born on vessels in United States territorial waters or on the
high seas has generally been held by the lower courts to be determined by the citizenship of the parents.\(^{10}\) Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.\(^{11}\)

In *Afroyim v. Rusk*,\(^{12}\) a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew from the Government of the United States the power to expatriate United States citizens against their will for any reason. *"[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other government unit."*\(^{13}\) In a subsequent decision, however, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of section 1 and

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\(^{10}\)United States v. Gordon, 25 Fed. Cas. 1364 (C.C.S.D.N.Y. 1861) (No. 15,231); *In re Look Tin Sing*, 21 F. 905 (C.C.Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928).

\(^{11}\)Insurance Co. v. New Orleans, 13 Fed. Cas. 67 (C.C.D. La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable to claim the protection of that clause of the Fourteenth Amendment which secures the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State." Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1869). This conclusion was in harmony with the earlier holding in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), to the effect that corporations were not within the scope of the privileges and immunities clause of state citizenship set out in Article IV, § 2. See also Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912); Berea College v. Kentucky, 211 U.S. 45 (1908); Liberty Warehouse Co. v. Tobacco Growers, 276 U.S. 71, 89 (1928); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

\(^{12}\)387 U.S. 253 (1967). Though the Court had previously upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in *Mackenzie v. Hare*, 239 U.S. 299 (1915), the subject first received extended judicial treatment in *Perez v. Brownell*, 356 U.S. 44 (1958), in which the Court, by a five-to-four decision, upheld a statute denaturalizing a native-born citizen for having voted in a foreign election. For the Court, Justice Frankfurter reasoned that Congress’ power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. Id. at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. See discussion of “Expatriation” under Article I, supra. In the years before *Afroyim*, a series of decisions had curbed congressional power.

\(^{13}\)Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967). The Court went on to say “It is true that the chief interest of the people in giving permanence and security to citizenship in the Fourteenth Amendment was the desire to protect Negroes.... This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted.” Four dissenters, Justices Harlan, Clark, Stewart, and White, controverted the Court’s reliance on the history and meaning of the Fourteenth Amendment and reasserted Justice Frankfurter’s previous reasoning in *Perez*. Id. at 268.
that Congress could therefore impose a reasonable and non-arbitrary condition subsequent upon their continued retention of United States citizenship.\textsuperscript{14} Between these two decisions there is a tension which should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

**PRIVILEGES OR IMMUNITIES**

Unique among constitutional provisions, the clause prohibiting state abridgement of the “privileges or immunities” of United States citizens was rendered a “practical nullity” by a single decision of the Supreme Court issued within five years of its ratification. In the *Slaughter-House Cases*,\textsuperscript{15} the Court evaluated a Louisiana statute which conferred a monopoly upon a single corporation to engage in the business of slaughtering cattle. In determining whether this statute abridged the “privileges” of other butchers, the Court frustrated the aims of the most aggressive sponsors of the Privileges or Immunities Clause. According to the Court, these sponsors had sought to centralize “in the hands of the Federal Government large powers hitherto exercised by the States” by converting the rights of the citizens of each State at the time of the adoption of the Fourteenth Amendment into protected privileges and immunities of United States citizenship. This interpretation would have allowed business to develop unimpeded by state interference by limiting state laws “abridging” these privileges.

According to the Court, however, such an interpretation would have “transfer[ed] the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States,” and would “constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment . . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . . We are convinced that no such results were intended by the Congress . . . , nor by the legislatures . . . which ratified”

\textsuperscript{14}Rogers v. Bellei, 401 U.S. 815 (1971). This, too, was a five-to-four decision, Justices Blackmun, Harlan, Stewart, and White, and Chief Justice Burger in the majority, and Justices Black, Douglas, Brennan, and Marshall dissenting.

\textsuperscript{15}83 U.S. (16 Wall.) 36, 71, 77–79 (1873).
this amendment, and that the sole “pervading purpose” of this and the other War Amendments was “the freedom of the slave race.”

Based on these conclusions, the Court held that none of the rights alleged by the competing New Orleans butchers to have been violated were derived from the butcher’s national citizenship; insofar as the Louisiana law interfered with their pursuit of the business of butchering animals, the privilege was one which “belonged to the citizens of the States as such.” Despite the broad language of this clause, the Court held that the privileges and immunities of state citizenship had been “left to the state governments for security and protection” and had not been placed by the clause “under the special care of the Federal Government.” The only privileges which the Fourteenth Amendment protected against state encroachment were declared to be those “which owe their existence to the Federal Government, its National character, its Constitution, or its laws.” These privileges, however, had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. The Slaughter-House Cases, therefore, reduced the privileges or immunities clause to a superfluous reiteration of a prohibition already operative against the states.

Although the Slaughter-House Cases Court expressed a reluctance to enumerate those privileges and immunities of United States citizens which are protected against state encroachment, it nevertheless felt obliged to suggest some. Among those which it then identified were the right of access to the seat of Government and to the seaports, subtreasuries, land officers, and courts of justice in the several States, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly, the privilege of habeas corpus, the right to use the navigable waters of the United States, and rights secured by treaty. In Twining v. New Jersey, the Court recognized “among the rights and privileges” of national citizenship the right to pass freely from State to State, the right to petition Congress for a redress
of grievances, the right to vote for national officers, the right to enter public lands, the right to be protected against violence while in the lawful custody of a United States marshal, and the right to inform the United States authorities of violation of its laws. Earlier, in a decision not mentioned in Twining, the Court had also acknowledged that the carrying on of interstate commerce is “a right which every citizen of the United States is entitled to exercise.”

In modern times, the Court has continued the minor role accorded to the clause, only occasionally manifesting a disposition to enlarge the restraint which it imposes upon state action. In Hague v. CIO, two and perhaps three justices thought that the freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States citizen, and in Edwards v. California four Justices were prepared to rely on the clause. In many other respects, however, claims based on this clause have been rejected.


20 Citing United States v. Cruikshank, 92 U.S. 542 (1876).
23 Citing Logan v. United States, 144 U.S. 263 (1892).
24 Citing In re Quarles and Butler, 158 U.S. 532 (1895).
26 Colgate v. Harvey, 296 U.S. 404 (1935), which was overruled five years later, see Madden v. Kentucky, 309 U.S. 83, 93 (1940), represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the privileges or immunities clause into a source of protection of other than those “interests growing out of the relationship between the citizen and the national government.” In Harvey, the Court declared that the right of a citizen to engage in lawful business in other states, such as by entering into contracts or by loaning money, was a privilege of national citizenship, and this privilege was abridged by a state income tax law which excluded interest received on money from loans from taxable income only if the loan was made within the State.
27 307 U.S. 496, 510–18 (1939) (Justices Roberts and Black; Chief Justice Hughes may or may not have concurred on this point. Id. at 532). Justices Stone and Reed preferred to base the decision on the due process clause. Id. at 518.
30 E.g., Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the State); Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); Heim v. McCall, 239 U.S. 175 (1915); Crane

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In *Oyama v. California*, the Court, in a single sentence, agreed with the contention of a native-born youth that a state Alien Land Law, which resulted in the forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set forth in any of the enumerations as one of the privileges protected against

v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the State); Missouri Pacific Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873); In re Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another State and secured by mortgage of land in the debtor's State); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tierman, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); In re Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (statute regulating the franchise to male citizens); Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a State to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters); Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the Governor); Maxwell v. Dow, 176 U.S. 581, 596, 597–98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association (other than benevolent orders, and the like) with knowledge that the association has failed to file its constitution and membership lists); Falco v. Connecticut, 302 U.S. 319 (1937) (statute allowing a State to appeal in criminal cases for errors of law and to retry the accused); Breedlove v. Sutiles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); Madden v. Kentucky, 309 U.S. 83, 92–93 (1940), (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the State are taxed at 50¢ per $100); Snowden v. Hughes, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least 50 of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the 49 most populous counties); New York v. O'Neill, 359 U.S. 1 (1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a State in criminal proceedings); James v. Valtierra, 402 U.S. 137 (1971) (a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without the affirmative vote of a majority of those citizens participating in a community referendum).
state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as white citizens enjoyed. 32

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause, 33 as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians who have been residents for less than a year to the level of benefits available in the State of their prior residence, the Court found a violation of the right of newly-arrived citizens to be treated the same as other state citizens. 34 Despite suggestions that this opinion will open the door to “guaranteed equal access to all public benefits,” 35 it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the state one chooses for permanent residence. 36

DUE PROCESS OF LAW

Generally

Due process under the Fourteenth Amendment can be broken down into two categories—procedural due process and substantive due process. Procedural due process, based on principles of “fundamental fairness,” addresses which legal procedures are required to be followed in state proceedings. Relevant issues, as discussed in detail below, include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. Substantive due process, while also based on principles of “fundamental fairness,” is used to evaluate whether a law can fairly be applied by states at all, regardless of the procedure followed. Substantive due process has generally dealt with specific subject areas, such as liberty of contract or privacy, and over time has alternately emphasized the importance of economic and non-economic matters. In theory, the issues of procedural and substantive due process are closely related. In reality, substantive due

33 See The Right to Travel, infra.
35 526 U.S. at 525 (Thomas, J., dissenting).
36 The right of United States citizens to choose their state of residence is specifically protected by the first sentence of the 14th Amendment “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”
process has had greater political import, as significant portions of a state legislature’s substantive jurisdiction can be restricted by its application.

While the extent of the rights protected by substantive due process may be controversial, its theoretical basis is firmly established and forms the basis for much of modern constitutional case law. Passage of the Reconstruction Amendments (13th, 14th and 15th) gave the federal courts the authority to intervene when a state threatened fundamental rights of its citizens, and one of the most important doctrines flowing from this is the application of the Bill of Rights to the states through the due process clause. Through the process of “selective incorporation,” most of the provisions of the first eight Amendments such as free speech, freedom of religion, and protection against unreasonable searches and seizures are applied against the states as they are against the federal government. Though application of these rights against the states is no longer controversial, the incorporation of other substantive rights, as is discussed in detail below, has been.

Definitions

“Person”.—The due process clause provides that no States shall deprive any “person” of “life, liberty or property” without due process of law. A historical controversy has been waged concerning whether the framers of the Fourteenth Amendment intended the word “person” to mean only natural persons, or whether the word was substituted for the word “citizen” with a view to protecting corporations from oppressive state legislation. As early as the 1877 Granger Cases the Supreme Court upheld various regulatory state laws without raising any question as to whether a corporation could advance due process claims. Further, there is no doubt that a corporation may not be deprived of its property without due proc-

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37 The Privileges or Immunities Clause, more so than the Due Process Clause, appears at first glance to speak directly to the issue of state intrusions on substantive rights and privileges—“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .”. See Akhil Reed Amar, The Bill of Rights 163-180 (1998). As discussed earlier, however, the Court limited the effectiveness of that clause soon after the ratification of the 14th Amendment. See Privileges or Immunities, supra. Instead, the Due Process Clause, though selective incorporation, has become the basis for the Court to recognize important substantive rights against the states.

38 See Bill of Rights, Fourteenth Amendment, supra.

39 See Graham, The ‘Conspiracy Theory’ of the Fourteenth Amendment, 47 Yale L. J. 371 (1938).

40 Munn v. Illinois, 94 U.S. 113 (1877). In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States “equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law.” Sinking Fund Cases, 99 U.S. 700, 718–19 (1879).
ess of law. While various decisions have held that the “liberty” guaranteed by the Fourteenth Amendment is the liberty of natural, not artificial, persons; nevertheless, in 1936, a newspaper corporation successfully objected that a state law deprived it of liberty of the press.

A separate question is the ability of a government official to invoke the due process clause to protect the interests of his office. Ordinarily, the mere official interest of a public officer, such as the interest in enforcing a law, has not been deemed adequate to enable him to challenge the constitutionality of a law under the Fourteenth Amendment. Similarly, municipal corporations have no standing “to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator,” the State. However, state officers are acknowledged to have an interest, despite their not having sustained any “private damage,” in resisting an “endeavor to prevent the enforcement of laws in relation to which they have official duties,” and, accordingly, may apply to federal courts for the “review of decisions of state courts declaring state statutes which [they] seek to enforce to be repugnant to the” Fourteenth Amendment.

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43 Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass’n v. Greenberg, 204 U.S. 359, 363 (1907); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Earlier, in Northern Securities Co. v. United States, 193 U.S. 197, 362 (1904), a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that “a corporation . . . is not endowed with the inalienable rights of a natural person.”

44 Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) (“a corporation is a ‘person’ within the meaning of the equal protection and due process of law clauses”). In First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. See id. at 778 n.14 (reserving question). But see id. at 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights state gives them).


“Property” and Police Power.—States have an inherent “police power” to promote public safety, health, morals, public convenience, and general prosperity, but the extent of the power may vary based on the subject matter over which it is exercised. If a police power regulation goes too far, it will be recognized as a taking of property for which compensation must be paid. Thus, the means employed to affect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, safety, or morals, or some other aspect of the general welfare.

An ulterior public advantage, however, may justify a comparatively insignificant taking of private property for what seems to be


48 Hudson Water Co. v. McCarter, 209 U.S. 539 (1908); Eubank v. Richmond, 226 U.S. 263, 267 (1912); Erie R.R. v. Williams, 233 U.S. 685, 699 (1914); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Hall v. Geiger-Jones Co., 242 U.S. 519 (1917); Panhandle Eastern Pipeline Co. v. Highway Comm’n, 294 U.S. 612, 622 (1935). “It is settled [however] that neither the ‘contract’ clause nor the ‘due process’ clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise.” Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 9, 558 (1914).

49 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Welch v. Swasey, 214 U.S. 91, 107 (1909). See also Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). See also analysis of “Regulatory Takings” under the Fifth Amendment. Although the Fourteenth Amendment does not contain a “taking” provisions such as is found in the Fifth Amendment, the Court has held that such provision has been incorporated. Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 159 (1980).

a private use. Mere “cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power.” Moreover, it is elementary that enforcement of a law passed in the legitimate exertion of the police power is not a taking without due process of law, even if the cost is borne by the regulated. Initial compliance with a regulation which is valid when adopted, however, does not preclude later protest if that regulation subsequently becomes confiscatory in its operation.

“Liberty” As will be discussed in detail below, the “liberty” guaranteed by the due process clause has been variously defined by the Court. In the early years, it meant almost exclusively “liberty of contract,” but with the demise of liberty of contract came a general broadening of “liberty” to include personal, political and social rights and privileges. Nonetheless, the Court is generally chary of expanding the concept absent statutorily recognized rights.

The Rise and Fall of Economic Substantive Due Process: Overview

Long before the passage of the 14th Amendment, the due process clause of the Fifth Amendment was recognized as a restraint upon the Federal Government, but only in the narrow sense that a legislature needed to provide procedural “due process” for the en-

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52 Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (bank may be required to contribute to fund to guarantee the deposits of contributing banks).
56 See the tentative effort in Hampton v. Mow Sun Wong, 426 U.S. 88, 102 & n. 23 (1976), apparently to expand upon the concept of “liberty” within the meaning of the Fifth Amendment’s due process clause and necessarily therefore the Fourteenth’s.
57 See the substantial confinements of the concept in Meachum v. Fano, 427 U.S. 215 (1976); and Montanye v. Haymes, 427 U.S. 236 (1976), in which the Court applied to its determination of what is a liberty interest the “entitlement” doctrine developed in property cases, in which the interest is made to depend upon state recognition of the interest through positive law, an approach contrary to previous due process-liberty analysis. Cf. Morrissey v. Brewer, 408 U.S. 471, 482 (1972). For more recent cases, see DeShaney v. Winnebago County Social Servs. Dep’t, 489 U.S. 189 (1989) (no Due Process violation for failure of state to protect an abused child from his parent, even though abuse had been detected by social service agency); Collins v. City of Harker Heights, 503 U.S. 115 (1992) (failure of city to warn its employees about workplace hazards does not violate due process; the due process clause does not impose a duty on the city to provide employees with a safe working environment); County of Sacramento v. Lewis, 523 U.S. 833 (1998) (high-speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment’s guarantee of substantive due process).
Although individual justices suggested early on that particular legislation could be so in conflict with precepts of natural law as to render it wholly unconstitutional, the potential of the due process clause of the 14th Amendment as a substantive restraint on state action appears to have been grossly underestimated in the years immediately following its adoption.

Thus, early invocations of “substantive” due process were unsuccessful. In the Slaughter-House Cases, discussed previously in the context of the Privileges or Immunities Clause, a group of butchers challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the validity of this monopoly, the Court noted that the prohibition against a deprivation of property without due process “has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitution of nearly all the States, as a restraint upon the power of the States... We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.”

Four years later, in Munn v. Illinois, the Court reviewed the regulation of rates charged for the transportation and warehousing of grain, and again refused to interpret the due process clause as invalidating substantive state legislation. Rejecting contentions

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58 The conspicuous exception to this was the holding in the Dred Scott case that former slaves, as non-citizens, could not claim the protections of the clause. Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

59 See, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (“[a]n act of the legislature (for I cannot call it a law) contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority”).

60 In the years following the ratification of the 14th Amendment, the Court often observed that the due process clause “operates to extend... the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment,” Hibben v. Smith, 191 U.S. 310, 325 (1903), and that “ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth,” Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905). See also French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). There is support for the notion, however, that the proponents of the 14th Amendment envisioned a more expansive substantive interpretation of that Amendment than had developed under the Fifth Amendment. See AKHIL REED AMAR, THE BILL OF RIGHTS 181-197 (1998).

61 38 U.S. (16 Wall.) 36, 80–81 (1873).

62 See Privileges or Immunities Clause

63 94 U.S. 113, 134 (1877).
that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring an interest in a private enterprise to the public, Chief Justice Waite emphasized that "the great office of statutes is to remedy defects in the common law as they are developed. . . . We know that this power [of rate regulation] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

In Davidson v. New Orleans, Justice Miller also counseled against a departure from these conventional applications of due process, although he acknowledged the difficulty of arriving at a precise, all-inclusive definition of the clause. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental of law. But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom . . . in

96 U.S. 97, 103–04 (1878).
the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require . . . .”

A bare half-dozen years later, however, in *Hurtado v. California*, the Justices gave warning of an impending modification of their views. Justice Mathews, speaking for the Court, noted that due process under the United States Constitution differed from due process in English common law in that the latter only applied to executive and judicial acts, while the former additionally applied to legislative acts. Consequently, the limits of the due process under the 14th Amendment could not be appraised solely in terms of the “sanction of settled usage” under common law. The Court then declared that “[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.” By this language, the States were put on notice that all types of state legislation, whether dealing with procedural or substantive rights, were now subject to the scrutiny of the Court when questions of essential justice were raised.

What induced the Court to overcome its fears of increased judicial oversight and of upsetting the balance of powers between the Federal Government and the states was state remedial social legislation, enacted in the wake of industrial expansion, and the impact of such legislation on property rights. The added emphasis on the due process clause also afforded the Court an opportunity to compensate for its earlier nullification of much of the privileges or immunities clause of the Amendment. Legal theories about the relationship between the government powers and private rights were available to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. In the meantime, however, the *Slaughter-
House Cases and Munn v. Illinois had to be overruled at least in part.

About twenty years were required to complete this process, in the course of which two strands of reasoning were developed. The first was a view advanced by Justice Field in a dissent in Munn v. Illinois, namely, that state police power is solely a power to prevent injury to the “peace, good order, morals, and health of the community.” This reasoning was adopted by the Court in Mugler v. Kansas, where, despite upholding a state alcohol regulation, the Court held that “[i]t does not at all follow that every statute enacted ostensibly for the promotion of [public health, morals or safety] is to be accepted as a legitimate exertion of the police powers of the state.” The second strand, which had been espoused by Justice Bradley in his dissent in the Slaughter-House Cases, tentatively transformed ideas embodying the social compact and natural rights into constitutionally enforceable limitations upon government. The consequence was that the States in exercising their police powers could foster only those purposes of health, morals, and safety which the Court had enumerated, and could employ only such means as would not unreasonably interfere with fundamental natural rights of liberty and property. As articulated by Justice Bradley, these rights were equated with freedom to pursue a lawful calling and to make contracts for that purpose.
Having narrowed the scope of the state's police power in deference to the natural rights of liberty and property, the Court proceeded to incorporate into due process theories of *laisssez faire* economics, reinforced by the doctrine of Social Darwinism (as elaborated by Herbert Spencer). Thus, “liberty” became synonymous with governmental non-interference in the field of private economic relations. For instance, in *Budd v. New York*, Justice Brewer declared in *dictum*: “[t]he paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government.”

Next, the Court watered down the accepted maxim that a state statute must be presumed to be valid until clearly shown to be otherwise, by shifting focus to whether facts existed to justify a particular law. The original position could be seen in earlier cases such as *Munn v. Illinois*, where the Court sustained legislation before it by presuming that such facts existed: “For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.” Ten years later, however, in *Mugler v. Kansas*, rather than presume the relevant facts, the Court sustained a statewide anti-liquor law based on the proposition that the deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them. This opened the door for future Court appraisals of the facts which had induced the legislature to enact the statute.

The implications of *Mugler* were significant, as it carried the inference that unless the Court found by judicial notice the exist-
ence of justifying fact, it would invalidate a police power regulation as bearing no reasonable or adequate relation to the purposes to be subserved by the latter—namely, health, morals, or safety. Interestingly, the Court found the rule of presumed validity quite serviceable for appraising state legislation affecting neither liberty nor property, but for legislation constituting governmental interference in the field of economic relations, especially labor-management relations, the Court found the principle of judicial notice more advantageous. In litigation embracing the latter type of legislation, the Court would also tend to shift the burden of proof, which had been with litigants challenging legislation, to the State seeking enforcement. Thus, the State had the task of demonstrating that a statute interfering with a natural right of liberty or property was in fact “authorized” by the Constitution, and not merely that the latter did not expressly prohibit enactment of the same. As will be discussed in detail below, this approach was utilized from the turn of the century through the mid 1930s to strike down numerous laws which were seen as restricting economic liberties.

As a result of the Depression, however, the *laissez faire* approach to economic regulation lost favor to the dictates of the New Deal. Thus, in 1934, the Court in *Nebbia v. New York* 78 discarded this approach to economic legislation. The modern approach is exemplified by the 1955 decision, *Williamson v. Lee Optical Co.*, 79 which upheld a statutory scheme regulating the sale of eyeglasses which favored ophthalmologists and optometrists in private professional practice and disadvantaged opticians and those employed by or using space in business establishments. “The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, ‘For protection against abuses by legislatures the people must resort to the polls, not to the courts.’” 80 The Court did go on to assess the reasons which might have justified the legislature in prescribing the regulation at issue, leaving open the possibility that some regulation might be found unreasonable. 81 More recent decisions have limited this inquiry to whether the legislation is arbi-

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78 291 U.S. 502 (1934).
80 348 U.S. at 488.
81 348 U.S. at 487, 491.
The Court has pronounced a strict "hands-off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such legislation is to be "accorded the traditional presumption of constitutionality generally accorded economic regulations" and is to be "upheld absent proof of arbitrariness or irrationality on the part of Congress." That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978).


Regulation of Labor Conditions

Liberty of Contract.—One of the most important concepts utilized during the ascendency of economic due process was liberty of contract. The original idea of economic liberties was advanced by Justices Bradley and Field in the Slaughter-House Cases, and elevated to the status of accepted doctrine in Allgeyer v. Louisiana. It was then used repeatedly during the early part of this century to strike down state and federal labor regulations. "The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The Court, however, did sustain some labor regulations by acknowledging that freedom of contract was "a qualified and not an absolute right. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions

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83 U.S. (16 Wall.) 36 (1872).

84 165 U.S. 578 (1897). Freedom of contract was also alluded to as a property right, as is evident in the language of the Court in Coppage v. Kansas, 236 U.S. 1, 14 (1915). "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right bestruck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

85 165 U.S. at 589.
imposed in the interest of the community. . . . In dealing with the relation of the employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.”  

Still, the Court was committed to the principle that freedom of contract is the general rule and that legislative authority to abridge it could be justified only by exceptional circumstances. To serve this end, the Court intermittently employed the rule of judicial notice in a manner best exemplified by a comparison of the early cases of *Holden v. Hardy* 87 and *Lochner v. New York*. 88 In *Holden v. Hardy*, 89 the Court, in reliance upon the principle of presumed validity, allowed the burden of proof to remain with those attacking a Utah act limiting the period of labor in mines to eight hours per day. Taking cognizance of the fact that labor below the surface of the earth was attended by risk to person and to health and for these reasons had long been the subject of state intervention, the Court registered its willingness to sustain a law which the state legislature had adjudged “necessary for the preservation of health of employees,” and for which there were “reasonable grounds for believing that . . . [it was] supported by the facts.”

Seven years later, however, a radically altered Court was predisposed in favor of the doctrine of judicial notice. In *Lochner v. New York*, 90 the Court found that a law restricting employment in bakeries to ten hours per day and 60 hours per week was not a true health measure, but was merely a labor regulation, and thus was an unconstitutional interference with the right of adult laborers, *sui juris*, to contract for their means of livelihood. Denying that the Court was substituting its own judgment for that of the legislature, Justice Peckham nevertheless maintained that whether the act was within the police power of the State was a “question that must be answered by the Court.” Then, in disregard of the medical evidence proffered, the Justice stated: “[i]n looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . It might be safely affirmed that almost all occu-

87 169 U.S. 366 (1898).
88 198 U.S. 45 (1905).
89 169 U.S. 366, 398 (1898).
90 198 U.S. 45 (1905).
pations more or less affect the health. . . . But are we all, on that account, at the mercy of the legislative majorities?" 91

Justice Harlan, in dissent, asserted that the law was a health regulation, pointing to the abundance of medical testimony tending to show that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages. He concluded that the very existence of such evidence left the reasonableness of the measure open to discussion and thus within the discretion of the legislature. "The responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [T]he public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." 92

A second dissenting opinion, written by Justice Holmes, has received the greater measure of attention as a forecast of the line of reasoning to be followed by the Court some decades later. "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relations of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon

91 198 U.S. at 58-59.
92 198 U.S. at 71, 74 (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)).
the question whether statutes embodying them conflict with the Constitution. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”

It should be noted that Justice Holmes did not reject the basic concept of substantive due process, but rather the Court’s presumption against economic regulation. Thus, Justice Holmes, whether consciously or not, was prepared to support, along with his opponents in the majority, a “perpetual censorship” over state legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the use of the doctrine of judicial notice by the former and the doctrine of presumed validity by the latter.

The Holmes dissent soon bore fruit in *Muller v. Oregon* and *Bunting v. Oregon*, which allowed, respectively, regulation of hours worked by women and by men in certain industries. The doctrinal approach employed was to find that the regulation was supported by evidence despite the shift in the burden of proof entailed by application of the principle of judicial notice. Thus, counsel defending the constitutionality of social legislation developed the practice of submitting voluminous factual briefs, known as “Brandeis Briefs,” replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals. Whenever the Court was disposed to uphold measures pertaining to industrial relations, such as laws limiting hours of work, it generally intimated that the facts thus submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof. On the other hand, whenever it chose to invalidate comparable legislation, such as enactments establishing a minimum wage for women and children, it brushed aside such supporting data, proclaimed its inability to perceive any reasonable connection between the statute and the legitimate objectives of health or safe-

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*93* 188 U.S. at 75-76.

*94* Thus, Justice Holmes’ criticism of his colleagues was unfair, as even a “rational and fair man” would be guided by some preferences or “economic predilections.”

*95* 208 U.S. 412 (1908).

*96* 243 U.S. 426 (1917).

*97* Named for attorney (later Justice) Louis Brandeis, who presented voluminous documentation to support the regulation of women’s working hours in *Muller v. Oregon*, 208 U.S. 412 (1908).

*98* E.g., *Muller v. Oregon*; *Bunting v. Oregon*.

*99* See, e.g., *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).
ty, and condemned the statute as an arbitrary interference with freedom of contract.

During the great Depression, however, the laissez faire tenet of self-help was replaced by the belief that it is peculiarly the duty of government to help those who are unable to help themselves. To sustain this remedial legislation, the Court had to extensively revise its previously formulated concepts of “liberty” under the due process clause. Thus, the Court, in overturning prior holdings and sustaining minimum wage legislation, took judicial notice of the demands for relief arising from the Depression. And, in upholding state legislation designed to protect workers in their efforts to organize and bargain collectively, the Court reconsidered the scope of an employer's liberty of contract, and recognized a correlative liberty of employees that state legislatures could protect.

To the extent that it acknowledged that liberty of the individual may be infringed by the coercive conduct of private individuals no less than by public officials, the Court in effect transformed the due process clause into a source of encouragement to state legislatures to intervene affirmatively to mitigate the effects of such coercion. By such modification of its views, liberty, in the constitutional sense of freedom resulting from restraint upon government, was replaced by the civil liberty which an individual enjoys by virtue of the restraints which government, in his behalf, imposes upon his neighbors.

**Laws Regulating Working Conditions and Wages.**—As noted, even during the Lochner era, the due process clause was construed as permitting enactment by the States of maximum hours laws applicable to women workers and to all workers in specified lines of work thought to be physically demanding or otherwise worthy of special protection. Similarly, the regulation of how wages were to be paid was allowed, including the form of pay-

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100 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Thus the National Labor Relations Act was declared not to “interfere with the normal exercise of the right of the employer to select its employees or to discharge them.” However, restraint of the employer for the purpose of preventing an unjust interference with the correlative right of his employees to organize was declared not to be arbitrary. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 45–46 (1937).

101 Miller v. Wilson, 236 U.S. 373 (1915) (statute limiting work to 8 hours/day, 48 hours/week); Bosley v. McLaughlin, 236 U.S. 385 (1915) (same restrictions for women working as pharmacists or student nurses). See also Muller v. Oregon, 208 U.S. 412 (1908) (10 hours/day as applied to work in laundries); Riley v. Massachusetts, 232 U.S. 671 (1914) (violation of lunch hour required to be posted).

102 See, e.g., Holden v. Hardy, 169 U.S. 366 (1898) (statute limiting the hours of labor in mines and smelters to eight hours per day; Bunting v. Oregon, 243 U.S. 426 (1917) (statute limiting to ten hours per day, with the possibility of 3 hours per day of overtime at time-and-a-half pay, work in any mill, factory, or manufacturing establishment).
and how such payment was to be calculated. And, because of the almost plenary powers of the State and its municipal subdivisions to determine the conditions for work on public projects, statutes limiting the hours of labor on public works were also upheld at a relatively early date. Further, states could prohibit the employment of persons under 16 years of age in dangerous occupations and require employers to ascertain whether their employees were in fact below that age.

The regulation of mines represented a further exception to the Lochner era's anti-discrimination tally. As such health and safety regulation was clearly within a State's police power, a State's laws providing for mining inspectors (paid for by mine owners), licensing mine managers and mine examiners, and imposing liability upon mine owners for failure to furnish a reasonably safe place for workmen were upheld during this period. Other similar regulations which were sustained included laws requiring that underground passageways meet or exceed a minimum width, that boundary pillars be installed between adjoining coal properties as a protection against flood in case of abandonment, and that washhouses be provided for employees.

One of the more significant negative holdings of the Lochner era was that states could not regulate how much wages were to be paid to employees. As with the other condition and wage issues, however, concern for the welfare of women and children seemed to weigh heavily on the justices, and restrictions on

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104 Laws requiring railroads to pay their employees semimonthly, Erie R.R. v. Williams, 233 U.S. 685 (1914), or to pay them on the day of discharge, without abatement or reduction, any funds due them, St. Louis, I. Mt. & S.P. Ry. v. Paul, 173 U.S. 404 (1899), do not violate due process.

105 Freedom of contract was held not to be infringed by an act requiring that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioning such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission. Rail Coal Co. v. Ohio Industrial Comm'n, 236 U.S. 338 (1915). See also McLean v. Arkansas, 211 U.S. 539 (1909).


109 Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907).


minimum wages for these groups were discarded in 1937. Ultimately, the reasoning of these cases was extended to more broadly based minimum wage laws, as the Court began to offer significant deference to the states to enact economic and social legislation benefitting labor.

The modern theory regarding substantive due process and wage regulation was explained by Justice Douglas in 1952 in the following terms: “Our recent decisions make plain that we do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits. . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.”

The Justice further noted that “many forms of regulation reduce the net return of the enterprise. . . . Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to

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115 Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (sustaining a Missouri statute giving employees the right to absent themselves for four hours while the polls were open on election day without deduction of wages for their absence). The Court in Day-Brite Lighting, Inc. recognized that the legislation in question served as a form of wage control for men, which had previously found unconstitutional. Justice Douglas, however, wrote that “the protection of the right of suffrage under our scheme of things is basic and fundamental,” and hence within the states’ police power.
legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases.\footnote{116}

**Workers' Compensation Laws.**—Workers’ compensation laws also evaded the ravages of *Lochner*. The Court “repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer’s liability for personal injuries to the employee.”\footnote{117} Accordingly, a state statute which provided an exclusive system to govern the liabilities of employers for disabling injuries and death caused by accident in certain hazardous occupations,\footnote{118} irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow-servants, was held not to work a denial of due process.\footnote{119} Likewise, an act which allowed an injured employee, though guilty of contributory negligence, an election of remedies between restricted recovery under a compensation law or full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law.\footnote{120} A variety of other statutory schemes have also been upheld.\footnote{121}

\footnote{116} 342 U.S. at 424-25. See also *Dean v. Gadsden Times Pub. Co.*, 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

\footnote{117} New York Cent. R.R. v. White, 243 U.S. 188, 200 (1917). “These decisions have established the propositions that the rules of law concerning the employer’s responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.” *Arizona Employers’ Liability Cases*, 250 U.S. 400, 419–20 (1919).

\footnote{118} In determining what occupations may be brought under the designation of “hazardous,” the legislature may carry the idea to the “vanishing point.” *Ward & Gow v. Krinsky*, 259 U.S. 503, 520 (1922).

\footnote{119} Nor does it violate due process to deprive an employee or his dependents of the higher damages which, in some cases, might be rendered under these doctrines. *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

\footnote{120} *Arizona Employers’ Liability Cases*, 250 U.S. 400 (1919).

\footnote{121} *Chicago, B. & Q. R.R. v. McGuire*, 219 U.S. 549 (1911) (prohibiting contracts limiting liability for injuries and stipulating that acceptance of benefits under such contracts shall not constitute satisfaction of a claim); *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532 (1935) (forbidding contracts exempting employers hired-in-state from liability for injuries outside the State); *Thornton v. Duffy*, 254 U.S. 361 (1920) (required contribution to a state insurance fund by an employer even though employer had obtained protection from an insurance company under previous statutory scheme); *Booth Fisheries v. Industrial Comm’n*, 271 U.S. 208 (1926) (finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance, right to come under a workmen’s com-
Even the imposition upon coal mine operators of the liability of compensating former employees who terminated work in the industry before passage of the law for black lung disabilities was sustained by the Court as a rational measure to spread the costs of the employees’ disabilities to those who have profited from the fruits of their labor. Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, i.e., that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law. Consequently, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

**Collective Bargaining.**—During the *Lochner* era, liberty of contract, as translated into what one Justice labeled the *Allgeyer-Lochner-Adair-Coppage* doctrine, was used to strike down legislation calculated to enhance the bargaining capacity of

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123 Justice Black in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949). In his concurring opinion, contained in the companion case of APL v. American Sash & Door Co., 335 U.S. 538, 543–44 (1949), Justice Frankfurter summarized the now obsolete doctrines employed by the Court to strike down state laws fostering unionization. “[U]nionization encountered the shibboleths of a premachine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of ‘liberty’ were equated with theories of laissez faire. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. . . . The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earners’ bargaining power. With that attitude as a premise, *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915), followed logically enough; not even *Truax v. Corrigan*, 257 U.S. 312 (1921), could be considered unexpected.”
workers as against that already possessed by their employers.\footnote{In Adair and Coppage the Court voided statutes outlawing “yellow dog” contracts whereby, as a condition of obtaining employment, a worker had to agree not to join or to remain a member of a union; these laws, the Court ruled, impaired the employer’s “freedom of contract”—the employer’s unrestricted right to hire and fire. In Truax, the Court found that a statute forbidding injunctions on labor protest activities was unconstitutional as applied to a labor dispute involving picketing, libelous statements, and threats. The statute subsequently upheld in Senn, on the other hand, authorized publicizing labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct. The difference between these statutes, according to the Court, was that the law in Senn applied to “peaceful” picketing only, while the law in Truax “was . . . applied to legalize conduct which was not simply}

The Court did, however, on occasion sustain measures affecting the employment relationship, such as a statute requiring every corporation to furnish a departing employee a letter setting forth the nature and duration of the employee’s service and the true cause for leaving.\footnote{Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922). Added provisions that such letters should be on plain paper selected by the employee, signed in ink and sealed, and free from superfluous figures and words, were also sustained as not amounting to any unconstitutional deprivation of liberty and property. Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922). In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement of a local policy rule which rendered illegal an agreement of several insurance companies having a local monopoly of a line of insurance, to the effect that no company would employ within two years anyone who had been discharged from, or left, the service of any of the others. On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute under which a labor union official was punished for having ordered a strike for the purpose of coercing an employer to pay a wage claim of a former employee. Dorchy v. Kansas, 272 U.S. 306 (1926).} In Senn v. Tile Layers Union,\footnote{301 U.S. 486 (1937).} however, the Court began to show a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments.

The significance of Senn\footnote{301 U.S. 468 (1937).} was, in part, that the case upheld a statute that was not appreciably different from a law voided five years earlier in Truax v. Corrigan. In Truax, the Court found that a statute forbidding injunctions on labor protest activities was unconstitutional as applied to a labor dispute involving picketing, libelous statements, and threats. The statute subsequently upheld in Senn, on the other hand, authorized publicizing labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct. The difference between these statutes, according to the Court, was that the law in Senn applied to “peaceful” picketing only, while the law in Truax “was . . . applied to legalize conduct which was not simply}
peaceful picketing." Inasmuch as the enhancement of job opportunities for members of the union was a legitimate objective, the State was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing Senn from continuing in business as an independent entrepreneur was declared to present an issue of public policy exclusively for legislative determination.

Years later, after regulations protective of labor allowed unions to amass enormous economic power, many state legislatures attempted to control the abuse of this power, and the Court’s new found deference to state labor regulation was also applied to restrictions on unions. Thus the Court upheld state prohibitions on racial discrimination by unions, rejecting claims that the measure interfered unlawfully with the union’s right to choose its members, abridged its property rights, or violated its liberty of contract. Inasmuch as the union “[held] itself out to represent the general business needs of employees” and functioned “under the protection of the State,” the union was deemed to have forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion.\(^{130}\)

Similarly, state laws outlawing closed shops were upheld in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company*\(^{131}\) and *AFL v. American Sash & Door Co.*\(^{132}\) When labor unions attempted to invoke freedom of contract, the Court, speaking through Justice Black, announced its refusal “to return . . . to . . . [a] due process philosophy that has been deliberately discarded. . . . The due process clause,” it maintained, does not “forbid a State to pass laws clearly designed to safeguard the opportunity of non-union workers to get and hold jobs, free from discrimination against them because they are nonunion workers.”\(^{133}\)

\(^{130}\)Railway Mail Ass’n v. Corsi, 326 U.S. 88, 94 (1945). Justice Frankfurter, concurring, declared that “the insistence by individuals of their private prejudices . . . in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts.” Id. at 98.

\(^{131}\)335 U.S. 525 (1949).

\(^{132}\)335 U.S. 538 (1949).

\(^{133}\)335 U.S. at 534, 537. In a lengthy opinion, in which he registered his concurrence with both decisions, Justice Frankfurter set forth extensive statistical data calculated to prove that labor unions not only were possessed of considerable economic power but by virtue of such power were no longer dependent on the closed shop for survival. He would therefore leave to the legislatures the determination “whether it is preferable in the public interest that trade unions should be subjected to state intervention or left to the free play of social forces, whether experience has disclosed ‘union unfair labor practices,’ and if so, whether legislative correction is
And, in *UAW v. WERB*, the Court upheld the Wisconsin Employment Peace Act, which had been used to proscribe unfair labor practices by a union. In *UAW*, the Union, acting after collective bargaining negotiations had become deadlocked, had attempted to coerce an employer through calling frequent, irregular, and unannounced union meetings during working hours, resulting in a slowdown in production. “No one,” declared the Court, can question “the State’s power to police coercion by . . . methods” which involve “considerable injury to property and intimidation of other employees by threats.”

**Regulation of Business Enterprises: Price Controls**

In examining whether the due process clause allows the regulation of business prices, the Supreme Court, almost from the inception of the Fourteenth Amendment, has devoted itself to the examination of two questions: (1) whether the clause restricted such regulation to certain types of business, and (2) the nature of the regulation allowed as to those businesses.

**Types of Businesses That May be Regulated.**—For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court found the due process clause to impose no substantive restraint on the power of States to fix rates chargeable by any industry. Thus, in *Munn v. Illinois*, the first of the “Granger Cases,” maximum charges established by a state for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose. The Court, in an opinion that was largely *dictum*, declared that the due process clause did not operate as a safeguard against oppressive rates, and that if regulation was permissible, the severity thereof was within legislative discretion and could be ameliorated only by resort to the polls. Not much time elapsed, however, before the Court effected a complete withdrawal

More appropriate than self-discipline and pressure of public opinion. . . .” Id. at 538, 549–50.

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135 336 U.S. at 253. See also *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949) (upholding state law forbidding agreements in restraint of trade as applied to union ice peddlers picketing wholesale ice distributor to induce the latter not to sell to nonunion peddlers). Other cases regulating picketing are treated under the First Amendment topics, “Picketing and Boycotts by Labor Unions” and “Public Issue Picketing and Parading,” supra.
136 94 U.S. 113 (1877). See also *Davidson v. New Orleans*, 96 U.S. 97 (1878); *Peik v. Chicago & Nw. Ry.*, 94 U.S. 164 (1877);
137 The Court not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the States’ police power, but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision.
from this position, and by 1890 \(^{138}\) it had fully converted the due process clause into a restriction on state agencies seeking to impose rates which, in a judge’s estimation, were arbitrary or unreasonable. This state of affairs continued for more than fifty years.

Prior to 1934, unless a business was “affected with a public interest,” control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, this standard, “business affected with a public interest,” never acquired any precise meaning, and as a consequence lawyers were never able to identify all those qualities or attributes which invariably distinguished a business so affected from one not so affected. The most coherent effort by the Court was the following classification prepared by Chief Justice Taft. \(^{139}\) “(1) Those [businesses] which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . . (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly.”

Through application of this formula, the Court sustained state laws regulating charges made by grain elevators, \(^{140}\) stockyards, \(^{141}\) and tobacco warehouses, \(^{142}\) and fire insurance rates \(^{143}\) and commissions paid to fire insurance agents. \(^{144}\) The Court also voided


\(^{142}\) Townsend v. Yeomans, 301 U.S. 441 (1937).


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statutes regulating business not “affected with a public interest,” including state statutes fixing the price at which gasoline may be sold, regulating the prices for which ticket brokers may resell theater tickets, and limiting competition in the manufacture and sale of ice through the withholding of licenses to engage therein.

In the 1934 case of Nebbia v. New York, however, the Court finally shelved the concept of “a business affected with a public interest,” upholding, by a vote of five-to-four, a depression-induced New York statute fixing fluid milk prices. “Price control, like any other form of regulation, is [now] unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.” Conceding that “the dairy industry is not, in the accepted sense of the phrase, a public utility,” that is, a “business affected with a public interest,” the Court in effect declared that price control henceforth is to be viewed merely as an exercise by the government of its police power, and as such is subject only to the restrictions which due process imposes on arbitrary interference with liberty and property.

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149 In reaching this conclusion the Court might be said to have elevated to the status of prevailing doctrine the views advanced in previous decisions by dissenting Justices. Thus, Justice Stone, dissenting in Ribnik v. McBride, 277 U.S. 350, 359–60 (1928), had declared: “Price regulation is within the State’s power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole.” In his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 302–03 (1932), Justice Brandeis had also observed: “The notion of a distinct category of business ‘affected with a public interest’ employing property ‘devoted to a public use’ rests upon historical error. In my opinion the true principle is that the State’s power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.”
150 Older decisions overturning price regulation were now viewed as resting upon this basis, i.e., that due process was violated because the laws were arbitrary in their operation and effect.
151 The Court was not disturbed by the “scientific validity” that had been claimed for the theory of Adam Smith that “price that will clear the market,” and was content to note that the “due process clause makes no mention of prices” and that the courts are both incompetent and unauthorized to deal with the wisdom of the policy adopted or the practicability of the law enacted to forward it. The minority continued to stress the unreasonableness of any state regulation interfering with the determination of prices by “natural forces.” Justice McReynolds, speaking for the dissenting Justices, labeled the controls imposed by the challenged statute as a “fanciful scheme to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold.” Intimating that the New York statute was as efficacious as a safety regulation which required “householders
Having thus concluded that it is no longer the nature of the business that determines the validity of a price regulation, the Court had little difficulty in upholding a state law prescribing the maximum commission which private employment agencies may charge. Rejecting contentions that the need for such protective legislation had not been shown, the Court, in *Olsen v. Nebraska*[^152^] held that differences of opinion as to the wisdom, need, or appropriateness of the legislation “suggest a choice which should be left to the States;” and that there was “no necessity for the State to demonstrate before us that evils persist despite the competition” between public, charitable, and private employment agencies.[^153^]

**Substantive Review of Price Controls.**—Ironically, private businesses, once they had been found subject to price regulation, seemed to have less protection than public entities. Thus, unlike operators of public utilities who, in return for a government grant of virtually monopolistic privileges must provide continuous service, proprietors of other businesses receive no similar special advantages and accordingly are unrestricted in their right to liquidate and close. Owners of ordinary businesses, therefore, are at liberty to escape the consequences of publicly imposed charges by dissolution, and have been found less in need of protection through judicial review. Thus, case law upholding challenges to price controls deals predominantly with governmentally imposed rates and charges for public utilities.

In 1886, Chief Justice Waite, in the *Railroad Commission Cases*[^154^], warned that the “power to regulate is not a power to destroy; [and] the State cannot do that in law which amounts to a taking of property for public use without just compensation or without due process of law.” In other words, a confiscatory rate could not be imposed by government on a regulated entity. By treating “due process of law” and “just compensation” as equivalents,[^155^] the Court was in effect asserting that the imposition of a rate so low as to damage or diminish private property ceased to be

[^154^]: The older case of Ribnik v. McBride, which had invalidated similar legislation upon the now obsolete concept of a “business affected with a public interest,” was expressly overruled. 277 U.S. 350 (1928). Adams v. Tanner, 244 U.S. 590 (1917), was disapproved in Ferguson v. Skrupa, 372 U.S. 726 (1963), and Tyson & Bro. v. Banton, 273 U.S. 418 (1927), was effectively overruled in Gold v. DiCarlo, 380 U.S. 520 (1965), without the Court hearing argument on it.
[^155^]: This was contrary to its earlier holding in Davidson v. New Orleans, 96 U.S. 97 (1877).
an exercise of a State’s police power and became one of eminent domain. Nevertheless, even this doctrine proved inadequate to satisfy public utilities, as it allowed courts to intervene only to prevent imposition of a confiscatory rate, *i.e.*, a rate so low as to be productive of a loss and to amount to taking of property without just compensation. The utilities sought nothing less than a judicial acknowledgment that courts could review the “reasonableness” of legislative rates.

Although as late as 1888 the Court doubted that it possessed the requisite power to challenge this doctrine,\(^{156}\) it finally acceded to the wishes of the utilities in 1890 in *Chicago, M. & St. P. Railway v. Minnesota*.\(^ {157}\) In this case, the Court ruled that “[t]he question of the reasonableness of rates . . . , involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . .”

Although the Court made a last-ditch attempt to limit the ruling of *Chicago, M. & S.P. Railway* to rates fixed by a commission as opposed to rates imposed by a legislature,\(^ {158}\) the Court in *Reagan v. Farmer’s Loan and Trust Co.*\(^ {159}\) finally removed all lingering doubts over the scope of judicial intervention. In *Reagan*, the Court declared that, “if a carrier . . . attempted to charge a shipper an unreasonable sum,” the Court, in accordance with common law principles, would pass on the reasonableness of its rates, and has “jurisdiction . . . to award the shipper any amount exacted . . . in excess of a reasonable rate . . . . The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of a carrier prescribes the rates.”\(^ {160}\) Reiterating virtually the same principle in *Smyth v. Ames*,\(^ {161}\) the Court not

\(^{156}\) Dow v. Beidelman, 125 U.S. 680 (1888).
\(^{157}\) 134 U.S. 418, 458 (1890).
\(^{158}\) Budd v. New York, 143 U.S. 517 (1892).
\(^{159}\) 154 U.S. 362, 397 (1894).
\(^{160}\) Insofar as judicial intervention resulting in the invalidation of legislatively imposed rates has involved carriers, it should be noted that the successful complainant invariably has been the carrier, not the shipper.
\(^{161}\) 169 U.S. 466 (1898). Of course the validity of rates prescribed by a State for services wholly within its limits must be determined wholly without reference to the interstate business done by a public utility. Domestic business should not be made to bear the losses on interstate business and vice versa. Thus a State has no power to require the hauling of logs at a loss or at rates that are unreasonable, even if
only obliterated the distinction between confiscatory and unreasonable rates but contributed the additional observation that the requirements of due process are not met unless a court further determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

**Early Limitations on Review.**—Even while reviewing the reasonableness of rates the Court recognized some limits on judicial review. As early as 1894, the Court asserted that “t]he courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; . . . [however, there can be no doubt] of their power and duty to inquire whether a body of rates . . . is unjust and unreasonable . . . and if found so to be, to restrain its operation.” 162 One can also infer from these early holdings a distinction between unreviewable fact questions that relate only to the wisdom or expediency of a rate order, and reviewable factual determinations that bear on a commission’s power to act. 163

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162 Reagan v. Farmers’ Loan & Trust Co., 154 U.S. 362, 397 (1894). And later, in 1910, the Court made a similar observation that courts may not, “under the guise of exerting judicial power, usurp merely administrative functions by setting aside” an order of the commission merely because such power was unwisely or expeditiously exercised. ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910). This statement, made in the context of federal ratemaking, appears to be equally applicable to judicial review of state agency actions.

163 This distinction was accorded adequate emphasis by the Court in Louisville & Nashville R.R. v. Garrett, 231 U.S. 298, 310–13 (1913), in which it declared that “the appropriate question for the courts” is simply whether a “commission,” in establishing a rate, “acted within the scope of its power” and did not violate “constitutional rights . . . by imposing confiscatory requirements.” The carrier contesting the rate was not entitled to have a court also pass upon a question of fact regarding the reasonableness of a higher rate the carrier charged prior to the order of the commission. All that need concern a court, it said, is the fairness of the proceeding.
Further, the Court placed various obstacles in the path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof, but he must present a case of “manifest constitutional invalidity.” And, if, notwithstanding this effort, the question of confiscation remains in doubt, no relief will be granted. Moreover, even the Court was inclined to withhold judgement on the application of a rate until the practical effect could be surmised.

In the course of time this distinction solidified. Thus, the Court initially adopted the position that it would not disturb findings of fact insofar as these were supported by substantial evidence. For instance, in San Diego Land Company v. National City, the Court declared that after a legislative body had fairly and fully investigated and acted, by fixing what it believed to be reasonable rates, the courts cannot step in and set aside the action due to a different conclusion about the reasonableness of the rates. “Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use.” And in a similar later case the Court expressed even more clearly its reluctance to reexamine ordinary factual determinations. It is not bound “to reexamine and weigh all the evidence . . . or to proceed according to . . . [its] independent opinion as to what are proper rates. It is enough if . . . [the Court] cannot say that it was impossible for a fair-minded board to come to the result which was reached.”

whereby the commission determined that the existing rate was excessive, but not the expediency or wisdom of the commission’s having superseded that rate with a rate regulation of its own.

165 Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 452 (1913).
167 Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909). However, a public utility which has petitioned a commission for relief from allegedly confiscatory rates need not await indefinitely for the commission’s decision before applying to a court for equitable relief. Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).
168 174 U.S. 739, 750, 754 (1899). See also Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 433 (1913).
170 Moreover, in reviewing orders of the Interstate Commerce Commission, the Court, at least in earlier years, chose to be guided by approximately the same standards it had originally formulated for examining regulations of state commissions. The following excerpt from its holding in ICC v. Union Pacific R.R., 222 U.S. 541, 547–48 (1912) represents an adequate summation of the law as it stood prior to 1920: “[Q]uestions of fact may be involved in the determination of questions of law,
These standards of review were, however, abruptly rejected by the Court in Ohio Valley Co. v. Ben Avon Borough as being no longer sufficient to satisfy the requirements of due process, ushering in a long period where courts substantively evaluated the reasonableness of rate settings. Although the state court in Ben Avon had in fact reviewed the evidence and ascertained that the state commission's findings of fact were supported by substantial evidence, it also construed the statute providing for review as denying to state courts "the power to pass upon the weight of such evidence." Largely on the strength of this interpretation of the applicable state statute, the Court held that when the order of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." 253 U.S. 297 (1920).

**History of the Valuation Question.**—For almost fifty years the Court wandered through a maze of conflicting formulas and factors for valuing public service corporation property including

171 253 U.S. 297 (1920).

172 Unlike previous confiscatory rate litigation, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a state appellate tribunal. 253 U.S. at 289. In injunctive proceedings, evidence is freshly introduced whereas in the cases received on appeal from state courts, the evidence is found within the record.

173 Without departing from the ruling previously enunciated in Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298 (1913) that the failure of a State to grant a statutory right of judicial appeal from a commission's regulation is not violative of due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by state law did not afford an adequate opportunity for testing a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that "where a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review." 253 U.S. 287, 291, 295 (1920).
“fair value,” 174 “reproduction cost,” 175 “prudent investment,” 176 “depreciation,” 177 “going concern value and good will,” 178 “salvage value,” 179 and “past losses and gains” 180 only to emerge therefrom


175 Various valuation cases emphasized reproduction costs, i.e., the present as compared with the original cost of construction. See, e.g., San Diego Land Co. v. National City, 174 U.S. 739, 757 (1899); San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 443 (1903).

176 Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm’n, 262 U.S. 276, 291–92, 302, 306–07 (1923) (Brandeis, J., concurring) (cost includes both operating expenses and capital charges i.e. interest for the use of capital, allowance for the risk incurred, funds to attract capital). This method would require “adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return.” As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930’s. The sharp decline in prices which occurred during this period doubtless contributed to the loss of affection for reproduction costs. In Los Angeles Gas Co. v. Railroad Comm’n, 289 U.S. 287 (1933) and Railroad Comm’n v. Pacific Gas Co., 302 U.S. 388, 399, 405 (1938), the Court upheld respectively a valuation from which reproduction costs had been excluded and another in which historical cost served as the rate base.

177 Knoxville v. Water Co., 212 U.S. 1, 9–10 (1909) (considering depreciation as part of cost). Notwithstanding its early recognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual allowances to cover the same. Indicative of such controversy was the disagreement as to whether annual allowances shall be in such amount as will permit the replacement of equipment at current costs, i.e., present value, or at original cost. In the Hope Gas case, 320 U.S. 591, 606 (1944), the Court reversed United Railways v. West, 280 U.S. 234, 253–254 (1930), insofar as that holding rejected original cost as the basis of annual depreciation allowances.

178 Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 165 (1915) (finding “going concern value” in an assembled and established plant, doing business and earning money, over one not thus advanced). Franchise value and good will, on the other hand, have been consistently excluded from valuation; the latter presumably because a utility invariably enjoys a monopoly and consumers have no choice in the matter of patronizing it. The latter proposition has been developed in the following cases: Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909); Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 163–64 (1915); Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922); Los Angeles Gas Co. v. Railroad Comm’n, 289 U.S. 287, 313 (1933).

179 Market Street Ry. v. Railroad Comm’n, 324 U.S. 548, 562, 564 (1945) (where a street-surface railroad had lost all value except for scrap or salvage it was permissible for a commission to consider the price at which the utility offered to sell its property to a citizen); Denver v. Denver Union Water Co., 246 U.S. 178 (1918) (where water company franchise has expired, but where there is no other source of supply, its plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant).

180 FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942) (“The Constitution [does not] require that the losses of . . . [a] business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned”). Nor can past losses be used to enhance the value of the property to support a claim that rates for the future are confiscatory. Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922), any more than profits of the past can be used to sustain confiscatory rates
in 1944 at a point not very far removed from Munn v. Illinois and its deference to rate-making authorities. By holding in FPC v. Natural Gas Pipeline Co., that the “Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas,” and in FPC v. Hope Natural Gas Co., that “it is the result reached not the method employed which is controlling, . . . [that] it is not the theory but the impact of the rate order which counts, [and that] if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end,” the Court, in effect, abdicated from the position assumed in the Ben Avon case. Without surrendering the judicial power to declare rates unconstitutional on ground of a substantive deprivation of due process, the Court announced that it would not overturn a result it deemed to be just simply because “the method employed [by a commission] to reach that result may contain infirmities. . . . [A] Commission’s order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.”


94 U.S. 113 (1877).

315 U.S. 575, 586 (1942).

320 U.S. 591, 602 (1944). Although this and the previously cited decision arose out of controversies involving the National Gas Act of 1938, the principles laid down therein are believed to be applicable to the review of rate orders of state commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures.


185 In FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942), Justices Black, Douglas, and Murphy, in a concurring opinion, proposed to travel the road all the way back to Munn v. Illinois, and deprive courts of the power to void rates simply because they deem the latter to be unreasonable. In a concurring opinion, Driscoll v. Edison Co., 307 U.S. 104, 122 (1939), Justice Frankfurter temporarily adopted a similar position; he declared that “the only relevant function of law . . . [in rate controversies] is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process.” However, in his dissent in FPC v. Hope Natural Gas Co., 320 U.S. 591, 625 (1944), he disassociated himself from this proposal, and asserted that “it was decided [more than fifty years ago] that the final say under the Constitution lies with the judiciary.

186 FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). See also Wisconsin v. FPC, 373 U.S. 294, 299, 317, 326 (1963), wherein the Court tentatively approved an “area rate approach,” that is “the determination of fair prices for gas, based on reasonable financial requirements of the industry, for . . . the various producing areas of the country,” and with rates being established on an area basis rather than on an individual company basis. Four dissenters, Justices Clark, Black, Brennan, and Chief Justice Warren, labelled area pricing a “wild goose chase,” and stated that the Commission had acted in an arbitrary and unreasonable manner entirely outside traditional concepts of administrative due process. Area rates were approved in Permian Basin Area Rate Cases, 390 U.S. 747 (1968).
In dispensing with the necessity of observing the old formulas for rate computation, the Court did not articulate any substitute guidance for ascertaining whether a so-called end result is unreasonable. It did intimate that rate-making “involves a balancing of the investor and consumer interests,” which does not, however, “insure that the business shall produce net revenues”. . . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.”

Regulation of Public Utilities and Common Carriers

In General.—Because of the nature of the business they carry on and the public’s interest in it, public utilities and common carriers are subject to state regulation, whether exerted directly by legislatures or under authority delegated to administrative bodies. But because the property of these entities remains under the full protection of the Constitution, it follows that due process is violated when the state regulates in a manner that infringes the right of ownership in what the Court considers to be an “arbitrary” or “unreasonable” way. Thus, when a street railway company lost its franchise, the city could not simply take possession of its equipment, although it could subject the company to the alternative of accepting an inadequate price for its property or of ceasing oper-

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190 Cleveland Electric Ry. v. Cleveland, 204 U.S. 116 (1907).
atations and removing its property from the streets. Likewise, a city wanting to establish a lighting system of its own may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise, although a city may compete with a company that has no exclusive charter. However, a municipal ordinance that demanded, as a condition for placing poles and conduits in city streets, that a telegraph company carry the city’s wires free of charge, and that required that conduits be moved at company expense, was constitutional.

And, the fact that a State, by mere legislative or administrative fiat, cannot convert a private carrier into a common carrier will not protect a foreign corporation which has elected to enter a State which requires that it operate its local private pipe line as a common carrier. Such foreign corporation is viewed as having waived its constitutional right to be secure against imposition of conditions which amount to a taking of property without due process of law.

Compulsory Expenditures: Grade Crossings, and the Like.—Generally, the enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property in violation of due process. Thus, where a water company laid its lines on an ungraded street, and the applicable rule at the time of the granting of its charter compelled the company to furnish connections at its own expense to one residing

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194 Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1912).
196 Norfolk Turnpike Co. v. Virginia, 225 U.S. 264 (1912) (requiring a turnpike company to suspend tolls until the road is put in good order not a violation of due process of law, notwithstanding the fact that present patronage does not yield revenue sufficient to maintain the road in proper condition); International Bridge Co. v. New York, 254 U.S. 126 (1920) (in the absence of proof that the addition will not yield a reasonable return, railroad bridge company not deprived of its property when it is ordered to widen its bridge by inclusion of a pathway for pedestrians and a roadway for vehicles); Chicago, B. & Q. R.R. v. Nebraska, 170 U.S. 57 (1898) (railroads may be required to repair viaduct under which they operate); Chicago, B. & Q. Ry. v. Drainage Comm’n, 200 U.S. 561 (1906) (reconstruct a bridge or provide means for passing water for drainage through their embankment); Chicago & Alton R.R. v. Trumbarger, 238 U.S. 67 (1915) (drainage requirements); Lake Shore & Mich. So. Ry. v. Clough, 242 U.S. 375 (1917) (drainage requirements) Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919) (requirement to aprinile street occupied by railroad). But see Chicago, St. P., Mo. & O. Ry. v. Holmberg, 282 U.S. 162 (1930) (due process violated by requirement that an underground cattle-pass be is constructed, not as a safety measure but as a convenience to farmers).
on such a street, due process is not violated.\textsuperscript{197} Or, where a gas company laid its pipes under city streets, it may validly be obligated to assume the cost of moving them to accommodate a municipal drainage system.\textsuperscript{198} Or, railroads may be required to help fund the elimination of grade crossings, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements.

While the power of the State in this respect is not unlimited, and an “arbitrary” and “unreasonable” imposition on these businesses may be set aside, the Court’s modern approach to substantive due process analysis makes this possibility far less likely than it once was. For instance, a 1935 case invalidated a requirement that railroads share 50\% of the cost of grade separation, irrespective of the value of such improvements to the railroad, suggesting that railroads could not be required to subsidize competitive transportation modes.\textsuperscript{199} But in 1953 the Court distinguished this case, ruling that the costs of grade separation improvements need not be allocated solely on the basis of benefits that would accrue to railroad property.\textsuperscript{200} While the Court cautioned that “allocation of costs must be fair and reasonable,” it was deferential to local governmental decisions, stating that in the exercise of the police power to meet transportation, safety, and convenience needs of a growing community, “the cost of such improvements may be allocated all to the railroads.”

\textbf{Compellable Services.}—A State may require that common carriers such as railroads provide services in a manner suitable for the convenience of the communities they serve.\textsuperscript{201} Similarly, a pri-

\textsuperscript{197} Consumers’ Co. v. Hatch, 224 U.S. 148 (1912). However, if pipe and telephone lines are located on a right of way owned by a pipeline company, the latter cannot, without a denial of due process, be required to relocate such equipment at its own expense Panhandle Eastern Pipeline Co. v. Highway Comm’n, 294 U.S. 613 (1935).

\textsuperscript{198} New Orleans Gas Co. v. Drainage Comm’n, 197 U.S. 453 (1905).

\textsuperscript{199} Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). See also Lehigh Valley R.R. v. Commissioners, 278 U.S. 24, 35 (1928) (upholding imposition of grade crossing costs on a railroad although “near the line of reasonableness,” and reiterating that “unreasonably extravagant” requirements would be struck down).


Amendment 14—Rights Guaranteed

Mary duty of a public utility is to serve all those who desire the service it renders, and so it follows that a company cannot pick and choose to serve only those portions of its territory which it finds most profitable. Therefore, compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the State does not result in an unconstitutional deprivation. Likewise, requiring a railway to continue the service of a branch or part of a line is acceptable, even if that portion of the operation is an economic drain. A company, however, cannot be compelled to operate its franchise at a loss, but must be at liberty to surrender it and discontinue operations.

As the standard for regulation of a utility is whether a particular directive is reasonable, the question of whether a state order requiring the provision of services is reasonable could include a consideration of the likelihood of pecuniary loss, the nature, extent and productiveness of the carrier’s intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered. An example of the kind of regulation where the issue of reasonableness would require an evaluation of numerous practical and economic factors is where railroads are required to lay tracks and otherwise provide the required equipment to facilitate the connection of separate track lines.

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205 Since the decision in Wisconsin, M. & P.R. Co. v. Jacobson, 179 U.S. 287 (1900), there can be no doubt of the power of a State, acting through an administrative body, to require railroad companies to make track connections. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. . . . If the order involves the use of property needed in the discharge of those
Generally, regulation of a utility’s service to commercial customers attracts less scrutiny\textsuperscript{207} than regulations intended to facilitate the operations of a competitor,\textsuperscript{208} and governmental power to regulate in the interest of safety has long been conceded.\textsuperscript{209} Requirements for service having no substantial relation to a utility’s duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though the furnishing of such necessary facilities may occasion an incidental pecuniary loss. Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier.” Washington ex rel. Oregon R.R. & Nav. Co. v. Fairchild, 224 U.S. 510, 528–29 (1912). See also Michigan Cent. R.R. v. Michigan R.R. Comm’n, 236 U.S. 615 (1915); Seaboard Air Line R.R. v. Georgia R.R. Comm’n, 240 U.S. 324, 327 (1916).

\textsuperscript{207}Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers. Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass’n, 247 U.S. 490 (1918). Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. Louisville & Nashville R.R. v. Kentucky, 183 U.S. 503, 512 (1902); Missouri Pacific Ry. v. McGrew Coal Co., 244 U.S. 191 (1917). Nor is it “unreasonable” or “arbitrary” to require a railroad to desist from demanding advance payment on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment. Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915).

\textsuperscript{208}Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars offered at an arbitrary connection point near its terminus by a competing road seeking to reach and use the former’s terminal facilities. Nor may a carrier be required to deliver its cars to connecting carriers without adequate protection from loss or undue detention or compensation for their use. Louisville & Nashvile R.R. v. Stock Yards Co., 212 U.S. 132 (1909). But a carrier may be compelled to interchange its freight cars with other carriers under reasonable terms, Michigan Cent. R.R. v. Michigan R.R. Comm’n, 236 U.S. 615 (1915), and to accept cars already loaded and in suitable condition, for reshipment over its lines to points within the State. Chicago, M. & St. P. Ry. v. Iowa, 233 U.S. 334 (1914).

regulated function, however, have been voided, such as requiring railroads to maintain scales to facilitate trading in cattle, or a prohibiting letting down an unoccupied upper berth on a rail car while the lower berth was occupied. 210

**Imposition of Statutory Liabilities and Penalties Upon Common Carriers.**—Legislators have considerable latitude to impose legal burdens upon common carriers, as long as the carriers are not precluded from shifting such burdens. Thus, a statute may make an initial rail carrier, 211 or the connecting or delivering carrier, 212 liable to the shipper for the nondelivery of goods which results from the fault of another, as long as the carrier has a subrogated right to proceed against the carrier at fault. Similarly, a railroad may be held responsible for damages to the owner of property injured by fire caused by locomotive engines, as the statute also granted the railroad an insurable interest in such property along its route, allowing the railroad to procure insurance against such liability. 213 Equally consistent with the requirements of due process are enactments imposing on all common carriers a penalty for failure to settle claims for freight lost or damaged in shipment within a reasonable specified period. 214

The Court has, however, established some limits on the imposition of penalties on common carriers. During the *Lochner* era, the Court invalidated an award of $500 in liquidated damages plus reasonable attorney’s fees imposed on a carrier that had collected transportation charges in excess of established maximum rates as disproportionate. The Court also noted that the penalty was exacted under conditions not affording the carrier an adequate opportunity to test the constitutionality of the rates before liability attached. 215 Where the carrier did have an opportunity to challenge the reasonableness of the rate, however, the Court indicated that the validity of the penalty imposed need not be determined by comparison with the amount of the overcharge. Inasmuch as a penalty is imposed as punishment for violation of law, the legislature may

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213 St. Louis & San Francisco Ry. v. Mathews, 165 U.S. 1 (1897).
214 Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) (penalty imposed if claimant subsequently obtained by suit more than the amount tendered by the railroad). But see Kansas City Ry. v. Anderson, 233 U.S. 325 (1914) (levying double damages and an attorney’s fee upon a railroad for failure to pay damage claims only where the plaintiff had not demanded more than he recovered in court); St. Louis, I. Mt. & So. Ry. v. Wynne, 224 U.S. 354 (1912) (same); Chicago, M. & St. P. Ry. v. Polt, 232 U.S. 165 (1914) (same).
adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be “so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.”

Regulation of Businesses, Corporations, Professions, and Trades

Generally.—States may impose significant regulations on businesses without violating due process. “The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State’s competency.” Still, the fact the State reserves the power to amend or repeal corporate charters does not support the taking of corporate property without due process of law, as termination of the corporate structure merely results in turning over corporate property to the stockholders after liquidation.

Foreign (out-of-state) corporations also enjoy the protection under the due process clauses, but this does not grant them an unconditional right to enter another State or to continue to do business therein. Language in some early cases suggested that States had plenary power to exclude or to expel a foreign corporation. This power is clearly limited by the modern doctrine of the “negative” commerce clause, which constrains states’ authority to discriminate against foreign corporations in favor of local commerce. Still, it has always been acknowledged that states may subject cor-

216 In accordance with this standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney’s fee was upheld. St. Louis, I. Mt. & So. Ry. v. Williams, 251 U.S. 63, 67 (1919). See also Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885) (statute requiring railroads to erect and maintain fences and cattle guards subject to award of double damages for failure to so maintain them upheld); Minneapolis Ry. v. Beckwith, 129 U.S. 26 (1889) (same); Chicago, B. & Q.R.R. v. Cram, 228 U.S. 70 (1913) (required payment of $10 per car per hour to owner of livestock for failure to meet minimum rate of speed for delivery upheld). But see Southwestern Tel. Co. v. Danaher, 238 U.S. 482 (1915) (fine of $3,600 imposed on a telephone company for suspending service of patron in arrears in accordance with established and uncontested regulations struck down as arbitrary and oppressive).


porate entry or continued operation to reasonable, non-discriminatory conditions. Thus, for instance, a state law which requires the filing of articles with a local official as a prerequisite to the validity of conveyances of local realty to such corporations is not violative of due process. Or, statutes which require a foreign insurance company to maintain reserves computed by a specific percentage of premiums (including membership fees) received in all States, or to consent to direct actions filed against it by persons injured in the host State are valid.

Laws Prohibiting Trusts, Restraint of Trade or Fraud.— Even during the period when the Court was invalidating statutes under liberty of contract principles, it recognized the right of states to prohibit combinations in restraint of trade. Thus, states could prohibit agreements to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain. Further, the Court held that the Fourteenth Amendment does not preclude a State from adopting a policy prohibiting competing corporations from combinations, even when such combinations were induced by good intentions and from which benefit and no injury have resulted. The Court also upheld a variety of statutes prohibiting activities taken by individual businesses intended to harm competitors or restrain the trade of others.

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222 Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954). Similarly a statute requiring a foreign hospital corporation to dispose of farm land not necessary to the conduct of their business was invalid even though the hospital, because of changed economic conditions, was unable to recoup its original investment from the sale. New Orleans Debenture Redemption Co. v. Louisiana, 180 U.S. 320 (1901).
223 See, e.g., Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910) (statute prohibiting retail lumber dealers from agreeing not to purchase materials from wholesalers selling directly to consumers in the retailers' localities upheld); Aikens v. Wisconsin, 195 U.S. 194 (1904) (law punishing combinations for "maliciously" injuring a rival in the same business, profession, or trade upheld).
226 Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912) (prohibition on intentionally destroying competition of a rival business by making sales at a lower rate, after considering distance, in one section of the State than in another upheld). But cf. Fairmont Co. v. Minnesota, 274 U.S. 1 (1927) (invalidating on liberty of contract grounds similar statute punishing dealers in cream who pay higher prices in one locality than in another, the Court finding no reasonable relation between the statute's sanctions and the anticipated evil).
227 Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936) (prohibition of contracts requiring that commodities identified by trademark will not be sold by the vendee or subsequent vendees except at prices stipulated by the original vendor upheld); Pep Boys v. Pyroil, 299 U.S. 198 (1936) (same); Safeway Stores v. Okla-
Laws and ordinances tending to prevent frauds by requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power. Thus, a prohibition on the issuance or sale by other than an authorized weigher of any weight certificate for grain weighed at any warehouse or elevator where state weighers are stationed is not unconstitutional. Similarly, the power of a State to prescribe standard containers to protect buyers from deception as well as to facilitate trading and to preserve the condition of the merchandise is not open to question.

A variety of other business regulations which tend to prevent fraud have withstood constitutional scrutiny. Thus, a State may require that the nature of a product be fairly set forth, despite the right of a manufacturer to maintain secrecy as to his compounds. Or, a statute providing that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it, and may rescind the contract if the machinery does not prove reasonably adequate, does not violate the due process clause. Further, in the exercise of its power to prevent fraud and imposition, a State may regulate

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homa Grocers, 360 U.S. 334 (1959) (application of an unfair sales act to enjoin a retail grocery company from selling below statutory cost upheld, even though competitors were selling at unlawful prices, as there is no constitutional right to employ retaliation against action outlawed by a State and appellant could enjoin illegal activity of its competitors)

228 Schmidinger v. City of Chicago, 226 U.S. 578, 588 (1913) (citing McLean v. Arkansas, 211 U.S. 539, 550 (1909)). See Hauge v. City of Chicago, 299 U.S. 387 (1937) (municipal ordinance requiring that commodities sold by weight be weighed by a public weighmaster within the city valid even as applied to one delivering coal from state-tested scales at a mine outside the city); Lemieux v. Young, 211 U.S. 489 (1909) (statute requiring merchants to record sales in bulk not made valid in the regular course of business valid); Kidd, Dater Co. v. Musselman Grocer Co., 217 U.S. 461 (1910) (same).


230 Pacific States Co. v. White, 296 U.S. 176 (1935) (administrative order prescribing the dimensions, form, and capacity of containers for strawberries and raspberries is not arbitrary as the form and dimensions bore a reasonable relation to the protection of the buyers and the preservation in transit of the fruit); Schmidinger v. City of Chicago, 226 U.S. 578 (1913) (ordinance fixing standard sizes is not unconstitutional); Armor & Co. v. North Dakota, 240 U.S. 510 (1916) (law that lard not sold in bulk should be put up in containers holding one, three, or five pounds weight, or some whole multiple of these numbers valid); Petersen Baking Co. v. Bryan, 290 U.S. 570 (1934) (regulations which imposed a rate of tolerance for the minimum weight for a loaf of bread upheld); But cf. Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (tolerance of only two ounces in excess of the minimum weight per loaf is unreasonable, given finding that it was impossible to manufacture good bread without frequently exceeding the prescribed tolerance).


trading in securities within its borders, require a license of those engaging in such dealing, make issuance of a license dependent on the good repute of the applicants, and permit, subject to judicial review of his findings, revocation of the license. 233

The power to regulate also includes the power to forbid certain business practices. Thus, a State may forbid the giving of options to sell or buy any commodity at a future time 234 It may also forbid sales on margin for future delivery, 235 and may prohibit the keeping of places where stocks, grain, and the like, are sold but not paid for at the time, unless a record of the same be made and a stamp tax paid. 236 A prohibitive license fee upon the use of trading stamps is not unconstitutional, 237 nor is imposing criminal penalties for any deductions by purchasers from the actual weight of grain, hay, seed, or coal purchased, even when such deduction is made under a claim of custom or under a rule of a board of trade. 238

Banking, Wage Assignments and Garnishment.—Regulation of banks and banking has always been considered well within the police power of states, and the Fourteenth Amendment did not eliminate this regulatory authority. 239 A variety of regulations have been upheld over the years. For example, state banks are not deprived of property without due process by a statute subjecting them to assessments for a depositors’ guaranty fund. 240 Also, a law requiring savings banks to turn over deposits inactive for thirty years to the State (when the depositor cannot be found), with provision for payment to the depositor or his heirs on establishment of the right, does not effect an invalid taking of the property of said banks; nor does a statute requiring banks to turn over to the pro-

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238 House v. Mayes, 219 U.S. 270 (1911).

239 Doty v. Love, 285 U.S. 64 (1935) (rights of creditors in an insolvent bank not violated by a later statute permitting re-opening under a reorganization plan approved by the court, the liquidating officer, and by three-fourths of the creditors) Farmers Bank v. Federal Reserve Bank, 262 U.S. 649 (1923) (Federal Reserve bank not unlawfully deprived of business rights of liberty of contract by a law which allows state banks to pay checks in exchange when presented by or through a Federal Reserve bank, post office, or express company and when not made payable otherwise by a maker).

tective custody of the State deposits that, depending on the nature of the deposit, have been inactive ten or twenty-five years. 241

A State is acting clearly within its police power in fixing maximum rates of interest on money loaned within its border, and such regulation is within legislative discretion if not unreasonable or arbitrary. 242 Equally valid is a requirement that assignments of future wages as security for debts of less than $200, to be valid, must be accepted in writing by the employer, consented to by the assignors, and filed in public office. Such a requirement deprives neither the borrower nor the lender of his property without due process of law. 243

**Insurance.**—Those engaged in the insurance business as well as the business itself have been peculiarly subject to supervision and control. 245 Even during the *Lochner* era the Court recognized that government may fix insurance rates and regulate the compensation of insurance agents, 246 and over the years the Court has upheld a wide variety of regulation. For instance, a state may impose a fine on "any person who shall act in any manner in the negotiation or transaction of unlawful insurance . . . with a foreign insurance company not admitted to do business [within said State]." 247 Or, a state may forbid life insurance companies and their agents to engage in the undertaking business and undertakers to serve as life insurance agents. 248 Further, foreign casualty and surety insurers were not deprived of due process by a Virginia law which prohibited the making of contracts of casualty or surety insurance except through registered agents, which required that such contracts applicable to persons or property in the State be countersigned by a registered local agent, and which prohibited such agents from sharing more than 50% of a commission

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241 Provident Savings Inst. v. Malone, 221 U.S. 660 (1911); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944). When a bank conservator appointed pursuant to a new statute has all the functions of a receiver under the old law, one of which is the enforcement on behalf of depositors of stockholders' liability, which liability the conservator can enforce as cheaply as could a receiver appointed under the pre-existing statute, it cannot be said that the new statute, in suspending the right of a depositor to have a receiver appointed, arbitrarily deprives a depositor of his remedy or destroys his property without the due process of law.


243 Mutual Loan Co. v. Martell, 222 U.S. 225 (1911).


with a nonresident broker.\textsuperscript{249} And just as all banks may be required to contribute to a depositors’ guaranty fund, so may automobile liability insurers be required to submit to the equitable apportionment among them of applicants who are in good faith entitled to, but are financially unable to, procure such insurance through ordinary methods.\textsuperscript{250}

However, the Court has discerned some limitations to such regulations. A statute which prohibited the insured from contracting directly with a marine insurance company outside the State for coverage of property within the State was held invalid as a deprivation of liberty without due process of law.\textsuperscript{251} For the same reason, the Court held, a State may not prevent a citizen from concluding a policy loan agreement with a foreign life insurance company at its home office whereby the policy on his life is pledged as collateral security for a cash loan to become due upon default in payment of premiums, in which case the entire policy reserve might be applied to discharge the indebtedness. Authority to subject such an agreement to the conflicting provisions of domestic law is not deducible from the power of a State to license a foreign insurance company as a condition of its doing business therein.\textsuperscript{252}

A stipulation that policies of hail insurance shall take effect and become binding twenty-four hours after the hour in which an application is taken and further requiring notice by telegram of rejection of an application was upheld.\textsuperscript{253} No unconstitutional restraint was imposed upon the liberty of contract of surety companies by a statute providing that, after enactment, any bond executed for the faithful performance of a building contract shall inure to the benefit of material men and laborers, notwithstanding any provision of the bond to the contrary.\textsuperscript{254} Likewise constitutional was a law requiring that a motor vehicle liability policy shall provide that bankruptcy of the insured does not release the insurer from liability to an injured person.\textsuperscript{255} There also is no denial of due process for a state to require that casualty companies, in case of total loss, pay the total amount for which the property was insured, less depreciation between the time of issuing the policy and the

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\item \textsuperscript{249} Osborn v. Ozlin, 310 U.S. 53, 68–69 (1940). Dissenting from the conclusion, Justice Roberts declared that the plain effect of the Virginia law is to compel a nonresident to pay a Virginia resident for services which the latter does not in fact render.
\item \textsuperscript{250} California Auto. Ass’n v. Maloney, 341 U.S. 105 (1951).
\item \textsuperscript{251} Allgeyer v. Louisiana, 165 U.S. 578 (1897).
\item \textsuperscript{252} New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).
\item \textsuperscript{253} National Ins. Co. v. Wanberg, 260 U.S. 71 (1922).
\item \textsuperscript{254} Hartford Accident Co. v. Nelson Co., 291 U.S. 352 (1934).
\item \textsuperscript{255} Merchants Liability Co. v. Smart, 267 U.S. 126 (1925).
\end{itemize}
time of the loss, rather than the actual cash value of the property at the time of loss. 256

Moreover, even though it had its attorney-in-fact located in Illinois, signed all its contracts there, and forwarded therefrom all checks in payment of losses, a reciprocal insurance association covering real property located in New York could be compelled to comply with New York regulations which required maintenance of an office in that State and the countersigning of policies by an agent resident therein. 257 Also, to discourage monopolies and to encourage rate competition, a State constitutionally may impose on all fire insurance companies connected with a tariff association fixing rates a liability or penalty to be collected by the insured of 25% in excess of actual loss or damage, stipulations in the insurance contract to the contrary notwithstanding. 258

A state statute by which a life insurance company, if it fails to pay upon demand the amount due under a policy after death of the insured, is made liable in addition for fixed damages, reasonable in amount, and for a reasonable attorney’s fee is not unconstitutional even though payment is resisted in good faith and upon reasonable grounds. 259 It is also proper by law to cut off a defense by a life insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured. 260 A provision that suicide, unless contemplated when the application for a policy was made, shall be no defense is equally valid. 261 When a cooperative life insurance association is reorganized so as to permit it to do a life insurance business of every kind, policyholders are not deprived of their property without due process of law. 262 Similarly, when the method of liquidation provided by a plan of rehabilitation of a mutual life insurance company is as favorable to dissenting policyholders as would have been the sale of assets and pro rata distribution to all creditors, the dissenters are unable to show any taking without due process. Dissenting policyholders have no constitutional right to a particular form of remedy. 263

Miscellaneous Businesses and Professions.—The practice of medicine, using this word in its most general sense, has long

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256 Orient Ins. Co. v. Daggs, 172 U.S. 577 (1899) (the statute was in effect when the contract at issue was signed).
257 Hooperston Co. v. Cullen, 318 U.S. 313 (1943).
been the subject of regulation. 264 A State may exclude osteopathic physicians from hospitals maintained by it or its municipalities, 265 or may regulate the practice of dentistry by prescribing qualifications that are reasonably necessary, requiring licenses, establishing a supervisory administrative board, and prohibiting certain advertising regardless of its truthfulness. 266 The Court has sustained a law establishing as a qualification for obtaining or retaining a pharmacy operating permit that one either be a registered pharmacist in good standing or that the corporation or association have a majority of its stock owned by registered pharmacists in good standing who were actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy. 267

While statutes requiring pilots to be licensed 268 and setting reasonable competency standards (e.g., that railroad engineers pass color blindness tests) have been sustained, 269 an act making it a misdemeanor for a person to act as a railway passenger conductor without having had two years’ experience as a freight conductor or brakeman was invalidated as not rationally distinguishing between those competent and those not competent to serve as conductor. 270 An act imposing license fees for operating employment agencies and prohibiting them from sending applicants to an employer who has not applied for labor does not deny due process of law. 271 Also,
a state law prohibiting operation of a “debt pooling” or a “debt adjustment” business except as an incident to the legitimate practice of law is a valid exercise of legislative discretion.  

The Court has also upheld a variety of other licensing or regulatory legislation applicable to places of amusement, grain elevators, detective agencies, the sale of cigarettes or cosmetics, and the resale of theatre tickets. Restrictions on advertising have also been upheld, including absolute bans on the advertising of cigarettes or the use of a representation of the United States flag on an advertising medium. Similarly constitutional were prohibitions on the solicitation by a layman of the business of collecting and adjusting claims, the keeping of private markets within six squares of a public market, the keeping of billiard halls except in hotels, or the purchase by junk dealers of wire, copper, and other items, without ascertaining the seller’s right to sell.

Protection of State Resources


273 Western Turf Ass’n v. Greenberg, 204 U.S. 359 (1907).
276 Gundling v. Chicago, 177 U.S. 183, 185 (1900).
283 Murphy v. California, 225 U.S. 623 (1912).
284 Rosenthal v. New York, 226 U.S. 260 (1912). The Court also upheld a state law forbidding (1) solicitation of the sale of frames, mountings, or other optical appliances, (2) solicitation of the sale of eyeglasses, lenses, or prisms by use of advertising media, (3) retailers from leasing, or otherwise permitting anyone purporting to do eye examinations or visual care to occupy space in a retail store, and (4) anyone, such as an optician, to fit lenses, or replace lenses or other optical appliances, except upon written prescription of an optometrist or ophthalmologist licensed in the State is not invalid. A State may treat all who deal with the human eye as members of a profession that should refrain from merchandising methods to obtain customers, and that should choose locations that reduce the temptations of commercialism; a state may also conclude that eye examinations are so critical that every change in frame and duplication of a lens should be accompanied by a prescription. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).
285 Cities Service Co. v. Peerless Co., 340 U.S. 179 (1950) (sustaining orders of the Oklahoma Corporation Commission fixing a minimum price for gas and requiring one producer to buy gas from another producer in the same field at a dictated
for instance, where there is a limited market for natural gas acquired attendant to oil production or where the pumping of oil and gas from one location may limit the ability of others to recover oil from a large reserve, a state may require that production of oil be limited or prorated among producers. Generally, whether a system of proration is fair is a question for administrative and not judicial judgment. On the other hand, where the evidence showed that an order prorating allowed production among several wells was actually intended to compel pipeline owners to furnish a market to those who had no pipeline connections, the order was held void as a taking of private property for private benefit.

A state may act to conserve resources even if it works to the economic detriment of the producer. Thus, a State may forbid certain uses of natural gas, such as the production of carbon black, where the gas is burned without fully utilizing the heat therein for other manufacturing or domestic purposes. Such regulations were sustained even where the carbon black was more valuable than the gas from which it was extracted, and notwithstanding the fact that the producer had made significant investment in a plant for the manufacture of carbon black. Likewise, for the purpose of regulating and adjusting coexisting rights of surface owners to underlying oil and gas, it is within the power of a State to prohibit the operators of wells from allowing natural gas, not conveniently necessary for other purposes, to come to the surface unless its lifting power was utilized to produce the greatest proportional quantity of oil.

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286 This can be done regardless of whether the benefit is to the owners of oil and gas in a common reservoir or because of the public interests involved. Thompson v. Consolidated Gas Co., 300 U.S. 55, 76–77 (1937) (citing Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190 (1900); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911). Thus, the Court upheld against due process challenge a statute which defined waste as including, in addition to its ordinary meaning, economic waste, surface waste, and production in excess of transportation or marketing facilities or reasonable market demands, and which limited each producer’s share to a prorated portion of the total production that can be taken from the common source without waste. Champlin Ref. Co. v. Corporation Comm’n, 286 U.S. 210 (1932).

287 Railroad Comm’n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (evaluating whether proration based on hourly potential is as fair as one based upon estimated recoverable reserves or some other combination of factors). See also Railroad Comm’n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941); Railroad Comm’n v. Humble Oil & Ref. Co., 311 U.S. 578 (1941).


290 Bandini Co. v. Superior Court, 284 U.S. 8 (1931).
Protection of Property and Agricultural Crops.—Special precautions may be required to avoid or compensate for harm caused by extraction of natural resources. Thus, a state may require the filing of a bond to secure payment for damages to any persons or property resulting from an oil and gas drilling or production operation. On the other hand, in Pennsylvania Coal Co. v. Mahon, a Pennsylvania statute which forbade the mining of coal under private dwellings or streets of cities by a grantor that had reserved the right to mine was viewed as too restrictive on the use of private property and hence a denial of due process and a “taking” without compensation. Years later, however, a quite similar Pennsylvania statute was upheld, the Court finding that the new law no longer involved merely a balancing of private economic interests, but instead promoted such “important public interests” as conservation, protection of water supplies, and preservation of land values for taxation.

A statute requiring the destruction of cedar trees within two miles of apple orchards in order to prevent damage to the orchards caused by cedar rust was upheld as not unreasonable even in the absence of compensation. Apple growing being one of the principal agricultural pursuits in Virginia and the value of cedar trees throughout the State being small as compared with that of apple orchards, the State was constitutionally competent to require the destruction of one class of property in order to save another which, in the judgment of its legislature, was of greater value to the public. Similarly, Florida was held to possess constitutional authority to protect the reputation of one of its major industries by penalizing the delivery for shipment in interstate commerce of citrus fruits so immature as to be unfit for consumption.

Gant v. Oklahoma City, 289 U.S. 98 (1933) (statute requiring bond of $200,000 per well-head, such bond to be executed, not by personal sureties, but by authorized bonding company).

292 260 U.S. 393 (1922).

293 The “taking” jurisprudence that has stemmed from the Pennsylvania Coal Co. v. Mahon is discussed, supra, at “Regulatory Takings,” under the Fifth Amendment.


Also distinguished from Pennsylvania Coal was a challenge to an ordinance prohibiting sand and gravel excavation near the water table and imposing a duty to refill any existing excavation below that level. The ordinance was upheld; the fact that it prohibited a business that had been conducted for over 30 years did not give rise to a taking in the absence of proof that the land could not be used for other legitimate purposes. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).


Water, Fish and Game.—A statute making it unlawful for a riparian owner to divert water into another State was held not to deprive the property owner of due process. "The constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . What it has it may keep and give no one a reason for its will." This holding has since been disapproved, but on interstate commerce rather than due process grounds. States may, however, enact and enforce a variety of conservation measures for the protection of watersheds.

Similarly, a State has sufficient control over fish and wild game found within its boundaries so that it may regulate or prohibit fishing and hunting. For the effective enforcement of such restrictions, a state may also forbid the possession within its borders of special instruments of violations, such as nets, traps, and seines, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor. The Court has also upheld a state law restricting a commercial reduction plant from accepting more fish than it could process without spoilage in order to conserve fish found within its waters, even allowing the application of such restriction to fish imported into the State from adjacent international waters.

The Court's early decisions rested on the legal fiction that the states owned the fish and wild game within their borders, and thus could reserve these possessions for use by their own citizens. The Court soon backed away from the ownership fiction, and in Hughes v. Oklahoma it formally overruled prior case law, indi-
cating that state conservation measures discriminating against out-of-state persons were to be measured under the commerce clause. Although a state’s “concerns for conservation and protection of wild animals” were still a “legitimate” basis for regulation, these concerns could not justify disproportionate burdens on interstate commerce. 306

More recently still, in the context of recreational rather than commercial activity, the Court reached a result more deferential to state authority, holding that access to recreational big game hunting is not within the category of rights protected by the Privileges or Immunities Clause, and that consequently a state could charge out-of-staters significantly more than in-staters for a hunting license. 307 Suffice it to say that similar cases involving a state’s efforts to reserve its fish and game for its own inhabitants are likely to be challenged under commerce or privileges and immunities principles, rather than under substantive due process.

Ownership of Real Property: Rights and Limitations

Zoning and Similar Actions.—It is now well established that states and municipalities have the police power to zone land for designated uses. Zoning authority gained judicial recognition early in the 20th century. Initially, an analogy was drawn to public nuisance law, so that States and their municipal subdivisions could declare that specific businesses, although not nuisances per se, were nuisances in fact and in law in particular circumstances and in particular localities. 308 Thus, a State could declare the emission of dense smoke in populous areas a nuisance and restrain it, even though this affected the use of property and subjected the owner to the expense of compliance. 309 Similarly, the Court upheld an ordinance that prohibited brick making in a designated area, even though the specified land contained valuable clay deposits which could not profitably be removed for processing elsewhere, was far more valuable for brick making than for any other purpose, had been acquired before it was annexed to the municipality, and had long been used as a brickyard. 310

308 Reinman v. City of Little Rock, 237 U.S. 171 (1915) (location of a livery stable within a thickly populated city “is well within the range of the power of the state to legislate for the health and general welfare”). See also Fischer v. St. Louis, 194 U.S. 361 (1904) (upholding restriction on location of dairy cow stables); Bacon v. Walker, 204 U.S. 311 (1907) (upholding restriction on grazing of sheep near habitations).
With increasing urbanization came a broadening of the philosophy of land-use regulation to protect not only health and safety but also the amenities of modern living.\(^{311}\) Consequently, the Court has recognized the power of government, within the loose confines of the due process clause, to zone in many ways and for many purposes. Governments may regulate the height of buildings,\(^ {312}\) establish building setback requirements,\(^ {313}\) preserve open spaces (through density controls and restrictions on the numbers of houses),\(^ {314}\) and preserve historic structures.\(^ {315}\) The Court will generally uphold a challenged land-use plan unless it determines that either the overall plan is arbitrary and unreasonable with no substantial relation to the public health, safety, or general welfare,\(^ {316}\) or that the plan as applied amounts to a taking of property without just compensation.\(^ {317}\)

Applying these principles, the Court has held that the exclusion of apartment houses, retail stores, and billboards from a “residential district” in a village is a permissible exercise of municipal power.\(^ {318}\) Similarly, a housing ordinance in a community of single-family dwellings, in which any number of related persons (blood, adoption, or marriage) could occupy a house but only two unrelated persons could do so, was sustained in the absence of any showing that it was aimed at the deprivation of a “fundamental interest.”\(^ {319}\) Such a fundamental interest, however, was found to be implicated in Moore v. City of East Cleveland\(^ {320}\) by a “single family” zoning ordinance which defined a “family” to exclude a grandmother who had been living with her two grandsons of different children. Similarly, black persons cannot be forbidden to occupy houses in blocks where the greater number of houses are occupied by white persons, or vice versa.\(^ {321}\)

\(^{313}\) Gorieb v. Fox, 274 U.S. 603 (1927).
\(^{317}\) See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and discussion of “Regulatory Taking” under the Fifth Amendment, supra
\(^{320}\) 431 U.S. 494 (1977). A plurality of the Court struck down the ordinance as a violation of substantive due process, an infringement of family living arrangements which are a protected liberty interest, id. at 500–506, while Justice Stevens concurred on the ground that the ordinance was arbitrary and unreasonable. Id. at 513. Four Justices dissented. Id. at 521, 531, 541.
\(^{321}\) Buchanan v. Warley, 245 U.S. 60 (1917).
In one aspect of zoning—the degree to which such decisions may be delegated to private persons—the Court has not been consistent. Thus, for instance, it invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two thirds of the property abutting any street. \footnote{Eubank v. City of Richmond, 226 U.S. 137 (1912).} Or, in another case, it struck down an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility. \footnote{Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).} In a decision falling chronologically between these two, however, the Court sustained an ordinance which permitted property owners to waive a municipal restriction prohibiting the construction of billboards. \footnote{Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).}

In its most recent decision, the Court upheld a city charter provision permitting a petition process by which a citywide referendum could be held on zoning changes and variances. The provision required a 55% approval vote in the referendum to sustain the commission’s decision, and the Court distinguished between delegating such authority to a small group of affected landowners and the people’s retention of the ultimate legislative power in themselves which for convenience they had delegated to a legislative body. \footnote{City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976).}

\textbf{Estates, Succession, Abandoned Property.}—The Due Process Clause does not prohibit a State from varying the rights of those receiving benefits under intestate laws. Thus, the Court held that the rights of an estate were not impaired where a New York Decedent Estate Law granted a surviving spouse the right to take as in intestacy, despite the fact that the spouse had waived any right to her husband’s estate before the enactment of the law. Because rights of succession to property are of statutory creation, the Court explained, New York could have conditioned any further exercise of testamentary power upon the giving of right of election to
the surviving spouse regardless of any waiver, however formally executed.\textsuperscript{326}

Even after the creation of a testamentary trust, a State retains the power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration. For instance, the Great Depression resulted in the default of numerous mortgages which were held by trusts, which had the affect of putting an unexpected accumulation of real property into those trusts. Under these circumstance, the Court upheld the retroactive application of a statute reallocating distribution within these trusts, even where the administration of the estate had already begun, and the new statute had the effect of taking away a remainderman’s right to judicial review of the trustee’s computation of income.\textsuperscript{327}

The states have significant discretion to regulate abandoned property. For instance, states have several jurisdictional bases to allow for the lawful application of escheat and abandoned property laws to out-of-state corporations. Thus, application of New York’s Abandoned Property Law to New York residents’ life insurance policies, even when issued by foreign corporations, did not deprive such companies of property without due process, where the insured persons had continued to be New York residents and the beneficiaries were resident at the maturity date of the policies. The relationship between New York and its residents who abandon claims against foreign insurance companies, and between New York and foreign insurance companies doing business therein, is sufficiently close to give New York jurisdiction.\textsuperscript{328} Or, in \textit{Standard Oil Co. v. New Jersey},\textsuperscript{329} a divided Court held that due process is not violated by a state statute escheating shares of stock in a domestic corporation, including unpaid dividends, even though the last known owners were nonresidents and the stock was issued and the dividends held in another State. The State’s power over the debtor corporation gives it power to seize the debts or demands represented by the stock and dividends.

\textsuperscript{326}Irving Trust Co. v. Day, 314 U.S. 556, 564 (1942).
\textsuperscript{327}Demorest v. City Bank Co., 321 U.S. 36, 47–48 (1944). Under the peculiar facts of the case, however, the remainderman’s right had been created by judicial rules promulgated after the death of the decedent, so the case is not precedent for a broad rule of retroactivity.
\textsuperscript{328}Connecticut Mut. Life Ins. Co. v. Moore, 333 U.S. 541 (1948). Justices Jackson and Douglas dissented on the ground that New York was attempting to escheat unclaimed funds not actually or constructively located in New York, and which were the property of beneficiaries who may never have been citizens or residents of New York.
\textsuperscript{329}341 U.S. 428 (1951).
A state's wide discretion to define abandoned property and dispose of abandoned property can be seen in *Texaco v. Short*. There, an Indiana statute was upheld which terminated interests in coal, oil, gas, or other minerals which had not been used in twenty years and which provided for reversion to the owner of the interest out of which the mining interests had been carved. The “use” of a mineral interest which could prevent its extinction included the actual or attempted extraction of minerals, the payment of rents or royalties, and any payment of taxes. Indeed, merely filing a claim with the local recorder would preserve the interest. The statute provided no notice to owners of interests, however, save for its own publication, nor did it require surface owners to notify owners of mineral interests that the interests were about to expire. By a narrow margin, the Court sustained the statute, holding that the State's interest in encouraging production, securing timely notices of property ownership, and settling property titles provided a basis for enactment, and finding that due process did not require any actual notice to holders of unused mineral interests. The State “may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of interests” and it may similarly “impose on him the lesser burden of keeping informed of the use or nonuse of his own property.”

**Health, Safety, and Morals**

*Health.*—Even under the narrowest concept of the police power as limited by substantive due process, it was generally conceded that states could exercise the power to protect the public health, safety, and morals. For instance, an ordinance for incineration of garbage and refuse at a designated place as a means of protecting public health is not a taking of private property without just compensation, even though such garbage and refuse may have

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331 With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder’s office.

332 The act provided a grace period and specified several actions which were sufficient to avoid extinguishment. With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder’s office.

333 Generally, property owners are charged with maintaining knowledge of the legal conditions of property ownership.

334 454 U.S. at 538. The four dissenters thought that some specific notice was required for persons holding before enactment. Id. at 540.

335 See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), and discussion supra under “The Development of Substantive Due Process.”
some elements of value for certain purposes.\textsuperscript{336} Or, compelling
property owners to connect with a publicly maintained system of
sewers and enforcing that duty by criminal penalties does not vi-
olate the due process clause.\textsuperscript{337}

There are few constitutional restrictions on the extensive state
regulations on the production and distribution of food and drugs.\textsuperscript{338}
Statutes forbidding or regulating the manufacture of oleomargarine
have been upheld,\textsuperscript{339} as have statutes ordering the destruction of
unsafe food\textsuperscript{340} or confiscation of impure milk,\textsuperscript{341} notwithstanding
that, in the latter cases, such articles had a value for purposes
other than food. There also can be no question of the authority of
the State, in the interest of public health and welfare, to forbid the
sale of drugs by itinerant vendors\textsuperscript{342} or the sale of spectacles by an
establishment where a physician or optometrist is not in charge.\textsuperscript{343}
Nor is it any longer possible to doubt the validity of state regula-
tions pertaining to the administration, sale, prescription, and use
of dangerous and habit-forming drugs.\textsuperscript{344}

Equally valid as police power regulations are laws forbidding
the sale of ice cream not containing a reasonable proportion of butter fat,\textsuperscript{345}
of condensed milk made from skimmed milk rather than whole milk,\textsuperscript{346}
or of food preservatives containing boric acid.\textsuperscript{347}
Similarly, a statute intended to prevent fraud and deception by
prohibiting the sale of “filled milk” (milk to which has been added
any fat or oil other than a milk fat) is valid, at least where such
milk has the taste, consistency, and appearance of whole milk prod-
ucts. The Court reasoned that filled milk is inferior to whole milk
in its nutritional content and cannot be served to children as a sub-
stitute for whole milk without producing a dietary deficiency.\textsuperscript{348}

\begin{itemize}
\item \textsuperscript{336}California Reduction Co. v. Sanitary Works, 199 U.S. 306 (1905).
\item \textsuperscript{337}Hutchinson v. City of Valdosta, 227 U.S. 303 (1913).
\item \textsuperscript{338}“The power of the State to . . . prevent the production within its borders of
impure foods, unfit for use, and such articles as would spread disease and pesti-
\item \textsuperscript{339}Powell v. Pennsylvania, 127 U.S. 678 (1888); Magnano v. Hamilton, 292 U.S.
\item \textsuperscript{340}North American Storage Co. v. City of Chicago, 211 U.S. 306 (1908).
\item \textsuperscript{341}Adams v. City of Milwaukee, 228 U.S. 572 (1913).
\item \textsuperscript{342}Baccus v. Louisiana, 232 U.S. 354 (1914).
\item \textsuperscript{343}Roschen v. Ward, 279 U.S. 337 (1929).
\item \textsuperscript{344}Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41, 45 (1921).
\item \textsuperscript{345}Hutchinson Ice Cream Co. v. Iowa, 242 U.S. 153 (1916).
\item \textsuperscript{346}Hebe Co. v. Shaw, 248 U.S. 297 (1919).
\item \textsuperscript{347}Price v. Illinois, 238 U.S. 446 (1915).
\item \textsuperscript{348}Sage Stores Co. v. Kansas, 323 U.S. 32 (1944). Where health or fraud are
not an issue, however, police power may be more limited. Thus, a statute forbidding
the sale of bedding made with shoddy materials, even if sterilized and therefore
harmless to health, was held to be arbitrary and therefore invalid Weaver v. Palmer
\end{itemize}
Even before the passage of the 21st Amendment, which granted states the specific authority to regulate alcoholic beverages, the Supreme Court had found that the states have significant authority in this regard. A State may declare places where liquor is manufactured or kept to be common nuisances, and may even subject an innocent owner to the forfeiture of his property if he allows it to be used for the illegal production or transportation of alcohol.

**Safety.**—Regulations designed to promote public safety are also well within a state’s authority to implement. For instance, various measures designed to reduce fire hazards have been upheld. These include municipal ordinances that prohibit the storage of gasoline within 300 feet of any dwelling, require that all gas storage tanks with a capacity of more than ten gallons be buried at least three feet under ground, or prohibit washing and ironing in public laundries and wash houses within defined territorial limits from 10 p.m. to 6 a.m. A city’s demolition and removal of wooden buildings erected in violation of regulations was also consistent with the Fourteenth Amendment. Construction of property in full compliance with existing laws, however, does not confer upon the owner an immunity against exercise of the police power. Thus, a 1944 amendment to a Multiple Dwelling Law, requiring installation of automatic sprinklers in lodging houses of non-fireproof construction, can be applied to a lodging house constructed in 1940, even though compliance entails an expenditure of $7,500 on a property worth only $25,000.

States exercise extensive regulation over transportation safety. Although state highways are used primarily for private purposes, they are public property, and the use of a highway for financial gain may be prohibited by the legislature or conditioned as it sees fit. Consequently, a State may reasonably provide that intra-
state carriers who have furnished adequate, responsible, and continuous service over a given route from a specified date in the past shall be entitled to licenses as a matter of right, but that issuance to those whose service began later shall depend upon public convenience and necessity. A state may require private contract carriers for hire to obtain a certificate of convenience and necessity, and decline to grant one if the service of common carriers is impaired thereby. A state may also fix minimum rates applicable to such private carriers, which are not less than those prescribed for common carriers, as a valid as a means of conserving highways. In the absence of legislation by Congress, a State may, in protection of the public safety, deny an interstate motor carrier the use of an already congested highway.

In exercising its authority over its highways, a State is not limited to the raising of revenue for maintenance and reconstruction or to regulating the manner in which vehicles shall be operated, but may also prevent the wear and hazards due to excessive size of vehicles and weight of load. No less constitutional is a municipal traffic regulation which forbids the operation in the streets of any advertising vehicle, excepting vehicles displaying business notices or advertisements of the products of the owner and not used mainly for advertising; and such regulation may be validly enforced to prevent an express company from selling advertising space on the outside of its trucks. A State may also provide that a driver who fails to pay a judgment for negligent operation shall have his license and registration suspended for three years, unless, in the meantime, the judgment is satisfied or dis-

361 Accordingly, a statute limiting to 7,000 pounds the net load permissible for trucks is not unreasonable. Sproles v. Binford, 286 U.S. 374 (1932).
362 Inasmuch as it is the judgment of local authorities that such advertising affects public safety by distracting drivers and pedestrians, courts are unable to hold otherwise in the absence of evidence refuting that conclusion. Railway Express Agency v. New York, 336 U.S. 106 (1949).
Compulsory automobile insurance is so plainly valid as to present no federal constitutional question. But see and see Packard v. Banton, 264 U.S. 140 (1924); Sprout v. South Bend, 277 U.S. 163 (1928); Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

Morality. Legislatures have wide discretion in regulating “immoral” activities. Thus, legislation suppressing prostitution or gambling will be upheld by the Court as within the police power of a State. Accordingly, a state statute may provide that judgment against a party to recover illegal gambling winnings may be enforced by a lien on the property of the owner of the building where the gambling transaction was conducted when the owner knowingly consented to the gambling. Similarly, a court may order a car used in an act of prostitution forfeited as a public nuisance, even if this works a deprivation on an innocent joint owner of the car. For the same reason, lotteries, including those operated under a legislative grant, may be forbidden, regardless of any particular equities.

Vested and Remedial Rights

As the Due Process Clause protects against arbitrary deprivation of “property,” privileges or benefits that constitute property are entitled to protection. Because an existing right of action to recover damages for an injury is property, that right of action is protected by the clause. Thus, where repeal of a provision that made directors liable for moneys embezzled by corporate officers was applied retroactively, it deprived certain creditors of their property without due process of law. A person, however, has no

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369 See, e.g., Snowden v. Hughes, 321 U.S. 1 (1944) (right to become a candidate for state office is a privilege only, hence an unlawful denial of such right is not a denial of a right of “property”); Cases under the equal protection clause now mandate a different result. See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 75 (1978) (seeking to conflate due process and equal protection standards in political rights cases).


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constitutionally protected property interest in any particular form of remedy and is guaranteed only the preservation of a substantial right to redress by an effective procedure. 373

Similarly, a statute creating an additional remedy for enforcing liability is not, as applied to stockholders then holding stock, violative of due process. 374 Nor is a law that lifts a statute of limitations and makes possible a suit, theretofore barred, for the value of certain securities. “The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression. . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.” 375

State Control over Local Units of Government

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, and whether they shall be appointed or popularly elected. 376 Nor does a statute requiring cities to indemnify owners of property damaged by mobs or during riots result in an unconstitutional deprivation of the property, even when the city could not have prevented the violence. 377 Likewise, a person obtaining a judgment against a municipality for damages resulting from a riot is not deprived of property without due process of law by an act which so limits the municipality’s taxing power as to prevent collection of funds adequate to pay it. As long as the judgment continues as an existing liability no unconstitutional deprivation is experienced. 378

Local units of government obliged to surrender property to other units newly created out of the territory of the former cannot

373 Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). See Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (limitation of common-law liability of private industry nuclear accidents in order to encourage development of energy a rational action, especially when combined with congressional pledge to take necessary action in event of accident; whether limitation would have been of questionable validity in absence of pledge uncertain but unlikely).


376 Soliah v. Heskin, 222 U.S. 522 (1912); City of Trenton v. New Jersey, 262 U.S. 182 (1923). The equal protection clause has been employed, however, to limit a State’s discretion with regard to certain matters. See “Fundamental Interests: The Political Process,” infra.

377 City of Chicago v. Sturges, 222 U.S. 313 (1911).

successfully invoke the due process clause, nor may taxpayers allege any unconstitutional deprivation as a result of changes in their tax burden attendant upon the consolidation of contiguous municipalities. Nor is a statute requiring counties to reimburse cities of the first class but not cities of other classes for rebates allowed for prompt payment of taxes in conflict with the due process clause.

**Taxing Power**

*Generally.*—It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the States. When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers, and the Court will refrain from condemning a tax solely on the ground that it is excessive. Nor can the constitutionality of taxation be made to depend upon the taxpayer’s enjoyment of any special benefits from use of the funds raised by taxation.

Theoretically, public moneys cannot be expended for other than public purposes. Some early cases applied this principle by invalidating taxes judged to be imposed to raise money for purely private rather than public purposes. However, modern notions of public purpose have expanded to the point where the limitation has little practical import. Whether a use is public or private, while it is

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381 Stewart v. Kansas City, 239 U.S. 14 (1915).
382 Tonawanda v. Lyon, 181 U.S. 389 (1901); Cass Farm Co. v. Detroit, 181 U.S. 396 (1901). Rather, the purpose of the amendment was to extend to the residents of the States the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment. Southwestern Oil Co. v. Texas, 217 U.S. 114, 119 (1910).
386 Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655 (1875) (voiding tax employed by city to make a substantial grant to a bridge manufacturing company to induce it to locate its factory in the city). See also City of Parkersburg v. Brown, 106 U.S. 487 (1882) (private purpose bonds not authorized by state constitution).
387 Taxes levied for each of the following purposes have been held to be for a public use: a city coal and fuel yard, Jones v. City of Portland, 245 U.S. 217 (1917), a state bank, a warehouse, an elevator, a flourmill system, homebuilding projects,
ultimately a judicial question, “is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.”  

The authority of states to tax income is “universally recognized.” Years ago the Court explained that “[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits.” Also, a tax on income is not constitutionally suspect because retroactive. The routine practice of making taxes retroactive for the entire year of the legislative session in which the tax is enacted has long been upheld, and there are also situations in which courts have upheld retroactive application to the preceding year or two.

A state also has broad tax authority over wills and inheritance. A State may apply an inheritance tax to the transmission of property by will or descent, or to the legal privilege of taking property by devise or descent, although such tax must be consistent with


In applying the Fifth Amendment Due Process Clause the Court has said that discretion as to what is a public purpose “belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.” Helvering v. Davis, 301 U.S. 619, 640 (1937); United States v. Butler, 297 U.S. 1, 67 (1936). That payment may be made to private individuals is now irrelevant. Carmichael, 301 U.S. at 518. Cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (sustaining tax imposed on mine companies to compensate workers for black lung disabilities, including those contracting disease before enactment of tax, as way of spreading cost of employee liabilities).


300 U.S. at 313. See also Shafer v. Carter, 252 U.S. 37, 49–52 (1920); and Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) (states may tax the income of nonresidents derived from property or activity within the state).


Welch v. Henry, 305 U.S. 134 (1938) (upholding imposition in 1935 of tax liability for 1933 tax year; due to the scheduling of legislative sessions, this was the legislature’s first opportunity to adjust revenues after obtaining information of the nature and amount of the income generated by the original tax). Since “[l]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract,” the Court explained, “its retroactive imposition does not necessarily infringe due process.” Id. at 146–47.

other due process considerations. Thus, an inheritance tax law, enacted after the death of a testator but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the State in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator’s death. Equally consistent with due process is a tax on an *inter vivos* transfer of property by deed intended to take effect upon the death of the grantor.

The taxation of entities that are franchises within the jurisdiction of the governing body raises few concerns. Thus, a city ordinance imposing annual license taxes on light and power companies does not violate the due process clause merely because the city has entered the power business in competition with such companies.

Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.

States have significant discretion in how they value real property for tax purposes. Thus, assessment of properties for tax purposes over real market value is allowed as merely another way of achieving an increase in the rate of property tax, and does not violate due process. Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.

A State also has wide discretion in how to apportion real property tax burdens. Thus, a State may defray the entire expense of creating, developing, and improving a political subdivision either

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394 When remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of the tax on the transfer of such remainder is unconstitutional. Coolidge v. Long, 282 U.S. 582 (1931). The Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that “the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event . . . . Taxation . . . of a gift which . . . [the donor] might well have refrained from making had he anticipated the tax . . . . [is] thought to be so arbitrary . . . as to be a denial of due process.” Welch v. Henry, 305 U.S. 134, 147 (1938). But where the remaindermen’s interests are contingent and do not vest until the donor’s death subsequent to the adoption of the statute, the tax is valid. Stebbins v. Riley, 268 U.S. 137 (1925).


400 Paddell v. City of New York, 211 U.S. 446 (1908).
from funds raised by general taxation, by apportioning the burden among the municipalities in which the improvements are made, or by creating (or authorizing the creation of) tax districts to meet sanctioned outlays. Or, where a state statute authorizes municipal authorities to define the district to be benefitted by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, cannot, if not arbitrary or fraudulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefitted by the improvement was not included.

On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon such railroad is violative of due process, whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon. Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving. However, when a high and dry island was included within the boundaries of a drainage district from which it could not be benefitted directly or indirectly, a tax imposed on the island land by the district was held to be a deprivation of property without due process of law. Finally, a State may levy an assessment for special benefits resulting from an improvement already made and may validate an assessment previously held void for want of authority.

401 Hagar v. Reclamation Dist., 111 U.S. 701 (1884).
402 Butters v. City of Oakland, 263 U.S. 162 (1923). It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work. Missouri Pacific R.R. v. Road District, 266 U.S. 187 (1924). See also Roberts v. Irrigation Dist., 289 U.S. 71 (1933) (an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received). Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefitted by the completed drainage plans. Houck v. Little River Dist., 239 U.S. 254 (1915).
404 Kansas City Ry. v. Road Dist., 266 U.S. 379 (1924).
Jurisdiction to Tax

Generally.—The operation of the Due Process Clause as a jurisdictional limitation on the taxing power of the states has been an issue in a variety of different contexts, but most involve one of two basic questions. First, is there a sufficient relationship between the state exercising taxing power and the object of the exercise of that power? Second, is the degree of contact sufficient to justify the state’s imposition of a particular obligation? Illustrative of the factual settings in which such issues arise are 1) determining the scope of the business activity of a multi-jurisdictional entity that is subject to a state’s taxing power; 2) application of wealth transfer taxes to gifts or bequests of nonresidents; 3) allocation of the income of multi-jurisdictional entities for tax purposes; 4) the scope of state authority to tax income of nonresidents; and 5) collection of state use taxes.

The Court’s opinions in these cases have often discussed due process and dormant Commerce Clause issues as if they were indistinguishable. A more recent decision in Quill Corp. v. North Dakota, however, utilized a two-tier analysis that found sufficient contact to satisfy due process but not dormant Commerce Clause requirements. In Quill, the Court struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales representatives in the state to collect and transmit use taxes on sales to state residents, but did so based on Commerce Clause rather than due process grounds. Taxation of an interstate business does not offend due process, the Court held, if that business “purposefully avails itself of the benefits of an economic market in the [taxing] State . . . even if it has no physical presence in the State.” Thus, Quill may be read as implying that the more stringent Commerce Clause standard subsumes due process jurisdictional issues, and that consequently these due process issues

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409 For discussion of the relationship between the taxation of interstate commerce and the dormant commerce clause, see Taxation, supra.


issues need no longer be separately considered. \footnote{A physical presence within the state is necessary, however, under the Commerce Clause analysis applicable to taxation of mail order sales. See Quill Corp. v. North Dakota, 504 U.S. at 309-19 (refusing to overrule the Commerce Clause ruling in National Bellas Hess v. Department of Revenue, 386 U.S. 753, 756 (1967)). See also Trinova Corp. v. Michigan Dept of Treasury, 498 U.S. 358 (1991) (neither the Commerce Clause nor the Due Process Clause is violated by application of a business tax, measured on a value added basis, to a company that manufactures goods in another state, but that operates a sales office and conducts sales within state).}

This interpretation has yet to be confirmed, however, and a detailed review of due process precedents may prove useful.

Real Property.—Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a State could not tax land situated beyond its limits. Subsequently elaborating upon that principle, the Court has said that, “we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by a court.” \footnote{See also Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903). Carstairs v. Cochran, 193 U.S. 10 (1904); Hanss Distilling Co. v. Baltimore, 216 U.S. 285 (1910); Frick v. Pennsylvania, 268 U.S. 473 (1925); Blodgett v. Silberman, 277 U.S. 1 (1928).}

Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

Tangible Personality.—A State may tax tangible property located within its borders (either directly through an ad valorem tax or indirectly through death taxes) irrespective of the residence of the owner. \footnote{New York ex rel. New York Cent. R.R. v. Miller, 202 U.S. 584 (1906). Wheeling Steel Corp. v. Fox, 298 U.S. 193, 208–10 (1936); Union Transit Co. v. Kentucky, 199 U.S. 194, 207 (1905); Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933).}

By the same token, if tangible personal property makes only occasional incursions into other States, its permanent situs remains in the State of origin, and, subject to certain exceptions, is taxable only by the latter. \footnote{Union Transit Co. v. Kentucky, 199 U.S. 194 (1905). Justice Black, in Central R.R. v. Pennsylvania, 370 U.S. 607, 619–21 (1962), had his “doubts about the
briefly at numerous ports never acquire a taxable situs at any one of them, and are taxable in the domicile of their owners or not at all.\footnote{Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911). Ships operating wholly on the waters within one State, however, are taxable there and not at the domicile of the owners. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905).} Thus, where airplanes are continuously in and out of a state during the course of a tax year, the entire fleet may be taxed by the domicile state.\footnote{Noting that an entire fleet of airplanes of an interstate carrier were “never continuously without the [domiciliary] State during the whole tax year,” that such airplanes also had their “home port” in the domiciliary State, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary State to all the airplanes owned by the taxpayer. Northwest Airlines v. Minnesota, 322 U.S. 292, 294–97 (1944). No other State was deemed able to accord the same protection and benefits as the taxing State in which the taxpayer had both its domicile and its business situs. Union Transit Co. v. Kentucky, 199 U.S. 194 (1905), which disallowed the taxing of tangibles located permanently outside the domicile state, was held to be inapplicable. 322 U.S. at 295 (1944). Instead, the case was said to be governed by New York \textit{ex rel.} New York Cent. R.R. v. Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other States, the Court declared that the “taxability of any part of this fleet by any other State, than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us.” Justice Jackson, in a concurring opinion, would treat Minnesota’s right to tax as exclusively of any similar right elsewhere.} Conversely, a nondomiciliary State, although it may not tax property belonging to a foreign corporation which has never come within its borders, may levy a tax on movables which are regularly and habitually used and employed therein. Thus, while the fact that cars are loaded and reloaded at a refinery in a State outside the owner’s domicile does not fix the situs of the entire fleet in that State, the State may nevertheless tax the number of cars which on the average are found to be present within its borders.\footnote{Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933). Moreover, in assessing that part of a railroad within its limits, a State need not treat it as an independent line valued as if it was operated separately from the balance of the railroad. The State may ascertain the value of the whole line as a single property and then determine the value of the part within on a mileage basis, unless there be special circumstances which distinguish between conditions in the several States. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).} But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds...
to the value of the road and the rights exercised in the State.422
Or, a state property tax on railroads, which is measured by gross
earnings apportioned to mileage, is constitutional unless it exceeds
what would be legitimate as an ordinary tax on the property val-
ued as part of a going concern or is relatively higher than taxes on
other kinds of property.423

**Intangible Personalty.**—To determine whether a State, or
States, may tax intangible personal property, the Court has applied
the fiction *mobilia sequuntur personam* (movable property follows
the person) and has also recognized that such property may ac-
quire, for tax purposes, a permanent business or commercial situs.
The Court, however, has never clearly disposed of the issue whether
multiple personal property taxation of intangibles is consistent
with due process. In the case of corporate stock, however, the Court
has obliquely acknowledged that the owner thereof may be taxed
at his own domicile, at the commercial situs of the issuing corpora-
tion, and at the latter’s domicile. Constitutional lawyers speculated
whether the Court would sustain a tax by all three jurisdictions,
or by only two of them. If the latter, the question would be which
two—the State of the commercial situs and of the issuing corpora-
tion’s domicile, or the State of the owner’s domicile and that of the
commercial situs.424

Thus far, the Court has sustained the following personal prop-
erty taxes on intangibles: (1) a debt held by a resident against a
nonresident, evidenced by a bond of the debtor and secured by a
mortgage on real estate in the State of the debtor’s residence;425
(2) a mortgage owned and kept outside the State by a nonresident
but on land within the State;426 (3) investments, in the form of
loans to a resident, made by a resident agent of a nonresident cred-
itor;427 (4) deposits of a resident in a bank in another State, where
he carries on a business and from which these deposits are derived,

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422 Wallace v. Hines, 253 U.S. 66 (1920). For example, the ratio of track mileage
within the taxing State to total track mileage cannot be employed in evaluating that
portion of total railway property found in the State when the cost of the lines in
the taxing State was much less than in other States and the most valuable termi-
nals of the railroad were located in other States. See also Fargo v. Hart, 193 U.S.
490 (1904); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919).

423 Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929). If a tax reaches only
revenues derived from local operations, the fact that the apportionment formula
does not result in mathematical exactitude is not a constitutional defect. Illinois

424 Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle*, 8 Mo.
L. Rev. 155, 160–62 (1943); Rawlins, *State Jurisdiction to Tax Intangibles: Some

425 Kirtland v. Hotchkiss, 100 U.S. 491, 498 (1879).


427 Bristol v. Washington County, 177 U.S. 133, 141 (1900).
but belonging absolutely to him and not used in the business;\textsuperscript{428} (5) membership owned by a nonresident in a domestic exchange, known as a chamber of commerce;\textsuperscript{429} (6) membership by a resident in a stock exchange located in another State;\textsuperscript{430} (7) stock held by a resident in a foreign corporation that does no business and has no property within the taxing State;\textsuperscript{431} (8) stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing State;\textsuperscript{432} (9) shares owned by nonresident shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder;\textsuperscript{433} (10) dividends of a corporation distributed ratably among stockholders regardless of their residence outside the State;\textsuperscript{434} (11) the transfer within the taxing State by one nonresident to another of stock certificates issued by a foreign corporation;\textsuperscript{435} and (12) promissory

\textsuperscript{428} These deposits were allowed to be subjected to a personal property tax in the city of his residence, regardless of whether or not they are subject to tax in the State where the business is carried on Fidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917). The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.

\textsuperscript{429} Rogers v. Hennepin County, 240 U.S. 184 (1916).

\textsuperscript{430} Citizens Nat’l Bank v. Durr, 257 U.S. 99, 109 (1921). “Double taxation” the Court observed “by one and the same State is not” prohibited “by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.

\textsuperscript{431} Hawley v. Malden, 232 U.S. 1, 12 (1914). The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, “the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . .” The Court also added that “undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether owned by residents or non-residents.”

\textsuperscript{432} First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937). The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the State, notwithstanding that ownership of the stock may also be a taxable subject in another State.

\textsuperscript{433} Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938).

\textsuperscript{434} The Court found that all stockholders were the ultimate beneficiaries of the corporation’s activities within the taxing State, were protected by the latter, and were thus subject to the State’s jurisdiction. International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944). This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments. Wisconsin Gas Co. v. United States, 322 U.S. 526 (1944).

\textsuperscript{435} New York ex rel. Hatch v. Reardon, 204 U.S. 152 (1907).
notes executed by a domestic corporation, although payable to banks in other States.\footnote{Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931). These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing State.} The following personal property taxes on intangibles have been invalidated: (1) debts evidenced by notes in safekeeping within the taxing State, but made and payable and secured by property in a second State and owned by a resident of a third State;\footnote{Buck v. Beach, 206 U.S. 392 (1907).} (2) a tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the State and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.\footnote{Senior v. Braden, 295 U.S. 422 (1935).}

The Court also invalidated a property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another State and as to which the beneficiary had neither control nor possession, apart from the receipt of income therefrom.\footnote{Brooke v. City of Norfolk, 277 U.S. 27 (1928).} However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, not withstanding that the trust was created by the will of a resident of another State in respect of intangible property located in the latter State, at least where it does not appear that the trustee is exposed to the danger of other ad valorem taxes in another State.\footnote{Greenough v. Tax Assessors, 331 U.S. 486, 496–97 (1947).} The first case, Brooke v. Norfolk,\footnote{277 U.S. 27 (1928).} is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Different too is Safe Deposit & T. Co. v. Virginia,\footnote{280 U.S. 83 (1929).} where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control.

A State in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the corporation's bank deposits and accounts receivable even though the deposits are outside the State and the accounts receivable arise from manufacturing activities in another State. Similarly, a nondomiciliary State in which a foreign corporation did business can tax the "corporate excess" arising from property em-
ployed and business done in the taxing State. On the other hand, when the foreign corporation transacts only interstate commerce within a State, any excise tax on such excess is void, irrespective of the amount of the tax.

Also a domiciliary State which imposes no franchise tax on a stock fire insurance corporation may assess a tax on the full amount of paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary State only a required registered office at which local claims are handled. Despite ‘the vicissitudes which the so-called ‘jurisdiction-to-tax’ doctrine has encountered . . .,’ the presumption persists that intangible property is taxable by the State of origin.

A property tax on the capital stock of a domestic company, however, which includes in the appraisal thereof the value of coal mined in the taxing State but located in another State awaiting sale deprives the corporation of its property without due process of law. Also void for the same reason is a state tax on the franchise of a domestic ferry company which includes in the valuation thereof the worth of a franchise granted to the said company by another State.

Transfer (Inheritance, Estate, Gift) Taxes.—As a state has authority to regulate transfer of property by wills or inheritance, it may base its succession taxes upon either the transmission or receipt of property by will or by descent. But whatever may be the justification of their power to levy such taxes, since 1905 the States have consistently found themselves restricted by the rule in Union

443 Adams Express Co. v. Ohio, 165 U.S. 194 (1897).
444 Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925). A domiciliary State, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this “corporate excess” arose from property located and business done in another State and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936). See also Memphis Gas Co. v. Beeler, 315 U.S. 649, 652 (1942).
445 Newark Fire Ins. Co. v. State Board, 307 U.S. 313, 318, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice Stone in Curry v. McCanless, 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a State where it does business, measured by the value of the intangibles used in its business there, does not preclude the State of incorporation from imposing a tax measured by all its intangibles.
Transit Co. v. Kentucky,\(^{449}\) which precludes imposition of transfer taxes upon tangible which are permanently located or have an actual situs outside the State.

In the case of intangibles, however, the Court has oscillated in upholding, then rejecting, and again sustaining the levy by more than one State of death taxes upon intangibles. Until 1930, transfer taxes upon intangibles by either the domiciliary or the situs (but nondomiciliary) State, were with rare exceptions approved. Thus, in Bullen v. Wisconsin,\(^{450}\) the domiciliary State of the creator of a trust was held competent to levy an inheritance tax on an out-of-state trust fund consisting of stocks, bonds, and notes, as the settlor reserved the right to control disposition and to direct payment of income for life. The Court reasoned that such reserved powers were the equivalent to a fee in the property. Cognizance was taken of the fact that the State in which these intangibles had their situs had also taxed the trust.\(^{451}\)

On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary State was held insufficient to support a tax by that State on the succession to shares of stock in that corporation owned by a nonresident decedent.\(^{452}\) Also against the trend was Blodgett v. Silberman,\(^{453}\) wherein the Court defeated collection of a transfer tax by the domiciliary State by treating coins and bank notes deposited by a decedent in a safe deposit box in another State as tangible property.\(^{454}\)

In the course of about two years following the Depression, the Court handed down a group of four decisions which placed the stamp of disapproval upon multiple transfer taxes and—by infer-


\(^{450}\) 240 U.S. 635, 631 (1916). A decision rendered in 1926 which is seemingly in conflict was Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567 (1926), in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter State. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in Graves v. Schmidlapp, 315 U.S. 657 (1942).

\(^{451}\) Levy of an inheritance tax by a nondomiciliary State was also sustained on similar grounds in Wheeler v. New York, 233 U.S. 434 (1914) wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.

\(^{452}\) Rhode Island Trust Co. v. Doughton, 270 U.S. 69 (1926).

\(^{453}\) 277 U.S. 1 (1928).

\(^{454}\) The Court conceded, however, that the domiciliary State could tax the transfer of books and certificates of indebtedness found in that safe deposit box as well as the decedent’s interest in a foreign partnership.
ence—other multiple taxation of intangibles. The Court found that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile." Thus, the Court proceeded to deny the right of nondomiciliary States to tax intangibles, rejecting jurisdictional claims founded upon such bases as control, benefit, protection or situs. During this interval, 1930–1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the due process clause.

The Court has expressly overruled only one of these four decisions condemning multiple succession taxation of intangibles. In 1939, in *Curry v. McCanless*, the Court announced a departure from the "doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one State. . . ." Taking cognizance of the fact that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, the Court declared that a correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another State, in such a way as to bring his person or . . . [his intangibles] within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, . . . [However], the State of domicile is not deprived, by the taxpayer's activities, elsewhere, of its constitutional jurisdiction to tax."

In accordance with this line of reasoning, the domicile of a decedent (Tennessee) and the state where a trust received securities conveyed from the decedent by will (Alabama) were both allowed to impose a tax on the transfer of these securities. "In effecting her purposes," the testatrix was viewed as having "brought some of the legal interests which she created within the control of one State by

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selecting a trustee there, and others within the control of the other State, by making her domicile there.” She had found it necessary to invoke “the aid of the law of both States and her legatees” were subject to the same necessity. 458

On the authority of Curry v. McCanless, the Court, in Pearson v. McGraw 459 sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company, although the property was never physically present in Oregon. Jurisdiction to tax was viewed as dependent, not on the location of the property in the State, but on the fact that the owner was a resident of Oregon. In Graves v. Elliott, 460 the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that “the power of disposition of property is the equivalent of ownership, . . . and its exercise in the case of intangibles is . . . [an] appropriate subject of taxation at the place of the domicile of the owner of the power. Relinquishment at death, in consequence of the nonexercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation.” 461
The costliness of multiple taxation of estates comprising intangibles can be appreciably aggravated if one or more States find that the decedent died domiciled within its borders. In such cases, contesting States may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in *Texas v. Florida*, the State of Texas filed an original petition in the Supreme Court against three other states who claimed to be the domicile of the decedent, noting that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other States. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate was valued less than the total of the demands of the several States, so that the latter were confronted with a prospective inability to collect.

**Corporate Privilege Taxes.**—A domestic corporation may be subjected to a privilege tax graduated according to paid-up capital stock, even though the stock represents capital not subject to the taxing power of the State, since the tax is levied not on property but on the privilege of doing business in corporate form. However, a State cannot tax property beyond its borders under the guise of taxing the privilege of doing an intrastate business. Therefore, a license tax based on the authorized capital stock of an out-of-state corporation is void, even though there is a maximum

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462 306 U.S. 398 (1939). Resort to the Supreme Court’s original jurisdiction was necessary because in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937), the Court, proceeding on the basis that inconsistent determinations by the courts of two States as to the domicile of a taxpayer do not raise a substantial federal constitutional question, held that the Eleventh Amendment precluded a suit by the estate of the decedent to establish the correct State of domicile. In *California v. Texas*, 437 U.S. 601 (1978), a case on all points with *Texas v. Florida*, the Court denied leave to file an original action to adjudicate a dispute between the two States about the actual domicile of Howard Hughes, a number of Justices suggesting that *Worcester County* no longer was good law. Subsequently, the Court reaffirmed *Worcester County*, *Cory v. White*, 457 U.S. 85 (1982), and then permitted an original action to proceed, *California v. Texas*, 457 U.S. 164 (1982), several Justices taking the position that neither *Worcester County* nor *Texas v. Florida* was any longer viable.

463 *Kansas City Ry. v. Kansas*, 240 U.S. 227 (1916); *Kansas City, M. & B.R. v. Stiles*, 242 U.S. 111 (1916). Similarly, the validity of a franchise tax, imposed on a domestic corporation engaged in foreign maritime commerce and assessed upon a proportion of the total franchise value equal to the ratio of local business done to total business, is not impaired by the fact that the total value of the franchise was enhanced by property and operations carried on beyond the limits of the State.

fee,\textsuperscript{465} unless the tax is apportioned based on property interests in the taxing state.\textsuperscript{466} On the other hand, a fee collected only once as the price of admission to do intrastate business is distinguishable from a tax and accordingly may be levied on an out-of-state corporation based on the amount of its authorized capital stock.\textsuperscript{467}

A municipal license tax imposed on a foreign corporation for goods sold within and without the State, but manufactured in the city, is not a tax on business transactions or property outside the city and therefore does not violate the due process clause.\textsuperscript{468} But a State lacks jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for fabricating equipment outside the taxing State, even if the equipment is later installed in the taxing State. Unless the activities which are the subject of the tax are carried on within its territorial limits, a State is not competent to impose such a privilege tax.\textsuperscript{469}

**Individual Income Taxes.**—A State may tax annually the entire net income of resident individuals from whatever source received,\textsuperscript{470} as jurisdiction is founded upon the rights and privileges incident to domicile. A State may also tax the portion of a non-resident's net income which is derived from property owned, and from any business, trade, or profession carried on, by him within its borders,\textsuperscript{471} based upon the State's dominion over the property or activity from which it is derived and the obligation to contribute to the support of a government which secures the collection of such income. Accordingly, a State may tax residents on income from rents of land located outside the State; from interest on bonds physically without the State and secured by mortgage upon lands similarly situated;\textsuperscript{472} and from a trust created and administered in another State, and not directly taxable to the trustee.\textsuperscript{473} Further,
the fact that another State has lawfully taxed identical income in the hands of trustees operating therein does not necessarily destroy a domiciliary State’s right to tax the receipt of income by a resident beneficiary.\textsuperscript{474}

\textbf{Corporate Income Taxes: Foreign Corporations.}—A tax based on the income of a foreign corporation may be determined by allocating to the State a proportion of the total,\textsuperscript{475} unless the income attributed to the State is out of all appropriate proportion to the business there transacted.\textsuperscript{476} Thus, a franchise tax on a foreign corporation may be measured by income, not just from business within the state, but also on net income from interstate and foreign business.\textsuperscript{477} Inasmuch as the privilege granted by a State to a foreign corporation of carrying on business supports a tax by that State, it followed that a Wisconsin privilege dividend tax, could be applied to a Delaware corporation despite it having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax could be imposed on the “privilege of declaring and receiving dividends” out of income derived from property located and business transacted in Wisconsin, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders.\textsuperscript{478}

\textsuperscript{474} Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938). Likewise, even though a nonresident does no business within a State, the latter may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders. New York ex. rel. Whitney v. Graves, 299 U.S. 366 (1937).

\textsuperscript{475} Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); Bass, Ratcliff & Gretton Ltd. v. Tax Comm’n, 266 U.S. 271 (1924). The Court has recently considered and expanded the ability of the States to use apportionment formulae to allocate to each State for taxing purposes a fraction of the income earned by an integrated business conducted in several States as well as abroad. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980). Exxon refused to permit a unitary business to use separate accounting techniques that divided its profits among its various functional departments to demonstrate that a State’s formulary apportionment taxes extraterritorial income improperly. \textit{Bair}, 437 U.S. at 276–80, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

\textsuperscript{476} Evidence may be submitted which tends to show that a State has applied a method which, although fair on its face, operates so as to reach profits which are in no sense attributable to transactions within its jurisdiction. Hans Rees’ Sons v. North Carolina, 283 U.S. 123 (1931).

\textsuperscript{477} Matson Nav. Co. v. State Board, 297 U.S. 441 (1936).

\textsuperscript{478} Wisconsin v. J.C. Penney Co., 311 U.S. 435, 448–49 (1940). Dissenting, Justice Roberts, along with Chief Justice Hughes and Justices McReynolds and Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many States does not depend on and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as divi-
**Insurance Company Taxes.**—A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the State does not deprive the company of property without due process, but such a tax is invalid if the company has withdrawn all its agents from the State and has ceased to do business, merely continuing to receive the renewal premiums at its home office. Also violative of due process is a state insurance premium tax imposed on a nonresident firm doing business in the taxing jurisdiction, which obtained the coverage of property within the State from an unlicensed out-of-state insurer which consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction. However, tax may be imposed upon the privilege of entering and engaging in business in a State, even if the tax is a percentage of the “annual premiums to be paid throughout the life of the policies issued.” Under this kind of tax, a State may continue to collect even after the company’s withdrawal from the State.

A State may lawfully extend a tax to a foreign insurance company that contracts with an automobile sales corporation in a third State to insure its customers against loss of cars purchased through it, so far as the cars go into possession of a purchaser within the taxing State. On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other States who are not authorized to do business in the taxing State, cannot constitutionally be subjected to a 5% tax on the amount of premiums paid for such coverage. Likewise a Connecticut life insurance corporation, licensed to do business in California, that negotiated reinsurance contracts in Connecticut, received payment of premiums thereon in Connecticut, and was there liable for payment of losses claimed thereunder, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of the stockholders, he contended is “one wholly beyond the reach of Wisconsin’s sovereign power, one which it cannot effectively command, or prohibit or condition.” The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, “if the exaction is an income tax in any sense it is such upon the stockholders (many of whom are nonresidents) and is obviously bad.” See also Wisconsin v. Minnesota Mining Co., 311 U.S. 452 (1940).

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480 Provident Savings Ass’n v. Kentucky, 239 U.S. 103 (1915).
482 Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940) (emphasis added).
residents therein. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that State.\textsuperscript{485}

**Procedure in Taxation**

*Generally.*—Exactly what due process is required in the assessment and collection of general taxes has never been decided by the Supreme Court. While it was held that “notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential” for imposition of special taxes, it has also ruled that laws for assessment and collection of general taxes stand upon a different footing and are to be construed with the utmost liberality, even to the extent of acknowledging that no notice whatever is necessary.\textsuperscript{486} Due process of law as applied to taxation does not mean judicial process;\textsuperscript{487} neither does it require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.\textsuperscript{488} Due Process is satisfied if a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether before a board having a quasi-judicial character, or before a tribunal provided by the State for such purpose.\textsuperscript{489}

*Notice and Hearing in Relation to Taxes.*—“Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax,

\textsuperscript{485} Connecticut General Co. v. Johnson, 303 U.S. 77 (1938). When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer. Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907). But when a resident policyholder’s loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company. Orleans Parish v. New York Life Ins. Co., 216 U.S 517 (1910). Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the State of the debtor’s domicile. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U.S. 346 (1911). The mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.


\textsuperscript{487} McMillen v. Anderson, 95 U.S. 37, 42 (1877).


\textsuperscript{489} Hodge v. Muscatine County, 196 U.S. 276 (1905).
fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.\footnote{Hagar v. Reclamation Dist., 111 U.S. 701, 709–10 (1884).}

Notice and Hearing in Relation to Assessments.—"But

where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent’s property, is due process of law.\footnote{111 U.S. at 710.}

Nevertheless, it has never been considered necessary to the validity of a tax that the party charged shall have been present, or had an opportunity to be present, in some tribunal when he was assessed.\footnote{McMillen v. Anderson, 95 U.S. 37, 42 (1877).} Where a tax board has its time of sitting fixed by law and where its sessions are not secret, no obstacle prevents the appearance of any one before it to assert a right or redress a wrong and in the business of assessing taxes, this is all that can be rea-
reasonably asked. Nor is there any constitutional command that notice of an assessment as well as an opportunity to contest it be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the State for remittance becomes final.

However, when assessments based on the enjoyment of a special benefit are made by a political subdivision, a taxing board or court, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination. The hearing need not amount to a judicial inquiry, although a mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient. Generally, if an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits. On the other hand, if the area of the assessment district was not determined by the legislature, a landowner does have the right to be heard respecting benefits to his property before it can be included in the improvement district and assessed, but due process is not denied if, in the absence of actual fraud or bad faith, the decision of the agency vested with the initial determination of benefits is made final. The owner has no constitutional right to be heard in opposition to the launching of a project which may end in assessment, and once his land has been duly in-

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493 State Railroad Tax Cases, 92 U.S. 575, 610 (1876).
494 Nickey v. Mississippi, 292 U.S. 393, 396 (1934). See also Clement Nat’l Bank v. Vermont, 231 U.S. 120 (1913). A hearing before judgment, with full opportunity to submit evidence and arguments being all that can be adjudged vital, it follows that rehearings and new trials are not essential to due process of law. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894). One hearing is sufficient to constitute due process, Michigan Central R.R. v. Powers, 201 U.S. 245, 302 (1906), and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is privileged to appeal it and, on appeal, to present evidence and be heard on the valuation of his property. Pittsburgh C. C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 45 (1898).
498 Withnell v. Ruecking Constr. Co., 249 U.S. 63, 68 (1919); Browning v. Hoover, 269 U.S. 396, 405 (1926). Likewise, the committing to a board of county supervisors of authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessment. Breiholz v. Board of Supervisors, 257 U.S. 118 (1921).
cluded within a benefit district, the only privilege which he thereafter enjoys is to a hearing upon the apportionment, that is, the amount of the tax which he has to pay.\footnote{Utley v. Petersburg, 292 U.S. 106, 109 (1934); French v. Barber Asphalt Paving Co., 181 U.S. 324, 341 (1901). See also Soliah v. Heskin, 222 U.S. 522 (1912).}

More specifically, where the mode of assessment resolves itself into a meremathematical calculation, there is no necessity for a hearing.\footnote{Hancock v. Muskogee, 250 U.S. 454, 458 (1919). Likewise, a taxpayer does not have a right to a hearing before a state board of equalization preliminary to issuance by it of an order increasing the valuation of all property in a city by 40%. Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915).} Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law.\footnote{City of Detroit v. Parker, 181 U.S. 399 (1901).} In contrast, when an attempt is made to cast upon particular property a certain proportion of the construction cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard.\footnote{Paulsen v. Portland, 149 U.S. 30, 38 (1893).}

Collection of Taxes.—States may undertake a variety of methods to collect taxes. For instance, collection of an inheritance tax may be expedited by a statute requiring the sealing of safe deposit boxes for at least ten days after the death of the renter and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the State.\footnote{National Safe Deposit Co. v. Stead, 232 U.S. 58 (1914).} A State may compel retailers to collect such gasoline taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.\footnote{Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924). Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property. Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910).} In collecting personal income taxes, most States require employers to deduct and withhold the tax from the wages of employees.\footnote{The duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting been viewed as an unreasonable regulation of the conduct of business. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).}

States may also use various procedures to collect taxes from prior tax years. To reach property which has escaped taxation, a State may tax estates of decedents for a period prior to death and
grant proportionate deductions for all prior taxes which the personal representative can prove to have been paid. Of, it is was found not to be a violation of property rights when a state asserts a prior lien against trucks repossessed by a vendor from a carrier (1) accruing from the operation by the carrier of trucks not sold by the vendors, either before or during the time the carrier operated the vendors’ trucks, or (2) arising from assessments against the carrier, after the trucks were repossessed, but based upon the carrier’s operations preceding such repossession. Such lien need not be limited to trucks owned by the carrier because the wear on the highways occasioned by the carrier’s operation is in no way altered by the vendor’s retention of title.

As a State may provide in advance that taxes will bear interest from the time they become due, it may with equal validity stipulate that taxes which have become delinquent will bear interest from the time the delinquency commenced. Further, a State may adopt new remedies for the collection of taxes and apply these remedies to taxes already delinquent. After liability of a taxpayer has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law. Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years. No less constitutional, as a means of facilitating collection, is an in rem proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all preexisting rights or liens are eliminated by a sale under a decree. On the other hand, while the conversion of an unpaid special assessment into both a personal judgment against the owner as well as a charge on the land is consistent with the Fourteenth Amendment, a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired no jurisdiction is void. Apart from such restraints, how-

\[509\] League v. Texas, 184 U.S. 156 (1902).
\[510\] Palmer v. McMahon, 133 U.S. 660, 669 (1890).
\[513\] Leigh v. Green, 193 U.S. 79 (1904).
\[514\] Davidson v. City of New Orleans, 96 U.S. 97, 107 (1878).
ever, a State is free to adopt new remedies for the collection of taxes and even to apply new remedies to taxes already delinquent. 516

**Sufficiency and Manner of Giving Notice.**—Notice of tax assessments or liabilities, insofar as it is required, may be either personal, by publication, by statute fixing the time and place of hearing, 517 or by delivery to a statutorily designated agent. 518 As regards land, “where the State . . . [desires] to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are ‘so minded,’ to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment. . . .” In fact, compliance with statutory notice requirements combined with actual notice to owners of land can be sufficient in an *in rem* case, even if there are technical defects in such notice. 519

Whether statutorily required notice is sufficient may vary based on particular circumstances. Thus, where a taxpayer was not legally competent, no guardian had not been appointed and town officials were aware of these facts, notice of a foreclosure was defective, even though the tax delinquency was mailed to her, published in local papers, and posted in the town post office. 520 On the other hand, due process was not denied to appellants who were unable to avert foreclosure on certain trust lands (based on liens for unpaid water charges) because their own bookkeeper failed to inform them of the receipt of mailed notices. 521


518 A state statute may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent him in proceedings for correcting assessment. Corry v. Baltimore, 196 U.S. 466, 478 (1905).

519 Leigh v. Green, 193 U.S. 79, 92–93 (1904). Thus, an assessment for taxes and a notice of sale when such taxes are delinquent will be sustained as long as there is a description of the land and the owner knows that the property so described is his, even if that description is not technically correct. Ontario Land Co. v. Yardy, 212 U.S. 152 (1909). Where tax proceedings are *in rem*, owners are bound to take notice thereof, and to pay taxes on their property, even if the land is assessed to unknown or other persons. Thus, if an owner stands by and sees his property sold for delinquent taxes, he is not thereby wrongfully deprived of his property. Id. See also Longyear v. Toolan, 209 U.S. 414 (1908).

520 Covey v. Town of Somers, 351 U.S. 141 (1956).

521 Nelson v. New York City, 352 U.S. 103 (1956). This conclusion was unaffected by the disparity between the value of the land taken and the amount owed
**Sufficiency of Remedy.**—When no other remedy is available, due process is denied by a judgment of a state court withholding a decree in equity to enjoin collection of a discriminatory tax.\(^5\) Requirements of due process are similarly violated by a statute which limits a taxpayer’s right to challenge an assessment to cases of fraud or corruption,\(^5\) and by a state tribunal which prevents a recovery of taxes imposed in violation of the Constitution and laws of the United States by invoking a state law limiting suits to recover taxes alleged to have been assessed illegally to taxes paid at the time and in the manner provided by said law.\(^5\) In the case of a tax held unconstitutional as a discrimination against interstate commerce and not invalidated in its entirety, the state has several alternatives for equalizing incidence of the tax: it may pay a refund equal to the difference between the tax paid and the tax that would have been due under rates afforded to in-state competitors; it may assess and collect back taxes from those competitors; or it may combine the two approaches.\(^5\)

**Laches.**—Persons failing to avail themselves of an opportunity to object and be heard cannot thereafter complain of assessments as arbitrary and unconstitutional.\(^5\) Likewise a car company, which failed to report its gross receipts as required by statute, has no further right to contest the state comptroller’s estimate of those receipts and his adding thereto the 10 percent penalty permitted by law.\(^5\)

**Eminent Domain**

The due process clause of the Fourteenth Amendment has been held to require that when a state or local governmental body, or

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523 Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907).
524 Carpenter v. Shaw, 280 U.S. 363 (1930). See also Ward v. Love County, 253 U.S. 17 (1920). In this as in other areas, the state must provide procedural safeguards against imposition of an unconstitutional tax. These procedures need not apply predeprivation, but a state that denies predeprivation remedy by requiring that tax payments be made before objections are heard must provide a postdeprivation remedy. McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 15 (1990). See also Reich v. Collins, 513 U.S. 106 (1994) (violation of due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dep’t of Revenue, 522 U.S. 442 (1998) (per curiam) (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy).
a private body exercising delegated power, takes private property it must provide just compensation and take only for a public purpose. Applicable principles are discussed under the Fifth Amendment. 528

**Fundamental Rights (Noneconomic Substantive Due Process)**

A counterpart to the now-discredited economic substantive due process, noneconomic substantive due process is still vital today. The concept has, over time, come to include a number of disparate lines of cases, and various labels have been applied to the rights protected, including “fundamental rights,” “privacy rights,” “liberty interests” and “incorporated rights.” The binding principle of these cases is that they involve rights so fundamental that the courts must subject any legislation infringing on them to close scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law, 529 serves as the basis for some of the most significant constitutional holdings of our time. For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on noneconomic substantive due process and the “incorporation” of fundamental rights. 530 Other noneconomic due process holdings, however, such as the cases establishing the right of a woman to have an abortion, 531 remain controversial.

**Development of the Right of Privacy.**—More so than other areas of law, noneconomic substantive due process seems to have started with few fixed precepts. Were the rights being protected property rights (and thus really protected by economic due process) or were they individual liberties? What standard of review needed to be applied? What were the parameters of such rights once identified? For instance, did a right of “privacy” relate to protecting physical spaces such as one’s home, or was it related to the issue of autonomy to make private, intimate decisions? Once a right was identified, often using abstract labels, how far could such an abstraction be extended? Did protecting the “privacy” of the decisions whether to have a family also include the right to make decisions regarding sexual intimacy? While many of these issues have, over time, been resolved, others remain.

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528 See analysis under “National Eminent Domain Power,” Fifth Amendment, supra.
530 See supra Bill of Rights, “Fourteenth Amendment”.
One of the earliest formulations of noneconomic substantive due process was the right to privacy. This right was first proposed by Samuel Warren and Louis Brandeis in an 1890 Harvard Law Review article as a unifying theme to various common law protections of the “right to be left alone,” including the developing laws of nuisance, libel, search and seizure, and copyright. According to the authors, “... the right to life has come to mean the right to enjoy life,—the right to be let alone ... . This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.”

The concepts put forth in this article, which appeared to relate as much to private intrusions on persons as to intrusions by government, reappeared years later in a dissenting opinion by Justice Brandeis regarding the Fourth Amendment. Then, in the 1920’s, at the heyday of economic substantive due process, the Court ruled in two cases which, although nominally involving the protection of property, foreshadowed the rise of the protection of noneconomic interests. In *Meyer v. Nebraska*, the Court struck down a state law forbidding schools from teaching any modern foreign language to any child who had not successfully finished the eighth grade. Then, two years later, in *Pierce v. Society of Sisters*, the Court declared it unconstitutional to require public school education of children aged eight to sixteen. The statute in *Meyer* was found to interfere with the property interest of the plaintiff, a German teacher, in pursuing his occupation, while the private school plaintiffs in *Pierce* were threatened with destruction of their businesses and the

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533 See Olmstead v. United States, 277 U.S. 438 (1928) (J. Brandeis, dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Brandeis said: “The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness ... . They sought to protect Americans in their beliefs, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” 277 U.S. at 473.
535 268 U.S. 510 (1925).
values of their properties. Yet in both cases the Court also permitted the plaintiffs to represent the interests of parents and children in the assertion of other noneconomic forms of “liberty.”

“Without doubt,” Justice McReynolds said in Meyer, liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” The right of the parents to have their children instructed in a foreign language was “within the liberty of the [Fourteenth] Amendment.” Meyer was then relied on in Pierce to assert that the statute there “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control... The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

Although the Supreme Court continued to define noneconomic liberty broadly in dicta, this new concept was to have little impact for decades. Finally, in 1967, the Court held in Loving v. Virginia that a statute prohibiting interracial marriage denied substantive due process. Marriage was termed “one of the ‘basic civil rights of man’” and a “fundamental freedom.” “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” and the classification of marriage rights on a racial basis was

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536 Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 531, 533, 534 (1928). The Court has subsequently made clear that these cases dealt with “a complete prohibition of the right to engage in a calling,” holding that “a brief interruption” did not constitute a constitutional violation. Conn v. Gabbert, 526 U.S. 286, 292 (1999) (search warrant served on attorney prevented attorney from assisting client appearing before a grand jury).

537 262 U.S. at 399.

538 262 U.S. at 400.

539 268 U.S. at 534-35.

540 Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage and procreation are among “the basic civil rights of man”); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (care and nurture of children by the family are within “the private realm of family life which the state cannot enter”).

541 E.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922) (allowing compulsory vaccination); Buck v. Bell, 274 U.S. 200 (1927) (allowing sterilization of inmates of state institutions found to be afflicted with hereditary forms of insanity or imbecility); Minnesota v. Proctor under Regents of the University of California ex rel. Pearson, 309 U.S. 270 (1940) (allowing institutionalization of habitual sexual offenders as psychopathic personalities).

542 388 U.S. 1, 12 (1967).
Indeed, in Griswold v. Connecticut, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted Meyer and Pierce as having been based on the First Amendment. Note also that in Epperson v. Arkansas, 393 U.S. 97, 105 (1968), and Tinker v. Des Moines School District, 393 U.S. 503, 506–07 (1969), Justice Fortas for the Court approvingly noted the due process basis of Meyer and Pierce while deciding both cases on First Amendment grounds.

According to Justice Harlan, due process is limited neither to procedural guarantees nor to the rights enumerated in the first eight Amendments of the Bill of Rights, but is rather “a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.” The liberty protected by the clause “is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.” 367 U.S. at 542, 543.

We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.” Griswold v. Connecticut, 381 U.S. at 482 (opinion of Court by Justice Douglas).

The analysis, while reminiscent of the “right to privacy” first suggested by Warren and Brandeis, still approached the matter in reliance on substantive due process cases. It should be noted that the separate concurrences of Justices Harlan and White were specifically based on substantive due process, 381 U.S. at 499, 502, which indicates that the majority's position was intended to be something different. Justice Goldberg, on the other hand, in concurrence, would have based the decision
on the Ninth Amendment. 381 U.S. at 486-97. See analysis under the Ninth Amendment, “Rights Retained By the People,” supra.


550 When the Court began to extend “privacy” rights to unmarried persons through the equal protection clause, it seemed to rely upon a view of rationality and reasonableness not too different from Justice Harlan’s dissent in Poe v. Ullman. Eisenstadt v. Baird, 405 U.S. 438 (1972), is the principal case. See also Stanley v. Illinois, 405 U.S. 645 (1972).


552 See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972). “If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” 405 U.S. at 453.

553 478 U.S. 186 (1986).
Similar disagreement over the appropriate level of generality for definition of a liberty interest was evident in *Michael H. v. Gerald D.*, involving the rights of a biological father to establish paternity and associate with a child born to the wife of another man. While recognizing the protection traditionally afforded a father, Justice Scalia, joined only by Chief Justice Rehnquist in this part of the plurality decision, rejected the argument that a non-traditional familial connection (i.e. the relationship between a father and the offspring of an adulterous relationship) qualified for constitutional protection, arguing that courts should limit consideration to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Dissenting Justice Brennan, joined by two others, rejected the emphasis on tradition, and argued instead that the Court should "ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected [as] an aspect of 'liberty.'"

*Abortion.*—In *Roe v. Wade*, the Court established a right of personal privacy protected by the due process clause that includes the right of a woman to determine whether or not to bear a child. In doing so, the Court dramatically increased judicial oversight of legislation under the privacy line of cases, striking down aspects of abortion-related laws in practically all the States, the District of Columbia, and the territories. To reach this result, the Court first undertook a lengthy historical review of medical and legal views regarding abortion, finding that modern prohibitions on abortion were of relatively recent vintage and thus lacked the historical foundation which might have preserved them from constitutional review. Then, the Court established that the word "person" as used in the due process clause and in other provisions of the Constitution did not include the unborn, and therefore the unborn...
lacked federal constitutional protection.\textsuperscript{559} Finally, the Court summarily announced that the “Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” includes “a right of personal privacy, or a guarantee of certain areas or zones of privacy” \textsuperscript{560} and that “[t]his right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” \textsuperscript{561}

It was also significant that the Court held this right of privacy to be “fundamental” and, drawing upon the strict standard of review found in equal protection litigation, held that the due process clause required that any limits on this right be justified only by a “compelling state interest” and be narrowly drawn to express only the legitimate state interests at stake.\textsuperscript{562} Assessing the possible interests of the States, the Court rejected justifications relating to the promotion of morality and the protection of women from the medical hazards of abortions as unsupported in the record and ill-served by the laws in question. Further, the state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue of when life begins. Two valid state interests were, however, recognized. “[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiability as the woman approaches term and, at a point during pregnancy, each becomes ‘compelling.’” \textsuperscript{563}

Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no capability of meaningful life outside the mother’s womb, the Court found that the State has no “compelling interest” in the first trimester and “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.” \textsuperscript{564} In the intermediate trimester, the danger to the woman increases and the State may therefore regulate the abortion procedure “to the extent that the regulation reasonably relates to the preservation and protection of maternal health,” but the fetus is

\textsuperscript{559} 410 U.S. at 156–59.
\textsuperscript{560} 410 U.S. at 152–53.
\textsuperscript{561} 410 U.S. at 152–53.
\textsuperscript{562} 410 U.S. at 152, 155-56. The “compelling state interest” test in equal protection cases is reviewed under “The New Standards: Active Review,” \textit{infra}.
\textsuperscript{563} 410 U.S. at 147-52, 159-63.
\textsuperscript{564} 410 U.S. at 163.
still not able to survive outside the womb, and consequently the actual decision to have an abortion cannot be otherwise impeded. \(^{565}\) “With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.” \(^{566}\)

Thus, the Court concluded that “(a) for the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician; (b) for the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health; (c) for the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”

Further, in a companion case, the Court struck down three procedural provisions relating to a law which did allow some abortions. \(^{567}\) These regulations required that an abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician’s judgment be confirmed by the independent examination of the patient by two other licensed physicians. These provisions were held not to be justified by the State’s interest in maternal health because they were not reasonably related to that interest. \(^{568}\) But a clause making the performance of an abortion a crime except when it is based upon the doctor’s “best clinical judgment that an abortion is necessary” was upheld against vagueness attack and was further held to benefit women seeking

\(^{565}\) 410 U.S. at 163.

\(^{566}\) 410 U.S. at 163-64. A fetus becomes “viable” when it is “potentially able to live outside the mother’s womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.” Id. at 160 (footnotes omitted).


\(^{568}\) 410 U.S. at 192-200. In addition, a residency provision was struck down as violating the privileges and immunities clause of Article IV, § 2. Id. at 200. See analysis under “State Citizenship: Privileges and Immunities,” supra.
abortion judgments inasmuch as the doctor could utilize his best clinical judgment in light of all the attendant circumstances. 569

After the decision in Roe, various states attempted to limit access to this newly found right, such as by requiring spousal or parental consent to obtain an abortion. 570 The Court, however, held that (1) requiring spousal consent was an attempt by the State to delegate a veto power over the decision of the woman and her doctor that the State itself could not exercise, 571 (2) that no significant state interests justified the imposition of a blanket parental consent requirement as a condition of the obtaining of an abortion by an unmarried minor during the first 12 weeks of pregnancy, 572 and

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569 410 U.S. at 191-92. “[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.” Id. at 192. Presumably this discussion applies to the Court’s ruling in Roe holding that even in the third trimester the woman may not be forbidden to have an abortion if it is necessary to preserve her health as well as her life, 410 U.S. at 163-64, a holding which is unelaborated in the opinion. See also United States v. Vuitch, 402 U.S. 62 (1971).


571 Planned Parenthood v. Danforth, 428 U.S. 52, 67–72 (1976). The Court recognized the husband’s interests and the state interest in promoting marital harmony. But the latter was deemed not served by the requirement, and, since when the spouses disagree on the abortion decision one has to prevail, the Court thought the person who bears the child and who is the more directly affected should be the one to prevail. Justices White and Rehnquist and Chief Justice Burger dissented. Id. at 92.

572 428 U.S. at 72-75. Minors have rights protected by the Constitution, but the States have broader authority to regulate their activities than those of adults. Here, the Court perceived no state interest served by the requirement that overcomes the woman’s right to make her own decision; it emphasized that it was not holding that every minor, regardless of age or maturity, could give effective consent for an abortion. Justice Stevens joined the other dissenters on this part of the holding. Id. at 101. In Bellotti v. Baird, 443 U.S. 622 (1979), eight Justices agreed that a parental consent law, applied to a mature minor found to be capable of making, and having made, an informed and reasonable decision to have an abortion, was void but split on the reasoning. Four Justices would hold that neither parents nor a court could be given an absolute veto over a mature minor’s decision, while four others would hold that if parental consent is required the State must afford an expeditious access to court to review the parental determination and set it aside in appropriate cases. In H. L. v. Matheson, 450 U.S. 398 (1981), the Court upheld, as applied to an unemancipated minor living at home and dependent on her parents, a statute requiring a physician, “if possible,” to notify the parents or guardians of a minor seeking an abortion. The decisions leave open a variety of questions, addressed by some concurring and dissenting Justices, dealing with when it would not be in the minor’s best interest to avoid notifying her parents and with the alternatives to parental
(3) that a criminal provision requiring the attending physician to exercise all care and diligence to preserve the life and health of the fetus without regard to the stage of viability was inconsistent with Roe. The Court did sustain provisions that required the woman’s written consent to an abortion with assurances that it is informed and freely given, and the Court also upheld mandatory reporting and record keeping for public health purposes with adequate assurances of confidentiality. Another provision that barred the use of the most commonly used method of abortion after the first 12 weeks of pregnancy was declared unconstitutional since in the absence of another comparably safe technique it did not qualify as a reasonable protection of maternal health and it instead operated to deny the vast majority of abortions after the first 12 weeks.

In other rulings applying Roe, the Court struck down some requirements and upheld others. A requirement that all abortions performed after the first trimester be performed in a hospital was invalidated as imposing “a heavy, and unnecessary, burden on women’s access to a relatively inexpensive, otherwise accessible, and [at least during the first few weeks of the second trimester] safe abortion procedure.” The Court held, however, that a state may require that abortions be performed in hospitals or licensed outpatient clinics, as long as licensing standards do not “depart from accepted medical practice.” Various “informed consent” requirements were struck down as intruding upon the discretion of the physician, and as being aimed at discouraging abortions rather than at informing the pregnant woman’s decision. The Court


573 Planned Parenthood v. Danforth, 428 U.S. 52, 81–84 (1976). A law requiring a doctor, subject to penal sanction, to determine if a fetus is viable or may be viable and to take steps to preserve the life and health of viable fetuses was held to be unconstitutionally vague. Colautti v. Franklin, 439 U.S. 379 (1979).


575 City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 438 (1983); Accord, Planned Parenthood Ass’n v. Ashcroft, 462 U.S. 476 (1983). The Court in Akron relied on evidence that “dilation and evacuation” (D&E) abortions performed in clinics cost less than half as much as hospital abortions, and that common use of the D&E procedure had “increased dramatically” the safety of second trimester abortions in the 10 years since Roe v. Wade. 462 U.S. at 435–36.


577 City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444–45 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). In City of Akron, the Court explained that while the state has a legitimate interest in ensuring that the woman’s consent is informed, it may not de-
also invalidated a 24-hour waiting period following a woman’s written, informed consent.578

On the other hand, the Court has upheld a requirement that tissue removed in clinic abortions be submitted to a pathologist for examination, since the same requirements were imposed for in-hospital abortions and for almost all other in-hospital surgery.579 Also, the Court upheld a requirement that a second physician be present at abortions performed after viability in order to assist in saving the life of the fetus.580 Further, the Court refused to extend Roe to require States to pay for abortions for the indigent, holding that neither due process nor equal protection requires government to use public funds for this purpose.581

The equal protection discussion in the public funding case bears closer examination because of its significance for later cases. The equal protection question arose because public funds were being made available for medical care to indigents, including costs attendant to childbirth, but not for expenses associated with abortions. Admittedly, discrimination based on a non-suspect class such as indigents does not generally compel strict scrutiny. However, the question arose as to whether such a distinction impinged upon the right to abortion, and thus should be subjected to heightened scrutiny. The Court rejected this argument and used a rational basis test, noting that the condition that was a barrier to getting an abortion—indigency—was not created or exacerbated by the government.

In reaching this finding the Court held that, while a state-created obstacle need not be absolute to be impermissible, it must at a minimum “unduly burden” the right to terminate a pregnancy. And, the Court held, to allocate public funds so as to further a state interest in normal childbirth does not create an absolute ob-

580 462 U.S. at 482-86, 505.
581 Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). See also Beal v. Doe, 432 U.S. 438 (1977) (states are not required by federal law to fund abortions); Harris v. McRae, 448 U.S. at 306–11 (same). The state restriction in Maher, 432 U.S. at 466, applied to nontherapeutic abortions, whereas the federal law barred funding for most medically necessary abortions as well, a distinction the Court deemed irrelevant, Harris, 448 U.S. at 323, although it provided Justice Stevens with the basis for reaching different results. Id. at 349 (dissenting).
stale to obtaining and does not unduly burden the right. What is interesting about this holding is that the “undue burden” standard was to take on new significance when the Court began raising questions about the scope and even the legitimacy of Roe.

Although the Court expressly reaffirmed Roe v. Wade in 1983, its 1989 decision in Webster v. Reproductive Health Services signaled the beginning of a retrenchment. Webster upheld two aspects of a Missouri statute regulating abortions: a prohibition on the use of public facilities and employees to perform abortions not necessary to save the life of the mother; and a requirement that a physician, before performing an abortion on a fetus she has reason to believe has reached a gestational age of 20 weeks, make an actual viability determination. This retrenchment was also apparent in two 1990 cases in which the Court upheld both one-parent and two-parent notification requirements.

Webster, however, exposed a split in the Court’s approach to Roe v. Wade. The plurality opinion by Chief Justice Rehnquist, joined in that part by Justices White and Kennedy, was highly crit-

582 "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there.” Maher, 432 U.S. at 469–74 (the quoted sentence is at 474); Harris, 448 U.S. at 321–26. Justices Brennan, Marshall, and Blackmun dissented in both cases and Justice Stevens joined them in Harris. Applying the same principles, the Court held that a municipal hospital could constitutionally provide hospital services for indigent women for childbirth but deny services for abortion. Poelker v. Doe, 432 U.S. 519 (1977).


585 The Court declined to rule on several other aspects of Missouri’s law, including a preamble stating that life begins at conception, and a prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion.

586 Ohio’s requirement that one parent be notified of a minor’s intent to obtain an abortion, or that the minor use a judicial bypass procedure to obtain the approval of a juvenile court, was approved. Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990). And, while the Court ruled that Minnesota’s requirement that both parents be notified was invalid standing alone, the statute was saved by a judicial bypass alternative. Hodgson v. Minnesota, 497 U.S. 417 (1990).
ical of Roe, but found no occasion to overrule it. Instead, the plurality’s approach sought to water down Roe by applying a less stringent standard of review. For instance, the plurality found the viability testing requirement valid because it “permissibly furthers the State’s interest in protecting potential human life.” Justice O'Connor, however, concurred in the result based on her view that the requirement did not impose “an undue burden” on a woman’s right to an abortion, while Justice Scalia’s concurrence urged that Roe be overruled outright. Thus, when a Court majority later invalidated a Minnesota procedure requiring notification of both parents without judicial bypass, it did so because it did “not reasonably further any legitimate state interest.”

Roe was not confronted more directly in Webster because the viability testing requirement, as characterized by the plurality, merely asserted a state interest in protecting potential human life after viability, and hence did not challenge Roe’s ‘trimester framework.’ Nonetheless, a majority of Justices appeared ready to reject a strict trimester approach. The plurality asserted a compelling state interest in protecting human life throughout pregnancy, rejecting the notion that the state interest “should come into existence only at the point of viability;” Justice O'Connor repeated her view that the trimester approach is “problematic;” and, as mentioned, Justice Scalia would have done away with Roe altogether.

Three years later, however, the Court invoked principles of stare decisis to reaffirm Roe’s “essential holding,” although it had by now abandoned the trimester approach and adopted Justice O'Connor’s “undue burden” test and Roe’s “essential holding.”

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587 492 U.S. at 519-20. Dissenting Justice Blackmun, joined by Justices Brennan and Marshall, argued that this “permissibly furthers” standard “completely disregards the irreducible minimum of Roe . . . that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy,” and instead balances “a lead weight” (the State’s interest in fetal life) against a “feather” (a woman’s liberty interest). Id. at 555, 556 n.11.


589 492 U.S. at 521. Concurring Justice O'Connor agreed that “no decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible.” Id. at 528.

590 492 U.S. at 519.

591 492 U.S. at 529. Previously, dissenting in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983), Justice O'Connor had suggested that the Roe trimester framework “is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.”

592 It was a new alignment of Justices that restated and preserved Roe. Joining Justice O'Connor in a jointly authored opinion adopting and applying Justice
According to the Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, the right to abortion has three parts. “First is a recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”

This restatement of Roe’s essentials, recognizing a legitimate state interest in protecting fetal life throughout pregnancy, necessarily eliminated the rigid trimester analysis permitting almost no regulation in the first trimester. Viability, however, still marked “the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions,” but less burdensome regulations could be applied before viability. “What is at stake,” the three-Justice plurality asserted, “is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.” Thus, unless an undue burden is imposed, states may adopt measures “designed to persuade [a woman] to choose childbirth over abortion.”

O’Connor’s “undue burden” analysis were Justices Kennedy and Souter. Justices Blackmun and Stevens joined parts of the plurality opinion, but dissented from other parts. Justice Stevens would not have abandoned trimester analysis, and would have invalidated the 24-hour waiting period and aspects of the informed consent requirement. Justice Blackmun, author of the Court’s opinion in Roe, asserted that “the right to reproductive choice is entitled to the full protection afforded by this Court before Webster,” id. at 923, and would have invalidated all of the challenged provisions. Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, would have overruled Roe and upheld all challenged aspects of the Pennsylvania law.

505 U.S. at 877-78. Application of these principles in Casey led the Court to uphold overrule some precedent, but to invalidate arguably the most restrictive provision. The four provisions challenged which were upheld included a narrowed definition of “medical emergency” (which controlled exemptions from the Act’s limitations), record keeping and reporting requirements, an informed consent and 24-hour waiting period requirement; and a parental consent requirement, with possibility for judicial bypass, applicable to minors. The provisions which was invalidated as an
Casey did, however, overturn earlier decisions striking down informed consent and 24-hour waiting periods.\(^{596}\) Given the state’s legitimate interests in protecting the life of the unborn and the health of the potential mother, and applying “undue burden” analysis, the three-Justice plurality found these requirements permissible.\(^{597}\) The Court also upheld application of an additional requirement that women under age 18 obtain the consent of one parent or avail themselves of a judicial bypass alternative.

On the other hand, the Court\(^{598}\) distinguished Pennsylvania’s spousal notification provision as constituting an undue burden on a woman’s right to choose an abortion. “A State may not give to a man the kind of dominion over his wife that parents exercise over their children” (and that men exercised over their wives at common law).\(^{599}\) Although there was an exception for a woman who believed that notifying her husband would subject her to bodily injury, this exception was not broad enough to cover other forms of abusive retaliation, e.g., psychological intimidation, bodily harm to children, or financial deprivation. To require a wife to notify her husband in spite of her fear of such abuse would unduly burden the wife’s liberty interest as an individual to decide whether to bear a child.

The passage of various state laws restricting so-called “partial birth abortions” gave observers an opportunity to see if the “undue burden” standard was in fact likely to lead to a major retrenchment in abortion regulation. In \textit{Stenberg v. Carhart},\(^{600}\) the Court reviewed a Nebraska statute which forbade “partially delivering vaginally a living unborn child before killing the unborn child and completing the delivery.” The Court noted that the prohibition ap-


\(^{597}\) Requiring informed consent for medical procedures was found to be both commonplace and reasonable, and, in the absence of any evidence of burden, the state could require that information relevant to informed consent be provided by a physician rather than an assistant. The 24-hour waiting period was approved both in theory (it being reasonable to assume “that important decisions will be more informed and deliberate if they follow some period of reflection”) and in practice (in spite of “troubling” findings of increased burdens on poorer women who must travel significant distances to obtain abortions, and on all women who must twice rather than once brave harassment by anti-abortion protesters). 505 U.S. at 885-87.

\(^{598}\) The plurality Justices were joined in this part of their opinion by Justices Blackmun and Stevens.

\(^{599}\) 505 U.S. at 898.

peared to apply to abortions performed throughout a pregnancy, and that the lone exception was for an abortion necessary to preserve the life of the mother. Thus the statute brought into question both the distinction maintained in *Casey* between pre-viability and post-viability abortions, and the oft-repeated language from *Roe*, which provides that abortion restrictions must contain exceptions for situations where there is a threat to either the life or the health of a pregnant woman. The Court, however, reaffirmed these central tenets of its abortion decisions, striking down the Nebraska law because its possible application to pre-viability abortions was too broad and the exception for threats to the life of the mother was too narrow.

**Privacy after Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?** — The use of strict scrutiny to review intrusions on personal liberties in *Roe v. Wade* seemed to portend the Court’s striking down many other governmental restraints upon personal activities. Those developments have not occurred, however, as the Court has been cautious in extending the right to privacy. Part of the reason that the Court may have been slow to extend the rationale of *Roe v. Wade* to other contexts was that “privacy” or the right “to be let alone” appears to encompass a number of different concepts arising from different parts of the Constitution, and the same combination of privacy rights and competing governmental interests are not necessarily implicated in other types of “private” conduct.

For instance, the term “privacy” itself seems to encompass at least two different but related issues. First, it relates to disclosure of information to the outside world, *i.e.*, the right of individuals to determine how much and what information about themselves is to be revealed to others. Second, it relates inward toward notions of personal autonomy, *i.e.*, the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences. These dual concepts, here referred to as “informational privacy” and “personal autonomy”, can easily arise in the same case, as government regulation of personal behavior can limit per-
sonal autonomy, while investigating and prosecuting such behavior can expose it to public scrutiny. Unfortunately, some of the Court's cases identified violations of a right of privacy without necessarily making this distinction clear. While the main thrust of the Court's fundamental-rights analysis appears to emphasize the personal autonomy aspect of privacy, now often phrased as "liberty" interests, a clear analytical framework for parsing these two concepts in different contexts has not yet been established.

Another reason that there is difficulty in defining "privacy" is that the right appears to arise from multiple sources. For instance, the Court first identified issues regarding informational privacy as specifically tied to various of the provisions of Bill of Rights, including the First and Fourth Amendments. In Griswold v. Connecticut, however, Justice Douglas found an independent right of privacy in the "penumbras" of these and other constitutional provisions. Although the parameters and limits of the right to privacy were not well delineated by that decision, which struck down a statute banning married couples from using contraceptives, the right appeared to be based on the notion that the government should not be allowed to gather information about private, personal activities. However, years later, when the closely related abortion cases were decided, the right to privacy being discussed was now characterized as a "liberty interest" protected under the due process clause of the Fourteenth Amendment, and the basis for the right identified was more consistent with a concern for personal autonomy.

After Griswold, the Court had several opportunities to address and expand on the concept of Fourteenth Amendment informational privacy, but instead it returned to Fourth and Fifth Amendment principles to address official regulation of personal informa-

\footnote{381 U.S. 479 (1965).}

\footnote{The predominant concern flowing through the several opinions in Griswold v. Connecticut is the threat of forced disclosure about the private and intimate lives of persons through the pervasive surveillance and investigative efforts that would be needed to enforce such a law; moreover, the concern was not limited to the pressures such investigative techniques would impose on the confines of the Fourth Amendment's search and seizure clause, but also included techniques that would have been within the range of permissible investigation.}


Similarly, in Fisher v. United States, the Court held that the Fifth Amendment's self-incrimination clause did not prevent the IRS from obtaining income tax records prepared by accountants and in the hands of either the taxpayer or his attorney, no matter how incriminating, because the Amendment only protects against compelled testimonial self-incrimination. The Court noted that it "has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." Further, "[w]e cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment." 425 U.S. at 401.


610 The Bank Secrecy Act required the banks to retain cancelled checks. The Court held that the checks were business records of the bank in which the depositors had no expectation of privacy and therefore there was no Fourth Amendment standing to challenge government legal process directed to the bank, and this status was unchanged by the fact that the banks kept the records under government mandate in the first place.


613 425 U.S. at 399.

614 425 U.S. at 401.
So what remains of informational privacy? Interestingly, a cryptic opinion in *Whalen v. Roe* may indicate the Court’s continuing willingness to recognize privacy interests as independent constitutional rights. At issue was a state’s pervasive regulation of prescription drugs with abuse potential, and a centralized computer record-keeping system through which prescriptions, including patient identification, could be stored. The scheme was attacked on the basis that it invaded privacy interests against disclosure and privacy interests involving autonomy of persons in choosing whether to have the medication. The Court appeared to agree that both interests are protected, but because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to “pose a sufficiently grievous threat to either interest to establish a constitutional violation.” Lower court cases have raised substantial questions as to whether this case established a “fundamental right” to informational privacy, and instead found that some as yet unspecified balancing test or intermediate level of scrutiny was at play.

In the interim, the Court briefly considered yet another aspect of privacy - the idea that certain personal activities that were otherwise unprotected could obtain some level of constitutional protection by being performed in particular private locations, such as the home. In *Stanley v. Georgia*, the Court held that the government may not make private possession of obscene materials for private use a crime. Normally, investigation and apprehension of an individual for possessing pornography in the privacy of the home would raise obvious First Amendment free speech and the Fourth Amendment search and seizure issues. In this case, however, the material was obscenity, unprotected by the First Amendment, and the police had a valid search warrant, obviating Fourth Amendment con-

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616 429 U.S. at 598-604. The Court cautioned that it had decided nothing about the privacy implications of the accumulation and disclosure of vast amounts of information in data banks. Safeguarding such information from disclosure “arguably has its roots in the Constitution,” at least “in some circumstances,” the Court seemed to indicate. Id. at 605. Compare id. at 606 (Justice Brennan concurring). What the Court’s careful circumscription of the privacy issue through balancing does to the concept is unclear after Nixon v. Administrator of General Services, 433 U.S. 425, 455–65 (1977) (stating that an invasion of privacy claim “cannot be considered in abstract [and] . . . must be weighed against the public interest”). But see id. at 504, 525–36 (Chief Justice Burger dissenting), and 545 n.1 (Justice Rehnquist dissenting).
617 See, e.g., *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (“. . . we believe that the balancing test, more common to due process claims, is appropriate here.”).
cerns. Nonetheless, the Court based its decision upon a person’s protected right to receive what information and ideas he wishes, which derives from the “right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy,” and from the failure of the state to either justify protecting an individual from himself or to show empirical proof of such activity harming society.

The potential significance of Stanley was enormous, as any number of illegal personal activities, such as drug use or illegal sex acts, could arguably be practiced in the privacy of one’s home with little apparent effect on others. The Stanley decision, however, was quickly restricted to the particular facts of the case, namely possession of pornography in the home. In Paris Adult Theatre v. Slaton, which upheld the government’s power to prevent the showing of obscene material in an adult theater, the Court recognized that governmental interests in regulating private conduct could include the promotion of individual character and public morality, and improvement of the quality of life and “tone” of society. “It is argued that individual ‘free will’ must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual’s desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. . . . [Many laws are enacted] to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.”

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619 In fact, the Court passed over a subsidiary Fourth Amendment issue that was available for decision in favor of a broader resolution. 394 U.S. at 569-72. (Stewart, J., concurring).
620 394 U.S. at 564-65
621 The rights noted by the Court were held superior to the interests Georgia asserted to override them. That is, first, the State was held to have no authority to protect an individual’s mind from the effects of obscenity, to promote the moral content of one’s thoughts. Second, the State’s assertion that exposure to obscenity may lead to deviant sexual behavior was rejected on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.
624 413 U.S. at 64. Similar themes can be found in Roe v. Wade, 410 U.S. 113, 148 (1972), decided the year before. Because the Court had determined that the
Furthermore, continued the Paris Adult Theatre Court “[o]ur Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as ‘wrong’ or ‘sinful.’ The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States’ ‘right . . . to maintain a decent society.’”

Ultimately, the idea that acts should be protected not because of what they are, but because of where they are performed, may have begun and ended with Stanley. The limited impact of Stanley was reemphasized in Bowers v. Hardwick. The Court in Bowers, finding that there is no protected right to engage in homosexual sodomy in the privacy of the home, held that Stanley did not implicitly create protection for “voluntary sexual conduct [in the home] between consenting adults.” Instead, the Court found Stanley “firmly grounded in the First Amendment,” and noted that extending the reasoning of that case to homosexual conduct would result in protecting all voluntary sexual conduct between

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625 Paris Adult Theatre v. Slaton, 413 U.S. 49, 57–63, 63–64, 68–69 (1973); and see id. at 68 n.15. While denying a privacy right to view obscenity in a theater, the Court did recognize that in order to protect otherwise recognized autonomy rights, the privacy right might need to be expanded to a variety of different locations: “[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor’s office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.” Paris Adult Theatre v. Slaton, 413 U.S. 49, 66 n.13 (1973). Thus, arguably, the constitutional protection of places (as opposed to activities) arises not because of any inherent privacy of the location, but because the protected activities normally take place in those locales.

626 478 U.S. at 195–96. Dissenting Justice Blackmun challenged the Court’s characterization of Stanley, suggesting that it had rested as much on the Fourth as on the First Amendment, and that “the right of an individual to conduct intimate relationships in . . . his or her own home [is] at the heart of the Constitution’s protection of privacy.” Id. at 207–08.

consenting adults, including adultery, incest, and other sexual crimes. This, said the Court, was a step it was not willing to take.

So, what of an expansion of the right to privacy under the rubric of personal autonomy? The Court speaking in Roe in 1973 made it clear that, despite the importance of its decision, the protection of personal autonomy was limited to a relatively narrow range of behavior. “The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942); contraception, Eisenstadt v. Baird, 405 U.S. at 453–54; id. at 460, 463–65 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra.”

The limits of this doctrine were amply demonstrated in 1986 by, again, Bowers v. Hardwick, where the Court by 5–4 vote roundly rejected the suggestion that the privacy cases protecting “family, marriage, or procreation” extend protection to private consensual homosexual sodomy, and also rejected the more comprehensive claim that the cases “stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription.” Justice White’s opinion for the Court in Hardwick sounded the same opposition to “announcing rights not readily identifiable in the Constitution’s text” that underlay his dissents in the abortion cases. In addition, the Court concluded that rationales relied upon in the earlier

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630 “[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.” 478 U.S. at 190-91.
631478 U.S. at 191. The Court asserted that Carey v. Population Services Int’l, 431 U.S. 678, 694 n.17 (1977), which had reserved decision on the issue, had established that the privacy right “did not reach so far.”
632478 U.S. at 191.
privacy cases do not extend “a fundamental right to homosexuals to engage in acts of consensual sodomy.” Heavy reliance was placed on the fact that prohibitions on sodomy have “ancient roots,” and on the fact that half of the states still prohibited the practices. The privacy of the home does not immunize all behavior from state regulation, and the Court was “unwilling to start down [the] road” of immunizing “voluntary sexual conduct between consenting adults.”

Interestingly, Justice Blackmun’s dissent in *Hardwick* was most critical of the Court’s framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited. Justice Blackmun would have instead addressed the issue more broadly as to whether the law violated an individual’s privacy right “to be let alone.” The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to “family, marriage, motherhood, procreation, and child rearing.”

Even as limited by *Roe*, the concept of privacy still retains sufficient breadth to occasion major constitutional decisions. For instance, in the 1977 case of *Carey v. Population Services International*, recognition of the “constitutional protection of individual autonomy in matters of childbearing” led the Court to invali-
date a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16. The Court significantly extended the Griswold-Baird line of cases so as to make the “decision whether or not to beget or bear a child” a “constitutionally protected right of privacy” interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to express only that interest or interests.

As exemplified by this case, the extent to which governmental regulation of the sexual activities of minors is subject to constitutional scrutiny is of great and continuing importance. Analysis of these questions is hampered, however, because the Court has not told us what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships to result in differing constitutional treatment. The Court’s observation in the abortion cases “that only personal rights that can be deemed ‘fundamental’ are included in this guarantee of personal privacy,” occasioning justification by a “compelling” interest, little elucidates the answers inasmuch as in the same Term the Court significantly restricted its equal protection

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640 431 U.S. at 684-91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court’s general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 702. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

The limitation of the number of outlets to adults “imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so” and was unjustified by any interest put forward by the State. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve “any significant state interest . . . that is not present in the case of an adult.” This test is “apparently less rigorous” than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors’ sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity. Id. at 691–99. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

641 The Court reserved this question in Carey, 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

doctrine of “fundamental” interests—“compelling” interest justification by holding that the “key” to discovering whether an interest or a relationship is a “fundamental” one is whether it is “explicitly or implicitly guaranteed by the Constitution.”

Whether there still exists an expansive right of “privacy,” as opposed to the limited “liberty” interest of more recent cases, is still unclear. There still appears to be a tendency to designate a right or interest as a right of privacy when the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is now settled to be a “liberty” protected under the due process clauses, however, the analytical validity of denoting the particular right or interest as an element of privacy seems open to question.

**Family Relationships**—Unlike the shifting definitions of the “privacy” line of case, the Court’s treatment of the “liberty” of familial relationships has a relatively principled doctrinal basis. Starting with *Meyer* and *Pierce*, the Court has held that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.” For instance, the right to marry is a fundamental right protected by the due process clause, and only “reasonable regulations” of such relationship may be imposed. Thus, the Court has held that a state may not deny the right to marry to someone who has failed to meet a child support obligation, as the State already has numerous other means for exacting compliance with support obligations. In fact, any regulation which aff

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643 San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this restriction is not holding with respect to equal protection analysis or due process analysis can be discerned easily. Compare Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), with id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).


ffects the ability to form, maintain, dissolve, or resolve conflicts within a family is subject to rigorous judicial scrutiny.

There is also a constitutional right to live together as a family, and this right is not limited to the nuclear family. Thus, a neighborhood which is zoned for single family occupancy, and which defines “family” so as to prevent a grandmother from caring for two grandchildren of different children, was found to violate the due process clause. And the concept of “family” may extend beyond the biological relationship to the situation of foster families, although the Court has acknowledged that such a claim raises complex and novel questions, and that the liberty interests may be limited. On the other hand, the Court has held, the presumption of legitimacy accorded to a child born to a married woman living with her husband is valid even to defeat the right of the child’s biological father to establish paternity and visitation rights.

The Court has merely touched upon but not dealt definitively with the complex and novel questions raised by possible conflicts between parental rights and children’s rights. The Court has, however, imposed limits on the ability of a court to require that

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649 "If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest, I should have little doubt that the State would have intruded impermissibly on ‘the private realm of family life which the state cannot enter.” Smith v. Organization of Foster Families, 431 U.S. 816, 862–63 (1977) (Justice Stewart concurring), cited with approval in Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

650 Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion). The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. Id. at 513.

651 Smith v. Organization of Foster Families, 431 U.S. 816 (1977). As the Court noted, the rights of a natural family arise independently of statutory law, whereas the ties that develop between a foster parent and a foster child arise as a result of State-ordered arrangement. As these latter liberty interests arise from positive law, they are subject to the limited expectations and entitlements provided under those laws. Further, in some cases, such liberty interests may not be recognized without derogation of the substantive liberty interests of the natural parents. Although Smith does not define the nature of the interest of foster parents, it would appear to be quite limited and attenuated. Id. at 842–47. In a conflict between natural and foster families, a court is likely to defer to a typical state process which makes such decisions based on the best interests of the child. See Quilloin v. Walcott, 434 U.S. 246 (1978).

652 Michael H. v. Gerald D., 491 U.S. 110 (1989). There was no opinion of the Court. A majority of Justices (Brennan, Marshall, Blackmun, Stevens, White) was willing to recognize that the biological father has a liberty interest in a relationship with his child, but Justice Stevens voted with the plurality (Scalia, Rehnquist, O’Connor, Kennedy) because he believed that the statute at issue adequately protected that interest.

children be made available for visitation with grandparents and other third parties. In *Troxel v. Granville*, the Court evaluated a Washington State law which allowed "any person" to petition a court "at any time" to obtain visitation rights whenever visitation "may serve the best interests" of a child. Under this law, a child's grandparents were awarded more visitation with a child than was desired by the sole surviving parent. A plurality of the Court, noting the "fundamental rights of parents to make decisions concerning the care, custody and control of their children," reversed this decision, noting the lack of deference to the parent's wishes and the contravention of the traditional presumption that a fit parent will act in the best interests of a child.

Liberty Interests of the Retarded, Mentally Ill or Abnormal: Civil Commitment and Treatment.—The recognition of liberty rights for retarded or handicapped individuals who are involuntarily committed or who voluntarily seek commitment to public institutions is potentially a major development in substantive due process. The States, pursuant to their *parens patriae* power, have a substantial interest in institutionalizing persons in need of care, both for their own protection and for the protection of others. Each individual, on the other hand, has a due process protected interest in freedom from confinement and personal restraint, and a liberty interest in reducing the degree of confinement exists even when individuals are properly committed. Little controversy has attended the gradual accretion of case law in the lower courts, now confirmed by the Supreme Court, that the due process clause guarantees freedom from unsafe conditions of confinement and undue physical restraint. A number of influential lower court decisions have also found a significant right to treatment or "habili-

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655 530 U.S. at 66.
656 These principles have no application to persons not held in custody by the state. DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no Due Process violation for failure of state to protect an abused child from his parent, even when the social service agency had been notified of possible abuse, and possibility had been substantiated through visits by social worker).
658 Youngberg v. Romeo, 457 U.S. 307, 314–316 (1982). Thus, personal security constitutes a "historic liberty interest" protected substantively by the due process clause. Ingraham v. Wright, 430 U.S. 651, 673 (1977) (liberty interest in being free from undeserved corporal punishment in school); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Justice Powell concurring) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental actions").
659 In Jackson v. Indiana, 406 U.S. 715, 738 (1972), the Court had said that "due process requires that the nature and duration of commitment bear some reasonable
tation,” although the Supreme Court’s approach in this area has been tentative.

For instance, in Youngberg v. Romeo, the Court recognized a liberty right to “minimally adequate or reasonable training to ensure safety and freedom from undue restraint.” While the lower court had agreed with plaintiff’s theory of entitlement to “such treatment as will afford a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit,” the Supreme Court felt that the plaintiff had reduced his theory to a claim for “training related to safety and freedom from restraint.” But the Court’s concern for federalism, its reluctance to approve judicial activism in supervising institutions, and its recognition of the budgetary constraints associated with state provision of services caused it to hold that lower federal courts need to defer to professional decision making to determine what level of care was adequate. Professional decisions are presumptively valid and liability can be imposed “only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision to the purpose for which the individual is committed.” Reasoning that if commitment is for treatment and betterment of individuals, it must be accompanied by adequate treatment, several lower courts recognized a due process right. E.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D.Ala), enforced, 334 F. Supp. 1341 (1971), supplemented, 334 F. Supp. 373 and 344 F. Supp. 387 (M.D.Ala. 1972), aff’d in part, reserved in part, and remanded, sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Donaldson v. O’Connor, 493 F.2d 507 (5th Cir. 1974), vacated on other grounds, 432 U.S. 563 (1975).

The word ‘habilitation’ is commonly used to refer to programs for the mentally retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. The principal focus of habilitation is upon training and development of needed skills.” Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982) (quoting amicus brief for American Psychiatric Association).

While the lower court had agreed with plaintiff’s theory of entitlement to “such treatment as will afford a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as [his] capacities permit,” the Supreme Court felt that the plaintiff had reduced his theory to a claim for “training related to safety and freedom from restraint.” But the Court’s concern for federalism, its reluctance to approve judicial activism in supervising institutions, and its recognition of the budgetary constraints associated with state provision of services caused it to hold that lower federal courts need to defer to professional decision making to determine what level of care was adequate. Professional decisions are presumptively valid and liability can be imposed “only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision to the purpose for which the individual is committed.” Reasoning that if commitment is for treatment and betterment of individuals, it must be accompanied by adequate treatment, several lower courts recognized a due process right. E.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D.Ala), enforced, 334 F. Supp. 1341 (1971), supplemented, 334 F. Supp. 373 and 344 F. Supp. 387 (M.D.Ala. 1972), aff’d in part, reserved in part, and remanded, sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Donaldson v. O’Connor, 493 F.2d 507 (5th Cir. 1974), vacated on other grounds, 432 U.S. 563 (1975).
sion on such a judgment.” 664 Presumably, however, the difference between liability for damages and injunctive relief will still afford federal courts considerable latitude in enjoining institutions to better their services in the future, even if they cannot award damages for past failures. 665

The Court’s resolution of a case involving persistent sexual offenders suggests that state civil commitment systems, besides confining the dangerously mentally ill, may also act to incapacitate persons predisposed to engage in specific criminal behaviors. In Kansas v. Hendricks, 666 the Court upheld a Kansas law which allowed civil commitment without a showing of “mental illness,” so that a defendant diagnosed as a pedophile could be committed based on his having a “mental abnormality” which made him “likely to engage in acts of sexual violence.” Although the Court minimized the use of this expanded nomenclature, 667 the concept of “mental abnormality” appears both more encompassing and less defined than the concept of “mental illness.” It is unclear how, or whether, the Court would distinguish this case from the indefinite civil commitment of other recidivists such as drug offenders. A subsequent opinion does seem to narrow the Hendricks holding so as to require an additional finding that the defendant would have difficulty controlling his or her behavior. 668

Still other issues await exploration. The whole area of the rights of committed individuals will likely be explored under a substantive and procedural due process analysis. 669 Additionally, federal legislation is becoming extensive, 670 and state legislative and

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664 457 U.S. at 323.
665 E.g., Ohlinger v. Watson, 652 F.2d 775, 779 (9th Cir. 1980); Welsch v. Likins, 550 F.2d 1122, 1132 (8th Cir. 1977). Of course, lack of funding will create problems with respect to injunctive relief as well. Cf. New York State Ass’n for Retarded Children v. Carey, 631 F.2d 162, 163 (2d Cir. 1980). It should be noted that the Supreme Court has limited the injunctive powers of the federal courts in similar situations.
667 521 U.S. at 359. But see Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (holding that a state can not hold a person suffering from a personality disorder without clear and convincing proof of a mental illness).
669 See Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974). In Mills v. Rogers, 457 U.S. 291 (1982), the Court had before it the issue of the due process right of committed mental patients at state hospitals to refuse administration of antipsychotic drugs. An intervening decision of the State’s highest court had measurably strengthened the patients’ rights under both state and federal law and the Court remanded for reconsideration in light of the state court decision. See also Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981).
judicial development of law is highly important because the Supreme Court looks to this law as one source of the interests which the due process clause protects. 671

“Right to Die”.—Although the popular term “right to die” has been used as a label to describe the debate over end-of-life decisions, the underlying issues include a variety of legal concepts, some distinct and some overlapping. For instance, “right to die” could include issues of suicide, passive euthanasia (allowing a person to die by refusal or withdrawal of medical intervention), assisted suicide (providing a person the means of committing suicide), active euthanasia (killing another), and palliative care (providing comfort care which accelerates the death process). Recently, a new category has been suggested—physician-assisted suicide—which appears to be an uncertain blend of assisted suicide or active euthanasia undertaken by a licensed physician.

There has been little litigation of constitutional issues surrounding suicide generally, although Supreme Court dicta seems to favor the notion that the state has a constitutionally defensible interest in preserving the lives of healthy citizens. 672 On the other hand, the right of a seriously ill person to terminate life-sustaining medical treatment has been addressed, but not squarely faced. In Cruzan v. Director, Missouri Department of Health, 673 the Court, rather than directly addressing the issue, “assume[d]” that a competent person has a constitutionally protected right to refuse lifesaving hydration and nutrition. 674 More importantly, however, a majority of the Justices separately declared that such a liberty interest exists. 675 Yet, it is not clear how actively the Court would seek to protect this right from state regulation.

In Cruzan, which involved a patient in a persistent vegetative state, the Court upheld a state requirement that there must be “clear and convincing evidence” of a patient’s previously manifested wishes before nutrition and hydration could be withdrawn. Despite the existence of a presumed due process right, the Court held that a state is not required to follow the judgment of the family, the guardian, or “anyone but the patient herself” in making this decision. 676 Thus, in the absence of clear and convincing evidence that

672 Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 280 (1990) ("We do not think that a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death").
674 497 U.S. at 279.
675 See 497 U.S. at 287 (O’Connor, concurring); id. at 304–05 (Brennan, joined by Marshall and Blackmun, dissenting); id. at 331 (Stevens, dissenting).
676 497 U.S. at 286.
the patient had expressed an interest not to be sustained in a persistent vegetative state, or that she had expressed a desire to have a surrogate make such a decision for her, the state may refuse to allow withdrawal of nutrition and hydration.\footnote{A State is entitled to guard against potential abuses” that can occur if family members do not protect a patient’s best interests, and “may properly decline to make judgments about the ‘quality’ of life that a particular individual may enjoy, and [instead] simply assert an unqualified interest in the preservation of human life to be weighed against the . . . interests of the individual.” 497 U.S. at 281-82.}

Despite the Court’s acceptance of such state requirements, the implications of the case are significant. First, the Court appears, without extensive analysis, to have adopted the position that refusing nutrition and hydration is the same as refusing other forms of medical treatment. Also, the Court seems ready to extend such right not only to terminally ill patients, but also to severely incapacitated patients whose condition has stabilized.\footnote{There was testimony that the patient in Cruzan could be kept “alive” for about 30 years if nutrition and hydration were continued.} However, the Court made clear in a subsequent case,\footnote{521 U.S. 702 (1997). In the companion case of Vacco v. Quill, 521 U.S. 793 (1997), the Court also rejected an argument that a state which prohibited assisted suicide but which allowed termination of medical treatment resulting in death unreasonably discriminated against the terminally ill in violation of the Equal Protection Clause of the Fourteenth Amendment.} that it intends to draw a line between withdrawal of medical treatment and more active forms of intervention.

In\footnote{E.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a liberty interest in terminating pregnancy).} Glucksberg, the Supreme Court rejected an argument that the Due Process Clause provides a terminally ill individual the right to seek and obtain a physician’s aid in committing suicide. Reviewing a challenge to a state statutory prohibition against assisted suicide, the Court noted that it moves with “utmost care” before breaking new ground in the area of liberty interests.\footnote{521 U.S. at 720.} The Court pointed out that suicide and assisted suicide have long been disfavored by the American judicial system, and courts have consistently distinguished between passively allowing death to occur and actively causing such death. The Court rejected the applicability of\footnote{521 U.S. 702 (1997).}\footnote{E.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a liberty interest in terminating pregnancy).} Cruzan and other liberty interest cases,\footnote{E.g., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a liberty interest in terminating pregnancy).} noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected. By rejecting the notion that assisted suicide is constitutionally protected, the Court also appears
to preclude constitutional protection for other forms of intervention in the death process, such as suicide or euthanasia. 682

PROCEDURAL DUE PROCESS: CIVIL

Generally

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power. 683 Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved. 684 One of the basic criteria used to establish if due process is satisfied is whether such procedure was historically required in like circumstance.

Relevance of Historical Use.—The requirements of due process are determined in part by an examination of the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of this country. 685 In other words, the antiquity of a legal procedure is a factor weighing in its favor. However, it does not follow that a procedure settled in English law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be “fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment.” 686 Fortunately, the States

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682 A passing reference by Justice O'Connor in a concurring opinion in Glucksberg and its companion case Vacco v. Quill may, however, portend a liberty interest in seeking pain relief, or “palliative” care. Glucksberg and Vacco, 521 U.S. at 736-37 (Justice O'Connor, concurring).

683 Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

684 Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884). “Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law.” Id. at 708; Accord, Hurtado v. California, 110 U.S. 516, 537 (1884).

685 Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175 U.S. 172, 175 (1899). “A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country.” Hurtado v. California, 110 U.S. at 529.

686 Twining, 211 U.S. at 101.
are not tied down by any provision of the Constitution to the practice and procedure which existed at the common law, but may avail themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary. 687

**Non-Judicial Proceedings.**—A court proceeding is not a requisite of due process. 688 Administrative and executive proceedings are not judicial, yet they may satisfy the due process clause. 689 Moreover, the due process clause does not require *de novo* judicial review of the factual conclusions of state regulatory agencies, 690 and may not require judicial review at all. 691 Nor does the Fourteenth Amendment prohibit a State from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature. 692 Further, it is up to a State to determine to what extent its legislative, executive, and judicial powers should be kept distinct and separate. 693

**The Requirements of Due Process.**—Although due process tolerates variances in procedure “appropriate to the nature of the case,” 694 it is nonetheless possible to identify its core goals and requirements. First, “[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” 695 Thus, the required elements of due process are those that “minimize substantively unfair or mistaken deprivations” by enabling persons to contest the basis upon which a State proposes to deprive them of

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689 For instance, proceedings to raise revenue by levying and collecting taxes are not necessarily judicial proceedings, yet their validity is not thereby impaired. McMillen v. Anderson, 95 U.S. 37, 41 (1877).
691 See, e.g., Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978) (upholding the preclusion of judicial review of decisions of the Veterans Administration regarding veteran’s benefits).
692 State statutes vesting in a parole board certain judicial functions, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade, New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 562 (1905), or vesting in a probate court authority to appoint park commissioners and establish park districts, Ohio ex rel. Bryant v. Akron Park Dist., 281 U.S. 74, 79 (1930), are not in conflict with the due process clause and present no federal question.
693 Carfer v. Caldwell, 200 U.S. 293, 297 (1906).
protected interests. The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

(1) Notice. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it. Such notice, however, need not describe the legal procedures necessary to protect one’s interest if such procedures are otherwise set out in published, generally available public sources.

(2) Hearing. “[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest.” This right is a “basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . .” Thus, the notice of hearing and the opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.”

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697 Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). See also Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayer who challenged a county’s occupation tax was not informed of prior case and where taxpayer interests were not adequately protected).


702 Armstrong v. Manzo, 380 U.S. 545, 552 (1965)
(3) Impartial Tribunal. Just as in criminal and quasi-criminal cases, an impartial decision maker is an essential right in civil proceedings as well. "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board’s effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.

There is, however, a “presumption of honesty and integrity in those serving as adjudicators,” so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. Thus, combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician’s suspension, may raise substantial concerns, but does not by itself establish a violation of due process. The Court has also held that the official or personal stake that school board members had in a decision to fire teachers

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707 Gibson v. Berryhill, 411 U.S. 564 (1973). Or, the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others’ investigations just as one of them would some day judge his, raised a substantial problem which was resolved through statutory construction. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).
709 Withrow v. Larkin, 421 U.S. 35 (1975). Where an administrative officer is acting in a prosecutorial, rather than judicial or quasi-judicial role, an even lesser standard of impartiality applies. Marshall v. Jerrico, 446 U.S. 238, 248–50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But “traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.” Id. at 249.
who had engaged in a strike against the school system in violation of state law was not such so as to disqualify them.\footnote{Hortonville Joint School Dist. v. Hortonville Educ. Ass’n, 426 U.S. 482 (1976). Compare Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (1974) (Justice Powell), with id. at 196–99 (Justice White), and 216 (Justice Marshall).}

(4) Confrontation and Cross-Examining. “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”\footnote{Goldberg v. Kelly, 397 U.S. 254, 269 (1970). See also ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913). Cf. § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).} Where the “evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously,” the individual’s right to show that it is untrue depends on the rights of confrontation and cross-examination. “This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.”\footnote{Greene v. McElroy, 360 U.S. 474, 496 (1959), quoted with approval in Goldberg v. Kelly, 397 U.S. 254, 270 (1970).}

(5) Discovery. The Court has never directly confronted this issue, but in one case it did observe in dictum that “where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”\footnote{Greene v. McElroy, 360 U.S. 474, 496–97 (1959). But see Richardson v. Perales, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). Cf. Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976).} Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so.\footnote{Recommendations and Reports of the Administrative Conference of the United States 571 (1968–1970).} There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization.\footnote{FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964).}

(6) Decision on the Record. While this issue arises principally in the administrative law area,\footnote{The exclusiveness of the record is fundamental in administrative law. See §7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d). However, one must show not only that the agency used ex parte evidence but that he was prejudiced thereby. Market Street Ry. v. Railroad Comm’n, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding ex parte evidence).} it is applicable generally. “[T]he
decisionmaker’s conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing . . . To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.” 717

(7) Counsel. In Goldberg v. Kelly, the Court held that an agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel. 718 In the years since, the Court has struggled with whether civil litigants in court and persons before agencies who could not afford retained counsel should have counsel appointed and paid for, and the matter seems far from settled. The Court has established the presumption that an indigent does not have the right to an appointed counsel unless his “physical liberty” is threatened. 719 However, where other liberty or property interests are threatened, a litigant may overcome this presumption, so that the right of an indigent to appointed counsel is to be determined on a case-by-case basis using a balancing standard. 720

For instance, in a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent’s interest as “an extremely important one.” The Court, however, also noted the State’s strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no “specially troublesome” substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel. 721 In other due process cases involving parental rights, the Court has held that due

719 Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The Court purported to draw this rule from Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no per se right to counsel in probation revocation proceedings). To introduce this presumption into the balancing, however, appears to disregard the fact that the first factor of Mathews v. Eldridge, 424 U.S. 319 (1976), upon which the Court (and dissent) relied, relates to the importance of the interest to the person claiming the right. Thus, at least in this context, the value of the first Eldridge factor is diminished. The Court noted, however, that Mathews v. Eldridge standards were drafted in the context of the generality of cases and were not intended for case-by-case application. Cf. 424 U.S. at 344 (1976)
720 452 U.S. at 31–32. The balancing decision is to be made initially by the trial judge, subject to appellate review. Id. at 32
721 452 U.S. at 27–31. The decision was a five-to-four, with Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, and Justices Blackmun, Brennan, Marshall, and Stevens in dissent. Id. at 35, 59.
process requires special state attention to parental rights.\footnote{See e.g., Little v. Streater, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a paternity action the State required to be instituted); Santosky v. Kramer, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).} Thus, it would appear likely that in other parental right cases, a right to appointed counsel could be established.

The Procedure Which Is Due Process

The Interests Protected: “Life, Liberty and Property”.—
The language of the Fourteenth Amendment requires the provision of due process when an interest in one’s “life, liberty or property” is threatened.\footnote{Morrissey v. Brewer, 408 U.S. 471, 481 (1982). “The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.” Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972). Developments under the Fifth Amendment’s due process clause have been interchangeable. Cf. Arnett v. Kennedy, 416 U.S. 134 (1974).} Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.\footnote{For instance, at common law, one’s right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law, and only for offenses deemed by a legislative body to be particularly heinous. One’s liberty, generally expressed as one’s freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures: One’s ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.} In the 1960s, however, the Court began a rapid expansion of the “liberty” and “property” aspects of the clause to include such non-traditional concepts as conditional property rights and statutory entitlements. Since then, the Court has followed an inconsistent path of expanding and contracting the breadth of these protected interests. The “life” interest, on the other hand, while often important in criminal cases, has found little application in the civil context.

The Property Interest.—The expansion of the concept of “property rights” beyond its common law roots reflected a recognition by the Court that certain interests which fell short of traditional property rights were nonetheless important parts of people’s economic well-being. For instance, where household goods were sold under an installment contract and title was retained by the seller, the possessory interest of the buyer was deemed sufficiently important to require procedural due process before repossession...
could occur. Or, the loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was deemed a sufficient property interest to require some form of determination that the garnisher was likely to prevail. Or, the continued possession of a drivers license, which may be essential to one’s livelihood, is protected; thus, a license should not be suspended after an accident for failure to post a security for the amount of damages claimed by an injured party without affording the driver an opportunity to raise the issue of liability.

A more fundamental shift in the concept of property occurred with recognition of society’s growing economic reliance on government benefits, employment and contracts, and with the decline of the “right-privilege” principle. This principle, discussed previously in the First Amendment context, was pithily summarized by Justice Holmes years ago in dismissing a suit by a policeman protesting being fired from his job: “[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” Under this theory, a finding that a litigant had no “vested property interest” in government employment or that some form of public assistance was “only” a privilege meant that no procedural due process was required before depriving a person of that interest. The reasoning was that if a government was under no obligation to provide something, it could choose to provide it subject to whatever conditions or protected by whatever procedures it might find appropriate.

The conceptual underpinnings of this position, however, were always in conflict with a line of cases holding that the government could not require the diminution of constitutional rights as a condition for receiving benefits. This line of thought, referred to as the “unconstitutional conditions” doctrine, held that “even though a

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725 Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating replevin statutes which authorized the authorities to seize goods simply upon the filing of an ex parte application and the posting of bond).
729 Tribe, supra, at 1084–90.
person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." Nonetheless, the two doctrines coexisted in an unstable relationship until the 1960s, at which point the right-privilege distinction became largely disregarded.

Concurrently with the virtual demise of the "right-privilege" distinction, there arose the "entitlement" doctrine, under which the Court erected a barrier of procedural—but not substantive—protections against erroneous governmental deprivation of something it had within its discretion bestowed. Previously, the Court had limited due process protections to constitutional rights, traditional rights, common law rights and "natural rights." Now, under a new "positivist" approach, a protected property or liberty interest might be found based on any positive governmental statute or governmental practice that gave rise to a legitimate expectation. Indeed, for a time it appeared that this positivist conception of protected rights was going to displace the traditional sources.

As noted previously, the advent of this new doctrine can be seen in Goldberg v. Kelly. In Goldberg, the Court held that, inasmuch as termination of welfare assistance may deprive an eligible recipient of the means of livelihood, the government must provide a pre-termination evidentiary hearing in which an initial determination of the validity of the dispensing agency's grounds for termination could be made. In order to reach this conclusion, the Court found that such benefits "are a matter of statutory entitlement for persons qualified to receive them." Thus, where the loss or reduction of a benefit or privilege was conditioned upon specified grounds, it was found that the recipient had a property


interest entitling him to proper procedure before termination or revocation.

At first, the Court’s emphasis on the importance of the statutory rights to the claimant led some lower courts to apply the due process clause by assessing the weights of the interests involved and the harm done to one who lost what he was claiming. This approach, the Court held, was inappropriate. “[W]e must look not to the ‘weight’ but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment’s protection of liberty and property.” To have a property interest in the constitutional sense, the Court held, it was not enough that one has an abstract need or desire for a benefit or a unilateral expectation. He must rather “have a legitimate claim of entitlement” to the benefit. “Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”

Consequently, in *Board of Regents v. Roth*, the Court held that the refusal to renew a teacher’s contract upon expiration of his one-year term implicated no due process values because there was nothing in the public university’s contract, regulations, or policies that “created any legitimate claim” to reemployment. On the other hand, in *Perry v. Sindermann*, a professor employed for several years at a public college was found to have a protected interest, although his employment contract had no tenure provision nor was there a statutory assurance of it. The “existing rules or  

739 Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972).
740 408 U.S. at 577. Although property interests often arise by statute, the Court has also recognized interests established by state case law. Thus, where state court holdings required that private utilities terminate service only for cause (such as nonpayment of charges), then a utility is required to follow procedures to resolve disputes about payment or the accuracy of charges prior to terminating service. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).
741 436 U.S. at 576–78. The Court also held that no liberty interest was implicated, because in declining to rehire Roth the State had not made any charges against him or taken any actions that would damage his reputation or stigmatize him. 436 at 572–75. For an instance of protection accorded a claimant on the basis of such an action, see Codd v. Velger. See also Bishop v. Wood, 426 U.S. 341, 347–50 (1976); Vitek v. Jones, 445 U.S. 480, 491–94 (1980); Board of Curators v. Horowitz, 435 U.S. 78, 82–84 (1978).
743 408 U.S. at 601–03 (1972). In contrast, a statutory assurance was found in Arnett v. Kennedy, 416 U.S. 134 (1974), where the civil service laws and regulations allowed suspension or termination “only for such cause as would promote the efficiency of the service.” 416 U.S. at 140. On the other hand, a policeman who was
understandings” were deemed to have the characteristics of tenure, and thus provided a legitimate expectation independent of any contract provision.744

The Court has also found “legitimate entitlements” in a variety of other situations beyond employment. In Goss v. Lopez,745 an Ohio statute provided for both free education to all residents between five and 21 years of age and compulsory school attendance; thus, the State was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days. “Having chosen to extend the right to an education to people of appellees’ class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.”746 The Court is highly deferential, however, to school dismissal decisions based on academic grounds.747

An incipient counter-revolution to the expansion of due process appears to have been at least temporarily rebuffed, at least as regards entitlements. In Arnett v. Kennedy,748 three Justices sought to qualify the principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction, albeit in a new formulation. The case involved a federal law which provided that employees could not be discharged except for cause, and the

744 408 U.S. at 601.
746 Goss v. Lopez, 419 U.S. at 574.. See also Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer’s license); O’Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care.)
747 Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). Although the Court “assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment” in a state university, this limited constitutional right is violated only by a showing that dismissal resulted from “such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.” 474 U.S. at 225.
Justices acknowledged that due process rights could be created through statutory grants of entitlements. The Justices, however, went on to observe that the same law specifically withheld the procedural protections now being sought by the employees. Because “the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest,” the employee would have to “take the bitter with the sweet.” Thus, Congress (and by analogy state legislatures) could qualify the conferral of an interest by limiting the process which might be otherwise required.

But the other six Justices, while disagreeing among themselves in other respects, rejected this attempt to so formulate the issue. “This view misconceives the origin of the right to procedural due process,” Justice Powell wrote. “That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.” Yet, in Bishop v. Wood, the Court accepted a district court’s finding that a policeman held his position “at will” despite language setting forth conditions for discharge. Although the majority opinion was couched in terms of statutory construction, the majority appeared to come close to adopting the three-Judge Arnett position, so much so that the dissenters accused the majority of having repudiated the majority position of the six Justices in Arnett. And, in Goss v. Lopez, Justice Powell, writing in dissent but using language quite similar to the Rehnquist Arnett language, seemed to indicate that the right to public education could be qualified by a statute authorizing a school principle to impose a ten day suspension.

More recently, however, the Court has squarely held that because “minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may

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416 U.S. at 155 (Justices Rehnquist and Stewart and Chief Justice Burger).
416 U.S. at 154.
426 U.S. 341 (1976). A five-to-four decision, the opinion was written by Justice Stevens, replacing Justice Douglas, and was joined by Justice Powell, who had disagreed with the theory in Arnett. See id. at 350, 353 n.4, 355 (dissenting opinions). The language is ambiguous and appears at different points to adopt both positions. But see id. at 345, 347.
419 U.S. at 584, 586–87 (Justice Powell dissenting).
have specified its own procedures that it may deem adequate for determining the preconditions to adverse action.” Indeed, any other conclusion would allow the State to destroy virtually any state-created property interest at will. The most striking application of this analysis, to date, is found in Logan v. Zimmerman Brush Co. In Logan, a state anti-discrimination law required the enforcing agency to convene a fact-finding conference within 120 days of the filing of the complaint. Inadvertently, the Commission scheduled the hearing after the expiration of the 120 days and the state courts held the requirement to be jurisdictional, necessitating dismissal of the complaint. The Court noted that various older cases had clearly established that causes of action were property, and, in any event, Logan’s claim was an entitlement grounded in state law and thus could only be removed “for cause.” This property interest existed independently of the 120-day time period and could not simply be taken away by agency action or inaction.

**The Liberty Interest.—**With respect to liberty interests, the Court has followed a similarly meandering path. Although the traditional concept of liberty was freedom from physical restraint, the Court has expanded the concept to include various other protected interests, some statutorily created and some not. Thus, in Ingraham v. Wright, the Court unanimously agreed that school children had a liberty interest in freedom from wrongfully or excessively administered corporal punishment, whether or not such interest was protected by statute. “The liberty preserved from deprivation without due process included the right ‘generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’ . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.”

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756 455 U.S. 422 (1982).
757 455 U.S. at 428–33 A different majority of the Court also found an equal protection denial. 455 U.S. 438, 433.
758 These procedural liberty interests should not, however, be confused with substantive liberty interests, which, if not outweighed by a sufficient governmental interest, may not be intruded upon regardless of the process followed. See “Fundamental Rights (Noneconomic Substantive Due Process)”, supra.
759 430 U.S. 651 (1977)
760 430 U.S. at 673. The family-related liberties discussed under substantive due process, as well as the associational and privacy ones, no doubt provide a fertile source of liberty interests for procedural protection. See Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father could not simply be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). See also Smith v. Organization of Foster Families, 431 U.S. 816
The Court also appeared to have expanded the notion of “liberty” to include the right to be free of official stigmatization, and found that such threatened stigmatization could in and of itself require due process. Thus, in Wisconsin v. Constantineau, the Court invalidated a statutory scheme in which persons could be labeled “excessive drinkers,” without any opportunity for a hearing and rebuttal, and could then be barred from places where alcohol was served. The Court, without discussing the source of the entitlement, noted that the governmental action impugned the individual’s reputation, honor, and integrity.

But, in Paul v. Davis, the Court appeared to retreat from recognizing damage to reputation alone, holding instead that the liberty interest extended only to those situations where loss of one’s reputation also resulted in loss of a statutory entitlement. In Davis, the police had included plaintiff’s photograph and name on a list of “active shoplifters” circulated to merchants without an opportunity for notice or hearing. But the Court held that “Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners’ actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interest by means of damage actions.” Thus, unless the government’s official defamation has a specific negative effect on an entitlement, such as the denial to “excessive drinkers” of the right to obtain alcohol that occurred in Constantineau, there is no protected liberty interest that would require due process.

A number of liberty interest cases which involve statutorily created entitlements involve prisoner rights, and thus are dealt with more extensively in the section on criminal due process. How-
ever, they are worth noting here. In *Meachum v. Fano*, the Court held that a state prisoner was not entitled to a fact-finding hearing when he is transferred to a different prison in which the conditions were substantially less favorable to him, because (1) the due process clause liberty interest by itself is satisfied by the initial valid conviction which had deprived him of liberty, and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. As a prisoner could be transferred for any reason or for no reason under state law, the decision of prison officials was not dependent upon any state of facts, and no hearing was required.

But in *Vitek v. Jones*, a state statute permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a finding, by a designated physician or psychologist, that the prisoner “suffers from a mental disease or defect” and “cannot be given treatment in that facility.” Because the transfer was conditioned upon a “cause,” the establishment of the facts necessary to show the cause had to be done through fair procedures. Interestingly, however, the *Vitek* Court also held that the prisoner had a “residuum of liberty” in being free from the different confinement and from the stigma of involuntary commitment for mental disease that the due process clause protected. Thus, the Court has recognized, in this case and in the cases involving revocation of parole or probation, a liberty interest that is separate from a statutory entitlement and that can be taken away only through proper procedures.

But with respect to the possibility of parole or commutation or otherwise more rapid release, no matter how much the expectancy matters to a prisoner, in the absence of some form of positive entitlement, the prisoner may be turned down without observance of procedures. Summarizing its prior holdings, the Court recently concluded that two requirements must be present before a liberty interest is created in the prison context: the statute or regulation must contain “substantive predicates” limiting the exercise of discretion, and there must be explicit “mandatory language” requiring

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a particular outcome if substantive predicates are found.\footnote{Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459–63 (1989) (prison regulations listing categories of visitors who may be excluded, but not creating a right to have a visitor admitted, contain “substantive predicates” but lack mandatory language).}

In an even more recent case, the Court limited the application of this test to those circumstances where the restraint on freedom imposed by the State creates an “atypical and significant” deprivation.\footnote{Sandin v. Conner, 515 U.S. 472, 484 (1995) (solitary confinement not atypical “in relation to the ordinary incidents of prison life”).}

**Proceedings in Which Procedural Due Process Need Not Be Observed.**—While due notice and a reasonable opportunity to be heard are two fundamental protections found in almost all systems of law established by civilized countries,\footnote{Twining v. New Jersey, 211 U.S. 78, 110 (1908); Jacob v. Roberts, 223 U.S. 261, 265 (1912).} there are certain proceedings in which the enjoyment of these two conditions has not been deemed to be constitutionally necessary. For instance, persons adversely affected by a law cannot challenge its validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view. “Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”\footnote{Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). See also Bragg v. Weaver, 251 U.S. 57, 58 (1919). And cf. Logan v. Zimmerman Brush Co., 445 U.S. 422, 432–33 (1982).}

Similarly, when an administrative agency engages in a legislative function, as, for example, when it drafts regulations of general application affecting an unknown number of persons, it need not afford a hearing prior to promulgation.\footnote{United States v. Florida East Coast Ry., 410 U.S. 224 (1973).} On the other hand, if a regulation, sometimes denominated an “order,” is of limited application, that is, it affects an identifiable class of persons, the question whether notice and hearing is required and, if so, whether it must precede such action becomes a matter of greater urgency and

\footnote{769 Kentucky Dep’t of Corrections v. Thompson, 490 U.S. 454, 459–63 (1989) (prison regulations listing categories of visitors who may be excluded, but not creating a right to have a visitor admitted, contain “substantive predicates” but lack mandatory language).}


\footnote{771 Twining v. New Jersey, 211 U.S. 78, 110 (1908); Jacob v. Roberts, 223 U.S. 261, 265 (1912).}


\footnote{773 United States v. Florida East Coast Ry., 410 U.S. 224 (1973).}
must be determined by evaluation of the various factors discussed below.\textsuperscript{774}

One such factor is whether agency action is subject to later judicial scrutiny.\textsuperscript{775} In one of the initial decisions construing the due process clause of the Fifth Amendment, the Court upheld the authority of the Secretary of the Treasury, acting pursuant to statute, to obtain money from a collector of customs alleged to be in arrears. The Treasury simply issued a distress warrant and seized the collector's property, affording him no opportunity for a hearing, and requiring him to sue for recovery of his property. While acknowledging that history and settled practice required proceedings in which pleas, answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usage in the United States, and was thus sustainable.\textsuperscript{776}

In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issuing notices to stockholders of their assessment, could issue execution for the amounts due, subject to the right of each stockholder to contest his liability for such an assessment by an affidavit of illegality. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable.\textsuperscript{777}

It is a violation of the due process clause for a State to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.\textsuperscript{778} With regard to the presentation of every available defense, however, the requirements of due process do not necessarily entail affording an opportunity to do so before entry of judgment.

\textsuperscript{774}110 U.S. at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). See Londoner v. City of Denver, 210 U.S. 373 (1908).

\textsuperscript{775}"It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights which, by later resort to the courts, secures to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process." Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246–47 (1944).


\textsuperscript{777}Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928).

The person may be remitted to other actions initiated by him or an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity to be heard on the issue of liability, was not denied due process where the state practice provided the opportunity for such a hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial of due process upon the fact that it lost this opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts. On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.

When Process Is Due.—The requirements of due process, as has been noted, depend upon the nature of the interest at stake, while the form of due process required is determined by the weight of that interest balanced against the opposing interests. The currently prevailing standard is that formulated in Mathews v. Eldridge, which concerned termination of Social Security benefits. “Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.”


781 Saunders v. Shaw, 244 U.S. 317 (1917).

782 "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss,’ . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.” Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970), (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring)). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894–95 (1961).

783 424 U.S. 319, 335 (1976).
The termination of welfare benefits in *Goldberg v. Kelly*, \(^784\) which could have resulted in a “devastating” loss of food and shelter, had required a pre-deprivation hearing. The termination of Social Security benefits at issue in *Mathews* would require less protection, however, because those benefits are not based on financial need and a terminated recipient would be able to apply for welfare if need be. Moreover, the determination of ineligibility for Social Security benefits more often turns upon routine and uncomplicated evaluations of data, reducing the likelihood of error, a likelihood found significant in *Goldberg*. Finally, the administrative burden and other societal costs involved in giving Social Security recipients a pre-termination hearing would be high. Therefore, a post-termination hearing, with full retroactive restoration of benefits, if the claimant prevails, was found satisfactory.\(^785\)

Application of the *Mathews* standard and other considerations brought some noteworthy changes to the process accorded debtors and installment buyers. Earlier cases, which had focused upon the interests of the holders of the property in not being unjustly deprived of the goods and funds in their possession, leaned toward requiring pre-deprivation hearings. Newer cases, however, look to the interests of creditors as well. “The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well.”\(^786\)

Thus, *Sniadach v. Family Finance Corp.*, \(^787\) which mandated pre-deprivation hearings before wages may be garnished, has apparently been limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.\(^788\) *Fuentes v. Shevin*, \(^789\) which struck


\(^787\) 395 U.S. 337 (1969)
down a replevin statute which authorized the seizure of property (here household goods purchased on an installment contract) simply upon the filing of an ex parte application and the posting of bond, has been limited,\textsuperscript{790} so that an appropriately structured ex parte judicial determination before seizure is sufficient to satisfy due process.\textsuperscript{791} Thus, laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor need only require that (1) the creditor furnish adequate security to protect the debtor’s interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity be assured for an adversary hearing promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor.\textsuperscript{792}

Similarly, applying the \textit{Mathews v. Eldridge} standard in the context of government employment, the Court has held, albeit by a combination of divergent opinions, that the interest of the employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of admin-
istrative burdens, and the risk of an erroneous termination combine to require the provision of some minimum pre-termination notice and opportunity to respond, followed by a full post-termination hearing, complete with all the procedures normally accorded and back pay if the employee is successful. Where the adverse action is less than termination of employment, the governmental interest is significant, and where reasonable grounds for such action have been established separately, then a prompt hearing held after the adverse action may be sufficient. In other cases, hearings with even minimum procedures may be dispensed with when what is to be established is so pro forma or routine that the likelihood of error is very small. In a case dealing with negligent state failure to observe a procedural deadline, the Court held that the claimant was entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.

In *Brock v. Roadway Express, Inc.*, a Court plurality applied a similar analysis to governmental regulation of private employment, determining that an employer may be ordered by an agency to reinstate a “whistle-blower” employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee’s charges, and to have an opportunity for informal rebuttal. The principal difference with the *Mathews v. Eldridge* test was that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer “in controlling the makeup of its workforce” and that of the employee in not being discharged for whistle-blowing. Whether the case signals a shift away from evidentiary

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793 Arnett v. Kennedy, 416 U.S. 134, 170–71 (1974) (Justice Powell concurring), and 416 U.S. at 195–96 (Justice White concurring in part and dissenting in part); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discharge of state government employee). In Barry v. Barchi, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured. See also *FDIC v. Mallen*, 486 U.S. 230 (1988) (strong public interest in the integrity of the banking industry justifies suspension of indicted bank official with no pre-suspension hearing, and with 90-day delay before decision resulting from post-suspension hearing).


795 *E.g.*, Dixon v. Love, 431 U.S. 105 (1977) (when suspension of drivers’ license is automatic upon conviction of a certain number of offenses, no hearing is required because there can be no dispute about facts).


797 481 U.S. 252 (1987). Justice Marshall’s plurality opinion was joined by Justices Blackmun, Powell, and O’Connor; Chief Justice Rehnquist and Justice Scalia joined Justice White’s opinion taking a somewhat narrower view of due process requirements but supporting the plurality’s general approach. Justices Brennan and Stevens would have required confrontation and cross-examination.
hearing requirements in the context of regulatory adjudication will depend on future developments. 798

In another respect, the balancing standard of Mathews has resulted in a State having wider flexibility in determining what process is required. For instance, in an alteration of previously existing law, no hearing is required if a State affords the claimant an adequate alternative remedy, such as a judicial action for damages or breach of contract. 799 Thus, the Court, in passing on the infliction of corporal punishment in the public schools, held that the existence of common-law tort remedies for wrongful or excessive administration of punishment, plus the context in which the punishment was administered (i.e., the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment), made reasonably assured the probability that a child would not be punished without cause or excessively. 800 The Court did not, however, inquire about the availability of judicial remedies for such violations in the State in which the case arose. 801

The Court has required greater protection from property deprivations resulting from operation of established state procedures than from those resulting from random and unauthorized acts of state employees, 802 and presumably this distinction still holds. Thus, the Court has held that post-deprivation procedures would not satisfy due process if it is “the state system itself that destroys a complainant’s property interest.” 803 While the Court did briefly entertain the theory that a negligent action (i.e. non-willful) by a state official was sufficient to invoke due process, and that a post-

801 Ingraham v. Wright, 430 U.S. 651, 680–82 (1977). In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19–22 (1987) involving cutoff of utility service for non-payment of bills, the Court rejected the argument that common-law remedies were sufficient to obviate the pre-termination hearing requirement.
802 Logan v. Zimmerman Brush Co., 455 U.S. at 435–36 (1982). The Court emphasized that a post-deprivation hearing regarding harm inflicted by a state procedure would be inadequate. “That is particularly true where, as here, the State’s only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole.” 455 U.S. 422, 436–37.
803 455 U.S. at 436
deprivation hearing regarding such loss was required, the Court subsequently overruled this holding, stating that “the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.”

In “rare and extraordinary situations,” where summary action is necessary to prevent imminent harm to the public, and the private interest infringed is reasonably deemed to be of less importance, government can take action with no notice and no opportunity to defend, subject to a later full hearing. Examples are seizure of contaminated foods or drugs or other such commodities to protect the consumer, collection of governmental revenues, and the seizure of enemy property in wartime. Thus, citing national security interests, the Court upheld an order, issued without notice and an opportunity to be heard, excluding a short-order cook employed by a concessionaire from a Naval Gun Factory, but the basis of the five-to-four decision is unclear. On the one hand, the Court was ambivalent about a right-privilege distinction; on the other hand, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the conces-
sionaire’s other premises—with the Government’s interest in conducting a high-security program. 812

**Jurisdiction**

**Generally.**—Jurisdiction may be defined as the power of a government to create legal interests, and the Court has long held that the Due Process clause limits the abilities of states to exercise this power. 813 In the famous case of *Pennoyer v. Neff*, 814 the Court enunciated two principles of jurisdiction respecting the States in a federal system 815—first, “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory,” and second, “no State can exercise direct jurisdiction and authority over persons or property without its territory.” 816 Over a long period of time, however, the mobility of American society and

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813 Scott v. McNeal, 154 U.S. 34, 64 (1894).

814 95 U.S. 714 (1878).

815 Although these two principles were drawn from the writings of Joseph Story refining the theories of continental jurists, Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252–62. the constitutional basis for them was deemed to be in the due process clause of the Fourteenth Amendment. Pennoyer v. Neff, 95 U.S. 714, 733–35 (1878). The due process clause and the remainder of the Fourteenth Amendment had not been ratified at the time of the entry of the state-court judgment giving rise to the case. This inconvenient fact does not detract from the subsequent settled utilization of this constitutional foundation. Pennoyer denied full faith and credit to the judgment because the state lacked jurisdiction.

816 95 U.S. at 722. The basis for the territorial concept of jurisdiction promulgated in Pennoyer and modified over the years is two-fold: a concern for “fair play and substantial justice” involved in requiring defendants to litigate cases against them far from their “home” or place of business. International Shoe Co. v. Washington 326 U.S. 310, 316, 317 (1945); Travelers Health Ass’n v. Virginia ex rel. State Corp. Comm., 339 U.S. 643, 649 (1950); Shaffer v. Heitner, 433 U.S. 186, 204 (1977), and, more important, a concern for the preservation of federalism. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Hanson v. Denckla, 357 U.S. 235, 251 (1958). The Framers, the Court has asserted, while intending to tie the States together into a Nation, “also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). Thus, the federalism principle is preeminent. “The Due Process Clause ‘does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.’ . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” 444 U.S. at 294 (internal quotation from International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
the increasing complexity of commerce led to attenuation of the second principle of Pennoyer, and consequently the Court established the modern standard of obtaining jurisdiction based upon the nature and the quality of contacts that individuals and corporations have with a State.\footnote{International Shoe Co. v. Washington, 326 U.S. 310 (1945).} This “minimum contacts” test, consequently, permits the courts of a State to obtain power over out-of-state defendants.

**In Personam Proceedings Against Individuals.**—How jurisdiction is determined depends on the nature of the suit being brought. If a dispute is directed against a person, not property, the proceedings are considered in personam, and jurisdiction must be established over the defendant’s person in order to render an effective decree.\footnote{With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).} Generally, presence within the State is sufficient to create personal jurisdiction over an individual, if process is served.\footnote{National Exchange Bank v. Wiley, 195 U.S. 257, 270 (1904); Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 471 (1905).} In the case of a resident who is absent from the state, domicile alone is deemed to be sufficient to keep him within reach of the state courts for purposes of a personal judgment, and process can be obtained by means of appropriate, substituted service or by actual personal service on the resident outside the State.\footnote{McDonald v. Mabee, 243 U.S. 90, 91 (1917).} However, if the defendant, although technically domiciled therein, has left the State with no intention to return, service by publication, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate, inasmuch as it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.\footnote{McDonald v. Mabee, 243 U.S. 90 (1917).}

With respect to a nonresident, it is clearly established that no person can be deprived of property rights by a decree in a case in
which he neither appeared nor was served or effectively made a party. The early cases held that the process of a court of one State could not run into another and summon a resident of that state to respond to proceedings against him, when neither his person nor his property was within the jurisdiction of the court rendering the judgment. This rule, however, has been attenuated in a series of steps.

Consent has always been sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum. For example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court’s power, and even a special appearance to deny jurisdiction might be treated as consensual submission to the court. The concept of “constructive consent” was then seized upon as a basis for obtaining jurisdiction. For instance, with the advent of the automobile, States were permitted to engage in the fiction that the use of their highways was conditioned upon the consent of drivers to be sued in state courts for accidents or other transactions arising out of such use. Thus, a state could designate a state official as a proper person to receive service of process in such litigation, and establishing jurisdiction required only that the official receiving notice communicate it to the person sued.

Although the Court approved of the legal fiction that such jurisdiction arose out of consent, the basis for jurisdiction was really the State’s power to regulate acts done in the state that were dan-


825 State legislation which provides that a defendant who comes into court to challenge the validity of service upon him in a personal action surrenders himself to the jurisdiction of the court, but which allows him to dispute where process was served, is constitutional and does not deprive him of property without due process of law. In such a situation, the defendant may ignore the proceedings as wholly ineffective, and attack the validity of the judgment if and when an attempt is made to take his property thereunder. If he desires, however, to contest the validity of the court proceedings and he loses, it is within the power of a State to require that he submit to the jurisdiction of the court to determine the merits. York v. Texas, 137 U.S. 15 (1890); Kauffman v. Wootters, 138 U.S. 285 (1891); Western Indemnity Co. v. Rupp, 235 U.S. 261 (1914)

gerous to life or property.\footnote{Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).} Inasmuch as the State did not really have the ability to prevent nonresidents from doing business in their state,\footnote{274 U.S. at 355. See Flexner v. Farson, 248 U.S. 289, 293 (1919).} this extension was necessary in order to permit States to assume jurisdiction over individuals “doing business” within the State. Thus, the Court soon recognized that “doing business” within a State was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation, and service could be effectuated within the State on an agent appointed to carry out the business.\footnote{Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).}

The culmination of this trend, established in the case of \textit{International Shoe Co. v. Washington},\footnote{326 U.S. 310, 316 (1945).} was the requirement that there be “minimum contacts” with the State in question in order to establish jurisdiction. The outer limit of this test is illustrated by \textit{Kulko v. Superior Court},\footnote{436 U.S. 84 (1978).} in which the Court held that California could not obtain personal jurisdiction over a New York resident whose sole relevant contact with the State was to send his daughter to live with her mother in California.\footnote{Kulko had visited the State twice, seven and six years respectively before initiation of the present action, his marriage occurring in California on the second visit, but neither the visitsnor the marriage was sufficient or relevant to jurisdiction. 436 U.S. at 92–93.} The argument was made that the father had “caused an effect” in the State by availing himself of the benefits and protections of California’s laws and by deriving an economic benefit in the lessened expense of maintaining the daughter in New York. The Court explained that, “\textquote{[l]ike any standard that requires a determination of ‘reasonableness,’ the ‘minimum contacts’ test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite ‘affiliating circumstances’ are present.”}\footnote{436 U.S. at 92.} Although the Court noted that the “effects” test had been accepted as a test of contacts when wrongful activity outside a State causes injury within the State or when commercial activity affects state residents, the Court found that these factors were not present in this case, and any economic benefit to Kulko was derived in New York and not in California.\footnote{436 U.S. at 96–98.} As with many such cases, the decision was narrowly limited to its facts and does little...
to clarify the standards applicable to state jurisdiction over non-residents.

**Suing Out-of-State (Foreign) Corporations.**—A curious aspect of American law is that a corporation has no legal existence outside the boundaries of the State chartering it. Thus, the basis for state court jurisdiction over an out-of-state (“foreign”) corporation has been even more uncertain than that with respect to individuals. Before the case of *International Shoe Co. v. Washington*, it was asserted that inasmuch as a corporation could not carry on business in a State without the State’s permission, the State could condition its permission upon the corporation’s consent to submit to the jurisdiction of the State’s courts, either by appointment of someone to receive process or in the absence of such designation, by accepting service upon corporate agents authorized to operate within the State. Further, by doing business in a State, the corporation was deemed to be present there and thus subject to service of process and suit. This theoretical corporate presence conflicted with the idea of corporations having no existence outside their State of incorporation, but it was nonetheless accepted that a corporation “doing business” in a State to a sufficient degree was “present” for service of process upon its agents in the State who carried out that business.

Such presence did not, however, expose a corporation to all manner of suits. Under the reasoning of these early cases, even continuous activity of some sort by a foreign corporation within a State would not suffice to render it amenable to suits therein unrelated to that activity. Without the protection of such a rule, it was maintained, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any State in which they happened to be carrying on business, suits for torts wherever committed and claims on contracts wherever made. And if the

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836 *326 U.S. 310 (1945).*
838 Presence was first independently used to sustain jurisdiction in *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914), although the possibility was suggested as early as *St. Clair v. Cox*, 106 U.S. 350 (1882). *See also Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264, 265 (1917) (Justice Brandeis for Court).
corporation stopped doing business in the forum State before suit against it was commenced, it might well escape jurisdiction altogether. The issue of the degree of activity required, in particular the degree of solicitation necessary to constitute doing business by a foreign corporation, was much disputed and led to very particularistic holdings. In the absence of enough activity to constitute doing business, the mere presence within its territorial limits of an agent, officer, or stockholder, upon whom service might readily be had, was not effective to enable a State to acquire jurisdiction over the foreign corporation.

The rationales and premises of these cases were swept away in *International Shoe Co. v. Washington,* although the results in many of them would stand on the basis of the case’s “minimum contacts” analysis. International Shoe, an out-of-state corporation, had not been issued a license to do business in Washington State, but it systematically and continuously employed a sales force of Washington residents to solicit therein, and thus was held amenable to suit in Washington for unpaid unemployment compensation contributions for such salesmen. A notice of assessment was served personally upon one of the local sales solicitors, and a copy of the assessment was sent by registered mail to the corporation’s principal office in Missouri, and this was deemed sufficient to apprise the corporation of the proceeding.

To reach this conclusion the Court not only overturned prior holdings to the effect that mere solicitation of business does not constitute a sufficient contact to subject a foreign corporation to a State’s jurisdiction, but also rejected the “presence” test as begging the question to be decided. “The terms ‘present’ or ‘presence,’”

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This departure was recognized by Justice Rutledge subsequently in Nippert v. City of Richmond, 327 U.S. 416, 422 (1946). Inasmuch as International Shoe, in addition to having its agents solicit orders, also permitted them to rent quarters for the display of merchandise, the Court could have utilized *International Harvester Co. v. Kentucky,* 234 U.S. 579 (1914), to find it was “present” in the State.
according to Chief Justice Stone, “are used merely to symbolize those activities of the corporation’s agent within the State which courts will deem to be sufficient to satisfy the demands of due process. . . . Those demands may be met by such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system . . . , to require the corporation to defend the particular suit which is brought there; [and] . . . that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’. . . . An ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal place of business is relevant in this connection.”\textsuperscript{846} As to the scope of application to be accorded this “fair play and substantial justice” doctrine, the Court concluded that “so far as . . . [corporate] obligations arise out of or are connected with activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”\textsuperscript{847}

Extending this logic, a majority of the Court ruled that an out-of-state association selling mail order insurance had developed sufficient contacts and ties with Virginia residents so that the State could institute enforcement proceedings under its Blue Sky Law by forwarding notice to the company by registered mail, notwithstanding that the Association solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever.\textsuperscript{848} The due process clause was declared not to “forbid a State to protect its citizens from such injustice” of having to file suits on their claims at a far distant home office of such company, especially in view of the fact that such suits could be more conveniently tried in Virginia where claims of loss could be investigated.\textsuperscript{849}

\textsuperscript{847} 326 U.S. at 319
\textsuperscript{848} Travelers Health Ass’n v. Virginia ex rel. State Corp. Comm’n, 339 U.S. 643 (1950). The decision was 5-to-4 with one of the majority Justices also contributing a concurring opinion. Id. at 651 (Justice Douglas). The possible significance of the concurrence is that it appears to disagree with the implication of the majority opinion, id. at 647–48, that a State’s legislative jurisdiction and its judicial jurisdiction are coextensive. d. at 652–53 (distinguishing between the use of the State’s judicial power to enforce its legislative powers and the judicial jurisdiction when a private party is suing). See id. at 659 (dissent).
\textsuperscript{849} 339 U.S. at 647-49. The holding in Minnesota Commercial Men’s Ass’n v. Benn, 261 U.S. 140 (1923), that a similar mail order insurance company could not be viewed as doing business in the forum State and that the circumstances under which its contracts with forum State citizens, executed and to be performed in its State of incorporation, were consummated could not support an implication that the foreign company had consented to be sued in the forum State, was distinguished rather than formally overruled. 339 U.S. at 647. In any event, Benn, although
Likewise, the Court reviewed a California statute which subjected foreign mail order insurance companies engaged in contracts with California residents to suit in California courts, and which had authorized the petitioner to serve a Texas insurer by registered mail only.\footnote{McGee v. International Life Ins. Co., 355 U.S. 220 (1957).} The contract between the company and the insured specified that Austin, Texas, was the place of “making” and the place where liability should be deemed to arise. The company mailed premium notices to the insured in California, and he mailed his premium payments to the company in Texas. Acknowledging that the connection of the company with California was tenuous—it had no office or agents in the State and no evidence had been presented that it had solicited anyone other than the insured for business—the Court sustained jurisdiction on the basis that the suit was on a contract which had a substantial connection with California. “The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.”\footnote{McGee v. International Life Ins. Co., 355 U.S. 220 (1957).}

In making this decision, the Court noted that “[l]ooking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.”\footnote{Hanson v. Denckla, decided during the same Term, the Court found in personam jurisdiction lacking for the first time since International} However, in Hanson v. Denckla, decided during the same Term, the Court found in personam jurisdiction lacking for the first time since International
Shoe Co. v. Washington, pronouncing firm due process limitations. In Hanson, the issue was whether a Florida court considering a contested will obtained jurisdiction over corporate trustees of disputed property through use of ordinary mail and publication. The will had been entered into and probated in Florida, the claimants were resident in Florida and had been personally served, but the trustees, who were indispensable parties, were resident in Delaware. Noting the trend in enlarging the ability of the States to obtain in personam jurisdiction over absent defendants, the Court denied the exercise of nationwide in personam jurisdiction by States, saying “it would be a mistake to assume that the trend [to expand the reach of state courts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts.”

The Court recognized in Hanson that Florida law was the most appropriate law to be applied in determining the validity of the will and that the corporate defendants might be little inconvenienced by having to appear in Florida courts, but it denied that either circumstance satisfied the due process clause. The Court noted that due process restrictions do more than guarantee immunity from inconvenient or distant litigation, in that “[these restrictions] are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the ‘minimum contacts’ with that State that are a prerequisite to its exercise of power over him.” The only contacts the corporate defendants had in Florida consisted of a relationship with the individual defendants. “The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant’s activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor’s execution in Florida of her power of appointment cannot remedy the absence of such an act in this case.”

853 357 U.S. 235 (1958). The decision was 5-to-4. See 357 U.S. at 256 (Justice Black dissenting), 262 (Justice Douglas dissenting).

854 357 U.S. at 251 In dissent, Justice Black observed that “of course we have not reached the point where state boundaries are without significance and I do not mean to suggest such a view here.” 357 U.S. at 260.

855 357 U.S. at 251, 253–54. Justice Black argued that the relationship of the nonresident defendants, of the subject of the litigation to the forum State, upon an analogy of choice of law and forum non conveniens, made Florida the natural and constitutional basis for asserting jurisdiction. 357 U.S. at 251, 258–59 The Court has numerous times asserted that contacts sufficient for the purpose of designating
In *World-Wide Volkswagen Corp. v. Woodson*, 856 the Court applied its “minimum contacts” test to preclude the assertion of jurisdiction over two foreign corporations that did no business in the forum State. Plaintiffs had sustained personal injuries in Oklahoma in an accident involving an alleged defect in their automobile. The car had been purchased the previous year in New York, while the plaintiffs were New York residents, and the accident had occurred while they were driving through Oklahoma on their way to a new residence in Arizona. Defendants were the automobile retailer and its wholesaler, both New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma courts of jurisdiction over defendants. The Court found that the defendants (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the State’s laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the State, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. The unilateral action of the purchasers in driving the car to Oklahoma was insufficient to create the kinds of requisite contacts.

While it might have been foreseeable that the automobile would travel to Oklahoma, foreseeability was held to be relevant only insofar as “the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” 857 Further, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State’s exercise of in personam jurisdiction over them. 858 Thus, a defendant must, as the Court said in *Denckla*, “purposefully [avail] itself of the privilege of conducting activities within the forum State,” 859 if not by carrying on business there within the constitutional sense, at least by delivering “its products into the

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856 444 U.S. 286 (1980).
857 444 U.S. at 297
858 444 U.S. at 299.
stream of commerce with the expectation that they will be purchased by consumers in the forum State." 860

The Court has had to decide how to apply International Shoe principles in several more situations. Thus, circulation of a magazine in a state is an adequate basis for that state to exercise jurisdiction over an out-of-state corporate magazine publisher in a libel action. The fact that the plaintiff did not have “minimum contacts” with the forum state was not dispositive since the relevant inquiry is the relations among the defendant, the forum, and the litigation. 861 Or, damage done to the plaintiff’s reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction over the out-of-state authors of such article, despite the lack of minimum contact between the authors (as opposed to the publishers) and the state. 862 Further, while there is no per se rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party’s forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation’s home state where the overall circumstances (contract terms themselves, course of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor’s home state. 863

**Actions In Rem: Proceeding Against Property.**—In an in rem action, which is brought directly against a property interest, a State can validly proceed to settle controversies with regard to rights or claims against tangible or intangible property within its borders, notwithstanding that jurisdiction over the defendant was
never established. Unlike jurisdiction in personam, a judgment entered by a court with in rem jurisdiction does not bind the defendant personally but determines the title to or status of the only property in question. Proceedings brought to register title to land, to condemn or confiscate real or personal property, or to administer a decedent’s estate are typical in rem actions. Due process is satisfied by seizure of the property (the “res”) and notice to all who have or may have interests therein. Under prior case law, a court could acquire in rem jurisdiction over nonresidents by mere constructive service of process, under the theory that property was always in possession of its owners and that seizure would afford them notice, inasmuch as they would keep themselves apprised of the state of their property. It was held, however, that this fiction did not satisfy the requirements of due process, and, whatever the nature of the proceeding, notice must be given in a manner that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.

Although the Court has now held “that all assertions of state-court jurisdiction must be evaluated according to the [minimum contacts] standards set forth in International Shoe Co. v. Washington,” it does not appear that this will appreciably change the result for in rem jurisdiction over property. “[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the
source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant’s claim to property located in the State would normally indicate that he expected to benefit from the State’s protection of his interest. The State’s strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.”

Thus, for “true” in rem actions, the old results are likely to still prevail.

**Quasi in Rem: Attachment Proceedings.**—If a defendant is neither present within a State nor domiciled therein, he cannot be served personally, and any judgment in money obtained against him would be unenforceable. This does not, however, prevent attachment of a defendant’s property within the state. The practice of allowing a State to attach a non-resident’s real and personal property situated within its borders to satisfy a debt or other claim by one of its citizens goes back to colonial times. Attachment is considered a form of in rem proceeding sometimes called “quasi in rem,” and under *Pennoyer v. Neff* an attachment could be implemented by obtaining a writ against the local property of the defendant and giving notice by publication. The judgement was then satisfied from the property attached, and if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum State, such as

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874 433 U.S. at 207–08 (footnote citations omitted). The Court also suggested that the State would usually have jurisdiction in cases such as those arising from injuries suffered on the property of an absentee owner, where the defendant’s ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that controversy. Id.


876 The theory was that property is always in possession of an owner, and that seizure of the property will inform him. This theory of notice was disavowed sooner than the theory of jurisdiction. See “Actions in Rem: Proceedings Against Property,” supra.

877 Other, quasi in rem actions, which are directed against persons, but ultimately have property as the subject matter, such as probate, Goodrich v. Ferris, 214 U.S. 71, 80 (1909), and garnishment of foreign attachment proceedings, Pennington v. Fourth Nat’l Bank, 243 U.S. 269, 271 (1917); Harris v. Balk, 198 U.S. 215 (1905), might also be prosecuted to conclusion without requiring the presence of all parties in interest. The jurisdictional requirements for rendering a valid divorce decree are considered under the full faith and credit clause, Art. I, §1.
where the property was related to the matter sued over. In others, the question was more disputed, as in the famous New York Court of Appeals case of Seider v. Roth, in which the property subject to attachment was the contractual obligation of the defendant’s insurance company to defend and pay the judgment. But in Harris v. Balk, the facts of the case and the establishment of jurisdiction through quasi in rem proceedings raised the issue of fairness and territoriality. The claimant was a Maryland resident who was owed a debt by Balk, a North Carolina resident. The Marylander ascertained, apparently adventitiously, that Harris, a North Carolina resident who owed Balk an amount of money, was passing through Maryland, and the Marylander attached this debt. Balk had no notice of the action and a default judgment was entered, after which Harris paid over the judgment to the Marylander. When Balk later sued Harris in North Carolina to recover on his debt, Harris argued that he had been relieved of any further obligation by satisfying the judgment in Maryland, and the Supreme Court sustained his defense, ruling that jurisdiction had been properly obtained and the Maryland judgment was thus valid.

Subsequently, Harris v. Balk was overruled in Shaffer v. Heitner, in which the Court rejected the Delaware state court’s jurisdiction, holding that the “minimum contacts” test of International Shoe applied to all in rem and quasi in rem actions. The case involved a Delaware sequestration statute under which plaintiffs were authorized to bring actions against nonresident defendants by attaching their “property” within Delaware, the property here consisting of shares of corporate stock and options to stock in the defendant corporation. The stock was considered to be in Delaware because that was the state of incorporation, but none of the certificates representing the seized stocks were physically present in Delaware. The reason for applying the same test as is applied in in personam cases, the Court said, “is simple and straightforward. It is premised on recognition that [t]he phrase ‘judicial jurisdiction’ over a thing,’ is a customary elliptical way of referring
to jurisdiction over the interests of persons in a thing.”

A further tightening of jurisdictional standards occurred in Rush v. Savchuk. The plaintiff was injured in a one-car accident in Indiana while a passenger in a car driven by defendant. Plaintiff later moved to Minnesota and sued defendant, still resident in Indiana, in state court in Minnesota. There were no contacts between the defendant and Minnesota, but defendant’s insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must be those of the defendant engaging in purposeful activity related to the forum. Rush thus resulted in the demise of the controversial Seider v. Roth doctrine, which lower courts had struggled to save after Shaffer v. Heitner.

Actions in Rem: Estates, Trusts, Corporations.—Generally, probate will occur where the decedent was domiciled, and as a probate judgment is considered in rem, a determination as to assets in that State will be determinative as to all interested persons. Insofar as the probate affects property, land or personality beyond the State’s boundaries, however, the judgment is in personam and

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883 433 U.S. at 207 (internal quotation from RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)).


886 444 U.S. at 328–30. In dissent, Justices Brennan and Stevens argued that what the state courts had done was the functional equivalent of direct-action statutes. Id. at 333 (Justice Stevens); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Justice Brennan). The Court, however, refused so to view the Minnesota garnishment action, saying that “[t]he State's ability to exert its power over the ‘nominal defendant’ is analytically prerequisite to the insurer’s entry into the case as a garnishee.” Id. at 330–31. Presumably, the comment is not meant to undermine the validity of such direct-action statutes, which was upheld in Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), a choice-of-law case rather than a jurisdiction case.


can bind only parties thereto or their privies.\textsuperscript{889} Thus, the full faith and credit clause would not prevent a out-of-state court in the state where the property is located from reconsidering the first court’s finding of domicile, which could affect the ultimate disposition of the property.\textsuperscript{890}

The difficulty of characterizing the existence of the \textit{res} in a particular jurisdiction is illustrated by the \textit{in rem} aspects of \textit{Hanson v. Denckla}.\textsuperscript{891} As discussed earlier,\textsuperscript{892} the decedent created a trust with a Delaware corporation as trustee,\textsuperscript{893} and the Florida courts had attempted to assert both \textit{in personam} and \textit{in rem} jurisdiction over the Delaware corporation. Asserting the old theory that a court’s \textit{in rem} jurisdiction “is limited by the extent of its power and by the coordinate authority of sister States,”\textsuperscript{894} \textit{i.e.}, whether the court has jurisdiction over the thing, the Court thought it clear that the trust assets that were the subject of the suit were located in Delaware and thus the Florida courts had no \textit{in rem} jurisdiction. The Court did not expressly consider whether the \textit{International Shoe} test should apply to such \textit{in rem} jurisdiction, as it has now held it generally must, but it did briefly consider whether Florida’s interests arising from its authority to probate and construe the domiciliary’s will, under which the foreign assets might pass, were a sufficient basis of \textit{in rem} jurisdiction and decided they were not.\textsuperscript{895} The effect of \textit{International Shoe} in this area is still to be discerned.

The reasoning of the \textit{Pennoyer}\textsuperscript{896} rule, that seizure of property and publication was sufficient to give notice to nonresidents or absent defendants, has also been applied in proceedings for the forfeiture of abandoned property. If all known claimants were personally served and all claimants who were unknown or nonresident

\textsuperscript{890} 315 U.S. at 353.
\textsuperscript{891} 357 U.S. 235 (1957).
\textsuperscript{892} The \textit{in personam} aspect of this decision is considered \textit{supra}.
\textsuperscript{893} She reserved the power to appoint the remainder, after her reserved life estate, either by testamentary disposition or by \textit{inter vivos} instrument. After she moved to Florida, she executed a new will and a new power of appointment under the trust, which did not satisfy the requirements for testamentary disposition under Florida law. Upon her death, dispute arose as to whether the property passed pursuant to the terms of the power of appointment or in accordance with the residuary clause of the will.
\textsuperscript{894} 357 U.S. at 246.
\textsuperscript{895} 357 U.S. at 247–50. The four dissenters, Justices Black, Burton, Brennan, and Douglas, believed that the transfer in Florida of $400,000 made by a domiciliary and affecting beneficiaries, almost all of whom lived in that State, gave rise to a sufficient connection with Florida to support an adjudication by its courts of the effectiveness of the transfer. 357 U.S. at 256, 262.
\textsuperscript{896} See discussion of \textit{Pennoyer}, supra.
were given constructive notice by publication, judgments in these proceedings were held binding on all.\footnote[897]{Hamilton v. Brown, 161 U.S. 256 (1896); Security Savings Bank v. California, 263 U.S. 282 (1923). See also Voeller v. Neilston Co., 311 U.S. 531 (1941).} But in \textit{Mullane v. Central Hanover Bank & Trust Co.},\footnote[898]{339 U.S. 306 (1950).} the Court, while declining to characterize the proceeding as \textit{in rem} or \textit{in personam}, held that a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries could not obtain a judicial settlement of accounts if the only notice was publication in a local paper. While such notice by publication was sufficient as to beneficiaries whose interests or addresses were unknown to the bank, the Court held it was feasible to make serious efforts to notify residents and nonresidents whose whereabouts were known, such as by mailing notice to the addresses on record with the bank.\footnote[899]{A related question is which state has the authority to escheat a corporate debt. See \textit{Western Union Tel. Co. v. Pennsylvania}, 368 U.S. 71 (1961); \textit{Texas v. New Jersey}, 379 U.S. 674 (1965). Where a state seeks to escheat intangible corporate property such as uncollected debt, the Court found that the multiplicity of States with a possible interest made a “contacts” test unworkable. Citing ease of administration rather than logic or jurisdiction, the Court held that the authority to take the uncollected claims against a corporation by escheat would be based on whether the last known address on the company’s books for the each creditor was in a particular State.}

\textbf{Notice: Service of Process}.—It is not enough that a State be potentially capable of exercising control over persons and property. Before a State can legitimately exercise such power, its jurisdiction must be perfected by an appropriate service of process which is effective to notify all parties of proceedings which may affect their rights.\footnote[900]{“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” \textit{Mullane v. Central Hanover Bank & Trust Co.}, 339 U.S. 306, 314 (1950). “There . . . must be a basis for the defendant’s amenable to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.” \textit{Omni Capital Int’l v. Rudolph Wolff & Co.}, 484 U.S. 97 (1987).} Personal service guarantees actual notice of the pendency of a legal action, and has traditionally been deemed necessary in actions styled \textit{in personam}.\footnote[901]{McDonald v. Mabee, 243 U.S. 90, 92 (1917).} But less rigorous notice procedures have been accepted, in light of history and of the practical obstacles to providing personal service in every instance, although these procedures do not carry with them the same certainty of actual notice as does personal service.\footnote[902]{Greene v. Lindsey, 456 U.S. 444, 449 (1982) See \textit{Dusenbery v. United States}, 534 U.S. 161 (2001) (upholding a notice of forfeiture which was delivered by certified mail to the mail-room of a prison where the individual to be served was incarcerated).} But, whether the action be \textit{in rem} or \textit{in personam}, there is a constitutional minimum; if it be shown that
the mode of notice used was not reasonably calculated to provide the necessary information, its age and history will not sustain it.\footnote{In Greene v. Lindsey, 456 U.S. 444 (1982), the Court held that in light of substantial evidence that notices posted on the doors of apartments in a housing project in an eviction proceeding were often torn down by children and others before tenants ever saw them, service by posting did not comport with due process. Without requiring it, the Court observed that the mails provided an efficient and inexpensive means of communication upon which prudent men could rely and that notice by mail would provide a reasonable assurance of notice. Id. at 455. See also Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (personal service or notice by mail is required for mortgagee of real property subject to tax sale); Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (notice by mail or other appropriate means to reasonably ascertainable creditors of probated estate).}

The use of mail to convey notice, for instance, has become quite established,\footnote{E.g., McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n ex rel. State Corp. Comm'n, 339 U.S. 643 (1950).} especially for assertion of in personam jurisdiction extraterritorially upon individuals and corporations having “minimum contacts” with a forum State, where various “long-arm” statutes authorize notice by mail.\footnote{See, e.g., G.D. Searle & Co. v. Cohn, 455 U.S. 404, 409–12 (1982) (discussing New Jersey’s “long-arm” rule, under which a plaintiff must make every effort to serve process upon someone within the State and then only if “after diligent inquiry and effort personal service cannot be made” within the State, then “service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.”). Cf. Velmos v. Maren Engineering Corp., 83 N.J. 282, 416 A.2d 372 (1980), vacated and remanded, 455 U.S. 985 (1982).} Or, in a class action, due process is satisfied by mail notification of out-of-state class members, giving such members the opportunity to “opt out” but with no requirement that inclusion in the class be contingent upon affirmative response.\footnote{Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).} Other service devices and substitutions, have been pursued and show some promise of further loosening of the concept of territoriality even while complying with minimum due process standards of notice.\footnote{E.g., Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) (authorizing direct action against insurance carrier rather than against the insured).}

\section*{Power of the States to Regulate Procedure}

\textit{Generally}.—As long as a party has been given sufficient notice and an opportunity to defend his interest, the due process clause of the Fourteenth Amendment does not generally mandate the particular forms of procedure to be used in state courts.\footnote{Holmes v. Conway, 241 U.S. 624, 631 (1916); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900). A State “is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176, (1912). The
States may regulate the manner in which rights may be enforced and wrongs remedied,\textsuperscript{909} and may create courts and endow them with such jurisdiction as, in the judgment of their legislatures, seems appropriate.\textsuperscript{910} Whether legislative action in such matters is deemed to be wise or proves efficient, whether it works a particular hardship on a particular litigant, or perpetuates or supplants ancient forms of procedure, are issues which ordinarily do not implicate the Fourteenth Amendment. The function of the Fourteenth Amendment is negative rather than affirmative\textsuperscript{911} and in no way obligates the States to adopt specific measures of reform.\textsuperscript{912}

\textbf{Commencement of Actions}.—A state may impose certain conditions on the right to institute litigation. Access to the courts has been denied to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered.\textsuperscript{913} But, foreclosure of all access to the courts, through financial barriers and perhaps through other means as well, is subject to federal constitutional scrutiny and must be justified by reference to a state interest of suitable importance. Thus, where a State has monopolized the avenues of settle-
ment of disputes between persons by prescribing judicial resolution, and where the dispute involves a fundamental interest, such as marriage and its dissolution, the State may not deny access to those persons unable to pay its fees. 914

In older cases, not questioned by the more recent ones, it was held that a State, as the price of opening its tribunals to a nonresident plaintiff, may exact the condition that the nonresident stand ready to answer all cross actions filed and accept any in personam judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff’s attorney of record. 915 For similar reasons, a requirement of the performance of a chemical analysis as a condition precedent to a suit to recover for damages resulting to crops from allegedly deficient fertilizers, while allowing other evidence, is not deemed to be arbitrary or unreasonable. 916

Amendment of pleadings is largely within the discretion of the trial court, and unless a gross abuse of discretion is shown, there is no ground for reversal. Accordingly, where the defense sought to be interposed is without merit, a claim that due process would be denied by rendition of a foreclosure decree without leave to file a supplementary answer is utterly without foundation. 917

Defenses.—Just as a State may condition the right to institute litigation, so may it establish terms for the interposition of certain defenses. It may validly provide that one sued in a possessory action cannot bring an action to try title until after judgment is rendered and after he has paid that judgment. 918 A State may limit the defense in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises. 919 A State may also provide that the doctrines of contributory negligence, assumption of risk, and fellow servant do not bar recovery in certain employment-related accidents. No person has a vested right in such defenses. 920 Similarly, a nonresident de-


916 Sawyer v. Piper, 189 U.S. 171 (1903).


fendant in a suit begun by foreign attachment, even though he has no resources or credit other than the property attached, cannot challenge the validity of a statute which requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend. 921

**Costs, Damages, and Penalties.**—What costs are allowed by law is for the court to determine; an erroneous judgment of what the law allows does not deprive a party of his property without due process of law. 922 Nor does a statute providing for the recovery of reasonable attorney’s fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation. 923 Congress may, however, severely restrict attorney’s fees in an effort to keep an administrative claims proceeding informal. 924

Equally consistent with the requirements of due process is a statutory procedure whereby a prosecutor of a case is adjudged liable for costs, and committed to jail in default of payment thereof, whenever the court or jury, after according him an opportunity to present evidence of good faith, finds that he instituted the prosecution without probable cause and from malicious motives. 925 Also, as a reasonable incentive for prompt settlement without suit of just demands of a class receiving special legislative treatment, such as common carriers and insurance companies together with their patrons, a State may permit harassed litigants to recover penalties in the form of attorney’s fees or damages. 926

By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a State may provide that a public officer embezzling public money shall, notwithstanding that he has made restitution, suffer

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921 Martinez v. California, 444 U.S. 277, 280–83 (1980) (State interest in fashioning its own tort law permits it to provide immunity defenses for its employees and thus defeat recovery).
924 Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650 (1914).
not only imprisonment but also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons whose money was embezzled. Whatever this fine is called, whether a penalty, or punishment, or civil judgment, it comes to the convict as the result of his crime. On the other hand, when appellant, by its refusal to surrender certain assets, was adjudged in contempt for frustrating enforcement of a judgment obtained against it, dismissal of its appeal from the first judgment was not a penalty imposed for the contempt, but merely a reasonable method for sustaining the effectiveness of the State's judicial process.

To deter careless destruction of human life, a State by law may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees, and may also allow punitive damages for fraud perpetrated by employees. Also constitutional is the traditional common law approach for measuring punitive damages, granting the jury wide but not unlimited discretion to consider the gravity of the offense and the need to deter similar offenses. The Court has indicated, however, that the amount of punitive damages are limited to those reasonably necessary to vindicate a state's interest in deterring unlawful conduct. These limits may be discerned by a court by examining the degree of reprehensibility of the act, the ratio between the punitive award and plaintiff's actual or potential harm, and the legislative sanctions provided for comparable misconduct.

Statutes of Limitation.—A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce the right by suit. By the same token, a State

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927 Coffey v. Harlan County, 204 U.S. 659, 663, 665 (1907).
928 National Union v. Arnold, 348 U.S. 37 (1954) (the judgment debtor had refused to post a supersedeas bond or to comply with reasonable orders designed to safeguard the value of the judgment pending decision on appeal).
932 BMW v. Gore, 517 U.S. 559 (1996) (holding that a $2 million judgement for failing to disclose to a purchaser that a "new" car had been repainted was "grossly excessive" in relation to the state's interest, as only a few of the 983 similarly repainted cars had been sold in that same state). But see TXO Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause even though the jury awarded actual damages of only $19,000).
may shorten an existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect. What is a reasonable period, however, is dependent on the nature of the right and particular circumstances.\footnote{Wheeler v. Jackson, 137 U.S. 245, 258 (1890); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 156 (1911). Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication).}

Thus, where a receiver for property is appointed 13 years after the disappearance of the owner and notice is made by publication, it is not a violation of due process to bar actions relative to that property after an interval of only one year after such appointment.\footnote{Blinn v. Nelson, 222 U.S. 1 (1911).} When a State, by law, suddenly prohibits all actions to contest tax deeds which have been of record for two years unless they are brought within six months after its passage, no unconstitutional deprivation is effected.\footnote{Turner v. New York, 168 U.S. 90, 94 (1897).} No less valid is a statute which provides that when a person has been in possession of wild lands under a recorded deed continuously for 20 years and had paid taxes thereon during the same, and the former owner in that interval pays nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision.\footnote{Soper v. Lawrence Brothers, 201 U.S. 359 (1906).} Similarly, an amendment to a workmen’s compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due process to one who sustained his injury at a time when the statute contained no limitation. A limitation is deemed to affect the remedy only, and the period of its operation in this instance was viewed as neither arbitrary nor oppressive.\footnote{Mattson v. Department of Labor, 293 U.S. 151, 154 (1934).}

Moreover, a State may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. Thus, a repeal or extension of a statute of limitations affects no unconstitutional deprivation of property of a debtor-defendant in whose favor such statute had already become a defense. “A right to defeat a just debt by the statute of limitation . . . [is not] a vested right,” such as is protected by the Constitution. Accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a
child for the use of her property, or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law, or a right of an employee to seek, on account of the aggravation of a former injury, an additional award out of a state-administered fund.

However, for suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title. Also unconstitutional is the application of a statute of limitation to extend a period that parties to a contract have agreed should limit their right to remedies under the contract. “When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired” unconstitutionally imposes a burden in excess of that contracted.

**Burden of Proof and Presumptions.**—It is clearly within the domain of the legislative branch of government to establish presumptions and rules respecting burden of proof in litigation. Nonetheless, the Due Process Clause does prevent the deprivation of liberty or property upon application of a standard of proof too lax to make reasonable assurance of accurate factfinding. Thus, “[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to ‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’”

Applying the formula it has worked out for determining what process is due in a particular situation, the Court has held that a standard at least as stringent as clear and convincing evidence

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is required in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period.\textsuperscript{947} Similarly, because the interest of parents in retaining custody of their children is fundamental, the State may not terminate parental rights through reliance on a standard of preponderance of the evidence—the proof necessary to award money damages in an ordinary civil action—but must prove that the parents are unfit by clear and convincing evidence.\textsuperscript{948} Further, unfitness of a parent may not simply be presumed because of some purported assumption about general characteristics, but must be established.\textsuperscript{949}

As long as a presumption is not unreasonable and is not conclusive, it does not violate the Due Process Clause. Legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property, however, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one's defense is void.\textsuperscript{950} On the other hand, if there is a rational connection between what is proved and what is inferred, legislation declaring that the proof of one fact or group of facts shall constitute prima facie evidence of a main or ultimate fact will be sustained.\textsuperscript{951}

For a brief period, the Court utilized what it called the "irrebuttable presumption doctrine" to curb the legislative tendency to confer a benefit or to impose a detriment based on presumed characteristics based on the existence of another characteristic.\textsuperscript{952}

\textsuperscript{947}Addington v. Texas, 441 U.S. 418 (1979).
\textsuperscript{949}Stanley v. Illinois, 405 U.S. 645 (1972) (presumption that unwed fathers are unfit parents). \textit{But see} Michael H. v. Gerald D., 491 U.S. 110 (1989) (statutory presumption of legitimacy accorded to a child born to a married woman living with her husband defeats the right of the child's biological father to establish paternity).
\textsuperscript{950}Presumptions were voided in Bailey v. Alabama, 219 U.S. 219 (1911) (anyone breaching personal services contract guilty of fraud); Manley v. Georgia, 279 U.S. 1 (1929) (every bank insolvency deemed fraudulent); Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929) (collision between train and auto at grade crossing constitutes negligence by railway company); Carella v. California, 491 U.S. 263 (1989) (conclusive presumption of theft and embezzlement upon proof of failure to return a rental vehicle).
\textsuperscript{951}Presumptions sustained include Hawker v. New York, 170 U.S. 189 (1898) (person convicted of felony unfit to practice medicine); Hawes v. Georgia, 258 U.S. 1 (1922) (person occupying property presumed to have knowledge of still found on property); Bandini Co. v. Superior Court, 284 U.S. 8 (1931) (release of natural gas into the air from well presumed wasteful); Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933) (rebuttable presumption of railroad negligence for accident at grade crossing). \textit{See also} Morrison v. California, 291 U.S. 82 (1934).
\textsuperscript{952}The approach was not unprecedented, some older cases having voided tax legislation that presumed conclusively an ultimate fact. Schlesinger v. Wisconsin,
Thus, in *Stanley v. Illinois*, the Court found invalid a construction of the state statute that presumed illegitimate fathers to be unfit parents and that prevented them from objecting to state wardship. Mandatory maternity leave rules requiring pregnant teachers to take unpaid maternity leave at a set time prior to the date of the expected births of their babies were voided as creating a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.

Major controversy developed over the application of “irrebuttable presumption doctrine” in benefits cases. Thus, while a State may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, it was held impermissible for the State to presume conclusively that because the legal address of a student was outside the State at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. The due process clause required that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.

Moreover, a food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that fairly often could be shown to be false if evidence could be presented. The rule which emerged for subjecting persons to detriment or qualifying them for benefits was that the legislature may not presume the existence of the decisive characteristic upon a given set of facts, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. The doctrine in effect afforded the Court the opportunity to choose between resort to the equal protection clause or to the due process clause in judging the

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270 U.S. 230 (1926) (deeming any gift made by decedent within six years of death to be a part of estate denies estate’s right to prove gift was not made in contemplation of death); Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm’n, 284 U.S. 206 (1931).


Thus, on the some day Murry was decided, a similar food stamp qualification was struck down on equal protection grounds. Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

Stanley and LaFleur were distinguished as involving fundamental rights of family and childbearing, 422 U.S. at 771, and Murry was distinguished as involving an irrational classification. Id. at 772. Vlandis, said Justice Rehnquist for the Court, meant no more than that when a State fixes residency as the qualification it may not deny to one meeting the test of residency the opportunity so to establish it. Id. at 771. But see id. at 802–03 (Justice Brennan dissenting).


Vlandis, which was approved but distinguished, is only marginally in this doctrinal area, involving as it does a right to travel feature, but it is like Salfi and Murry in its benefit context and order of presumption. The Court has avoided deciding whether to overrule, retain, or further limit Vlandis. Elkins v. Moreno, 435 U.S. 647, 658–62 (1978).

In Turner v. Department of Employment Security, 423 U.S. 44 (1975), decided after Salfi, the Court voided under the doctrine a statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected birth until six weeks after childbirth. But see Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1977) (provision granting benefits to miners “irrebuttably presumed” to be disabled is merely a way of giving benefits to all those with the condition triggering the presumption); Califano v. Boles, 443 U.S. 282,
Trials and Appeals.—Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process, and the Fourteenth Amendment has not been held to restrain the States in retaining or abolishing civil juries. Thus, abolition of juries in proceedings to enforce liens, mandamus and quo warranto actions, and in eminent domain and equity proceedings has been approved. States are also free to adopt innovations respecting selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of unanimity, and petit juries containing eight rather than the conventional number of twelve members may be established.

If a full and fair trial on the merits is provided, due process does not require a State to provide appellate review. But if an appeal is afforded, the State must not so structure it as to arbitrarily deny to some persons the right or privilege available to others.

PROCEDURAL DUE PROCESS—CRIMINAL

Generally: The Principle of Fundamental Fairness

The Court in recent years has held that practically all the criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees denies a suspect or a defendant due process of law under the Fourteenth Amendment. Further, the Court has held that the due process clause protects against practices and

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284–85 (1979) (Congress must fix general categorization; case-by-case determination would be prohibitively costly).
966 In re Delgado, 140 U.S. 586, 588 (1891).
971 See Maxwell v. Dow, 176 U.S. 581, 602 (1900).
973 405 U.S. at 74-79 (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal, is invalid when no similar provision is applied to other cases). Cf. Bunkers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (assessment of 15% penalty on party who unsuccessfully appeals from money judgment meets rational basis test under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).
974 See analysis under the Bill of Rights, “Fourteenth Amendment,” supra.
policies which violate precepts of fundamental fairness,\(^\text{975}\) even if they do not violate specific guarantees of the Bill of Rights.\(^\text{976}\) The standard query in such cases is whether the challenged practice or policy violates “a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government.”\(^\text{977}\)

This inquiry contains a historical component, as “recent cases . . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . . [Therefore, the limitations imposed by the Court on the States are] not necessarily fundamental to fairness in every criminal system that might be imagined but [are] fundamental in the

\(^{975}\)For instance, In re Winship, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is a due process requirement. For other recurrences to general due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, see, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973) (defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged); Wardius v. Oregon, 412 U.S. 470 (1973) (defendant may not be held to rule requiring disclosure to prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state); Mullaney v. Wilbur, 421 U.S. 684 (1975) (defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); Estelle v. Williams, 425 U.S. 501 (1976) (a State cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes); Henderson v. Kibbe, 431 U.S. 145 (1977) (sufficiency of jury instructions); Patterson v. New York, 432 U.S. 197 (1977) (defendant may be required to bear burden of affirmative defense); Taylor v. Kentucky, 436 U.S. 478 (1978) (requiring, upon defense request, jury instruction on presumption of innocence); Kentucky v. Whorton, 441 U.S. 786 (1979) (fairness of failure to give jury instruction on presumption of innocence evaluated under totality of circumstances); Sandstrom v. Montana, 442 U.S. 510 (1979) (conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); Hicks v. Oklahoma, 447 U.S. 343 (1980) (where sentencing enhancement scheme for habitual offenders found unconstitutional, defendant’s sentence cannot be sustained, even if sentence falls within range of unenhanced sentences).

\(^{976}\)Justice Black thought the Fourteenth Amendment should be limited to the specific guarantees found in the Bill of Rights. See, e.g., In re Winship, 397 U.S. 358, 377 (1970) (dissenting). For Justice Harlan’s response, see id. at 372 n.5 (concurring).

context of the criminal processes maintained by the American States.” 978

The Elements of Due Process

Initiation of the Prosecution.—Indictment by a grand jury is not a requirement of due process; a State may proceed instead by information. 979 Due process does require that, whatever the procedure, a defendant must be given adequate notice of the offense charged against him and for which he is to be tried, 980 even aside from the notice requirements of the Sixth Amendment. 981 Where, of course, a grand jury is utilized, it must be fairly constituted and free from prejudicial influences. 982

Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine.—Criminal statutes which lack sufficient definiteness or specificity are commonly held “void for vagueness.” 983 Such legislation “may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.” 984


979 Hurtado v. California, 110 U.S. 516 (1884). The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. Albright v. Oliver, 510 U.S. 266 (1994) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause).

980 Smith v. O'Grady, 312 U.S. 329 (1941) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of “burglary with explosives” carrying a much lengthier sentence voided). See also Cole v. Arkansas, 333 U.S. 196 (1948) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); In re Ruffalo, 390 U.S. 544 (1968) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); Rabe v. Washington, 405 U.S. 313 (1972) (affirmance of obscenity conviction because of the context in which a movie was shown—ground neither covered in the statute nor listed in the charge—was invalid).

981 See Sixth Amendment, Notice of Accusation, supra.


984 Musser v. Utah, 333 U.S. 95, 97 (1948). “The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt.” Id. at 97. “Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with
Men of common intelligence cannot be required to guess at the meaning of [an] enactment." 985

For instance, the Court voided for vagueness a criminal statute providing that a person was a "gangster" and subject to fine or imprisonment if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was "known to be a member of a gang of two or more persons." The Court observed that neither common law nor the statute gave the words "gang" or "gangster" definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase "known to be a member" was ambiguous. The statute was held void, and the Court refused to allow specification of details in the particular indictment to save it because it was the statute, not the indictment, that prescribed the rules to govern conduct. 986

A statute may be so vague or so threatening to constitutionally-protected activity that it can be pronounced wholly unconstitutional; in other words, it is "unconstitutional on its face." 987 Thus, for instance, a unanimous Court in Papachristou v. City of Jacksonville 988 struck down as invalid on its face a vagrancy ordinance which punished "dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by fre-

985 Winters v. New York, 333 U.S. 507, 515–16 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable test to ascertain guilt." Id. Cf. Colten v. Kentucky, 407 U.S. 104, 110 (1972). Thus, a state statute imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed" was held to be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385 (1926). Similarly, a statute which allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge's instruction to the jury that the defendant should only have to pay the costs if it thought him guilty of "some misconduct" though innocent of the crime with which he was charged, was found to fall short of the requirements of due process. Giaccio v. Pennsylvania, 382 U.S. 399 (1966).


988 405 U.S. 156 (1972).
quenting house of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children..."

The ordinance was found to be facially invalid, according to Justice Douglas for the Court, because it did not give fair notice, it did not require specific intent to commit an unlawful act, it permitted and encouraged arbitrary and erratic arrests and convictions, it committed too much discretion to policemen, and it criminalized activities which by modern standards are normally innocent.

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court. For instance, where the terms of a statute could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be held unconstitutional only as applied. Thus, in *Palmer v. City of Euclid*, an ordinance punishing "suspicious persons" defined as "[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself" was found void only as applied to a particular defendant. In Palmer, the Court found that the defendant, having dropped off a passenger and begun talking into a two-way radio, 

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990 Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was found impermissibly vague and void on its face because it encroached on the freedom of assembly. Coates v. City of Cincinnati, 402 U.S. 611 (1971). See Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (conviction under statute imposing penalty for failure to "move on" voided); Bouie v. City of Columbia, 378 U.S. 347 (1964) (conviction on trespass charges arising out of a sit-in at a drugstore lunch counter voided since the trespass statute did not give fair notice that it was a crime to refuse to leave private premises after being requested to do so); Kolender v. Lawson, 461 U.S. 352 (1983) (requirement that person detained in valid Terry stop provide "credible and reliable" identification is facially void as encouraging arbitrary enforcement).

991 Where the terms of a vague statute do not threaten a constitutionally protected right, and where the conduct at issue in a particular case is clearly proscribed, then a due process challenge is unlikely to be successful. Where the conduct in question is at the margins of the meaning of an unclear statute, however, it will be struck down as applied. E.g., United States v. National Dairy Corp., 372 U.S. 29 (1963).


was engaging in conduct which could not reasonably be anticipated as fitting within the “without any visible or lawful business” portion of the ordinance’s definition.

Loitering statutes which are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.\footnote{Kolender v. Lawson, 461 U.S. 352, 358 (1983).} Thus, a Chicago ordinance which required police to disperse all persons in the company of “criminal street gang members” while in a public place with “no apparent purpose,” failed to meet the “requirement that a legislature establish minimal guidelines to govern law enforcement.”\footnote{City of Chicago v. Morales, 527 U.S. 41 (1998).} The Court noted that “no apparent purpose” is inherently subjective because its application depends on whether some purpose is “apparent” to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.\footnote{527 U.S. at 62.} On the other hand, where such a statute additionally required a finding that the defendant was intent on causing inconvenience, annoyance, or alarm, it was upheld against facial challenge, at least as applied to a defendant who was interfering with the ticketing of a car by the police.\footnote{Colten v. Kentucky, 407 U.S. 104 (1972).}

Statutes with vague standards may nonetheless be upheld if the text of statute is interpreted by a court with sufficient clarity. Thus, the civil commitment of persons of “such conditions of emotional instability . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons” was upheld by the Court, based on a state court’s construction of the statute as only applying to persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions—habitual course of misconduct in sexual matters and lack of power to control impulses and likelihood of attack on others—were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal proceedings.\footnote{Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).}

Conceptually related to the problem of definiteness in criminal statutes is the problem of notice. Ordinarily, it can be said that ignorance of the law affords no excuse, or, in other instances, that the nature of the subject matter or conduct may be sufficient to
alert one that there are laws which must be observed.999 On occasion the Court has even approved otherwise vague statutes because the statute forbade only “willful” violations, which the Court construed as requiring knowledge of the illegal nature of the proscribed conduct.1000 Where conduct is not in and of itself blameworthy, however, a criminal statute may not impose a legal duty without notice.1001

The question of notice has also arisen in the context of “judge-made” law. While the Ex Post Facto Clauses forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law rule that a victim must die within a “year and a day” in order for homicide charges to be brought in Rogers v. Tennessee,1002 the question arose whether such rule could be applied to acts occurring before the court’s decision. The dissent argued vigorously that unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court’s decision was an outright reversal of existing law. Under this reasoning, the new “law” could not be applied retrospectively. The majority held, however, that only those holdings which were “unexpected and indefensible by reference to the law which had been express prior to the conduct in issue”1003 could not be applied retroactively. The relatively archaic nature of “year and a day rule”, its abandonment by most jurisdictions, and its inapplicability to modern times

999 E.g., United States v. Freed, 401 U.S. 601 (1971). Persons may be bound by a novel application of a statute, not supported by Supreme Court or other “fundamentally similar” case precedent, so long as the court can find that, under the circumstance, “unlawfulness . . . is apparent” to the defendant. United States v. Lanier, 520 U.S. 259, 271–72 (1997).


1001 See, e.g. Lambert v. California, 355 U.S. 225 (1957) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In Lambert, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite “unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.” “Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.” Id. at 228, 229-30.


were all cited as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

**Entrapment.**—Certain criminal offenses, because they are consensual actions taken between and among willing parties, present police with difficult investigative problems. Thus, in order to deter such criminal behavior, police agents may “encourage” persons to engage in criminal behavior, such as selling narcotics or contraband, or they may may seek to test the integrity of public employees, officers or public officials by offering them bribes. In such cases, an “entrapment” defense is often made, though it is unclear whether the basis for the defense is the due process clause, the supervisory authority of the federal courts to deter wrongful police conduct, or merely statutory construction (interpreting criminal laws to find that the legislature would not have intended to punish conduct induced by police agents).

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1004 Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment, or informers may be utilized, which also has constitutional implications.


1006 For instance, this strategy was seen in the “Abscam” congressional bribery controversy. The defense of entrapment was rejected as to all the “Abscam” defendants. E.g., United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983); United States v. Williams, 705 F.2d 603 (2d Cir. 1983); United States v. Jannotti, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982).

1007 For a thorough evaluation of the basis for and the nature of the entrapment defense, see Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 Sup. Ct. Rev. 111. The Court’s first discussion of the issue was based on statutory grounds, see Sorrells v. United States, 287 U.S. 435, 446–49 (1932), and that basis remains the choice of some Justices. Hampton v. United States, 425 U.S. 484, 488–89 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). In Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring), however, Justice Frankfurter based his opinion on the supervisory powers of the courts. But, utilization of that power was rejected in United States v. Russell, 411 U.S. 423, 490 (1973), and by the plurality in Hampton, 425 U.S. at 490. The Hampton plurality thought the due process clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some protected right of the defendant, and that inducement and encouragement could never do that. Justices Powell and Blackmun, on the other hand, 411 U.S. at 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The *Russell* and *Hampton* dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. 411 U.S. at 495 (Justices Brennan, Stewart, and Marshall); Russell, 411 U.S. at 439 (Justices Stewart, Brennan, and Marshall). The Court again failed to clarify the basis for the defense in Mathews v. United States, 485 U.S. 58 (1988) (a defendant in a federal criminal case who denies commission of the crime is entitled to assert an “inconsistent” entrapment defense where the evidence warrants), and in Jacobson v. United States, 503 U.S.
The Court has employed the so-called “subjective approach” in evaluating the defense of entrapment.\textsuperscript{1008} This subjective approach follows a two-pronged analysis. First, the question is asked whether the offense was induced by a government agent. Second, if the government has induced the defendant to break the law, “the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.”\textsuperscript{1009} If the defendant can be shown to have been ready and willing to commit the crime whenever the opportunity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement.\textsuperscript{1010} On the other hand, “[w]hen the Government’s quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene.”\textsuperscript{1011}

**Criminal Identification Process.**—The use by police of procedures seeking to identify the perpetrators of crimes—by lineups, showups, photographic displays, and the like—can raise due process problems. When police use lineups or showups\textsuperscript{1012} and other identification processes at which the defendant is not present,\textsuperscript{1013}
the admissibility of a subsequent in-court identification or of testimony about an out-of-court identification is whether there is “a highly substantial likelihood of misidentification,” and that question must be determined “on the totality of the circumstances.”

“Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” But, balancing the factors that it thought furnished the guidance for decision, the Court declined to lay down a per se rule of exclusion of an identification because it was obtained under conditions of unnecessary suggestiveness alone, feeling that the fairness standard of due process does not require an evidentiary rule of such severity.

**Fair Trial.**—As noted, the provisions of the Bill of Rights now applicable to the States contain basic guarantees of a fair trial—right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. “Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept... What is fair in one set of circumstances may be an act of tyranny in others.” Conversely, “as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it... [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.”

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1014 Neil v. Biggers, 409 U.S. 188, 196–201 (1972); Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. See also Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970).

1015 Manson v. Brathwaite, 432 U.S. 98, 107–14 (1977). The possibility of a per se rule in post-Stovall cases had been left open in Neil v. Biggers, 409 U.S. 188, 199 (1972). In Manson, the Court evaluated what the per se rule and the less strict rule contributed to excluding unreliable eyewitness testimony from jury consideration, to deterrence of suggestive procedures, and to the administration of justice. Due process does not require that the in-court hearing to determine whether to exclude a witness’ identification as arrived at improperly be out of the presence of the jury. Watkins v. Sowders, 449 U.S. 341 (1981).


For instance, bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one’s right to a fair trial. Thus, in *Tumey v. Ohio* 1019 it was held to violate due process for a judge to receive, in addition to his salary, the costs imposed on a convicted defendant, the judge in this case also being a mayor of the municipality which received part of the money collected in fines. Or, in other cases, the Court has found that contemptuous behavior in court may affect the impartiality of the presiding judge, so as to disqualify such judge from citing and sentencing the contemnors. 1020 Due process is also violated by the participation of a biased or otherwise partial juror, although there is no presumption that all jurors with a potential bias are in fact prejudiced. 1021

Public hostility toward a defendant which intimidates a jury is, or course, a classic due process violation. 1022 More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they

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1020 *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) ( . . . it is generally wise where the marks of unseemly conduct have left persons stings [for a judge to ask a fellow judge to take his place]; *Taylor v. Hayes*, 418 U.S. 488, 503 (1974) (where “marked personal feelings were present on both sides,” a different judge should preside over a contempt hearing). *But see* Ungar v. Sarafite, 376 U.S. 575 (1964) (“[w]e cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to authority”). In the context of alleged contempt before a judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: “A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.” In re *Murchison*, 349 U.S. 133, 136 (1955).

1021 Ordinarily the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual bias. *Smith v. Phillips*, 455 U.S. 209 (1982) (juror had job application pending with prosecutor’s office during trial). *See also* Remmer v. United States, 347 U.S. 227 (1954) (bribe offer to sitting juror); *Dennis v. United States*, 339 U.S. 162, 167–72 (1950) (government employees on jury). But, a trial judge’s refusal to question potential jurors about the contents of news reports to which they had been exposed did not violate the defendant’s right to due process, it being sufficient that the judge on *voir dire* asked the jurors whether they could put aside what they had heard about the case, listen to the evidence with an open mind, and render an impartial verdict. *Mu'Min v. Virginia*, 500 U.S. 415 (1991). Nor is it a denial of due process for the prosecution, after a finding of guilt, to call the jury’s attention to the defendant’s prior criminal record, if the jury has been given a sentencing function to increase the sentence which would otherwise be given under a recidivist statute. *Spencer v. Texas*, 385 U.S. 554 (1967). For discussion of the requirements of jury impartiality about capital punishment, *see discussion under Sixth Amendment, supra.*

should be vigilant to guard against such prejudice and to curb both the publicity and the jury’s exposure to it.\footnote{Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); \textit{But see} Stroble v. California, 343 U.S. 181 (1952); Murphy v. Florida, 421 U.S. 794 (1975).}

The fairness of a particular rule of procedure may also be the basis for due process claims, but such decisions need to be made based on the totality of the circumstances surrounding such procedures.\footnote{Initially, the televising of certain trials was struck down on the grounds that the harmful potential effect on the jurors was substantial, that the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, that the judge’s ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and that the defendant is likely to be harassed by his television exposure. Estes v. Texas, 381 U.S. 532 (1965). Subsequently, however, in part because of improvements in technology which caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not altogether preclude the televising of state criminal trials. Chandler v. Florida, 449 U.S. 560 (1981). The decision was unanimous but Justices Stewart and White concurred on the basis that Estes had established a \textit{per se} constitutional rule which had to be overruled, id. at 583, 586, contrary to the Court’s position. Id. at 570–74.}

For instance, the presumption of innocence has been central to a number of Supreme Court cases. Thus, under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence, even though the burden on the defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. Taylor v. Kentucky, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case, Kentucky v. Whorton, 441 U.S. 786 (1979), (reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process). The circumstances emphasized in Taylor included skeletal instructions on burden of proof combined with the prosecutor’s remarks in his opening and closing statements inviting the jury to consider the defendant’s prior record and his indictment in the present case as indicating guilt. \textit{See also} Sandstrom v. Montana, 442 U.S. 510 (1979) (instructing jury trying person charged with “purposely or knowingly” causing victim’s death that “law presumes that a person intends the ordinary consequences of his voluntary acts” denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event State would not have carried its burden of proving guilt). \textit{And see} Cupp v. Naughten, 414 U.S. 141 (1973); Henderson v. Kibbe, 431 U.S. 145, 154–55 (1973).

For other cases applying Sandstrom, \textit{see} Francis v. Franklin, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state’s burden of persuasion on intent does not erase Sandstrom error in earlier part of charge); Rose v. Clark, 478 U.S. 570 (1986) (Sandstrom error can in some circumstances constitute harmless error under principles of Chapman v. California, 386 U.S. 18 (1967)). Similarly, improper arguments by a prosecutor do not necessarily constitute “plain error,” and a reviewing court may consider in the context of the entire record of the trial the trial court’s failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985).
all hypnotically refreshed testimony.\textsuperscript{1026} Or, while a State may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, due process requires reciprocal discovery in such circumstances, necessitating that the State give defendant pretrial notice of its rebuttal evidence on the alibi issue.\textsuperscript{1027} Due process is also violated when the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.\textsuperscript{1028}

The combination of otherwise acceptable rules of criminal trials may in some instances deny a defendant due process. Thus, based on the particular circumstance of a case, two rules that (1) denied defendant the right to cross-examine his own witness in order to elicit evidence exculpatory to defendant\textsuperscript{1029} and (2) denied defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, denied defendant his constitutional right to present his own defense in a meaningful way.\textsuperscript{1030} Similarly, a questionable procedure may be saved by its combination with another. Thus, it does not deny a defendant due process to subject him initially to trial before a non-lawyer police court judge when there is a later trial de novo available under the State’s court system.\textsuperscript{1031}

\textbf{Prosecutorial Misconduct}.—When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, due process is violated. The clause “cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . .

\begin{footnotes}
\item[1028] Estelle v. Williams, 425 U.S. 501 (1976). The convicted defendant was denied \textit{habeas} relief, however, because of failure to object at trial. \textit{But cf.} Holbrook v. Flynn, 475 U.S. 560 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation).
\item[1029] The defendant called the witness because the prosecution would not.
\item[1030] Chambers v. Mississippi, 410 U.S. 284 (1973). \textit{See also} Davis v. Alaska, 415 U.S. 308 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid); Crane v. Kentucky, 476 U.S. 683 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession). \textit{But see} Montana v. Egelhoff, 518 U.S. 37 (1996) (state may bar defendant from introducing evidence of intoxication to prove lack of \textit{mens rea}).
\end{footnotes}
is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." 1032

The above quoted language was dictum in the case in which it was set forth,1033 but the principle enunciated has required state officials to controvert allegations that knowingly false testimony had been used to convict 1034 and has upset convictions found to have been so procured.1035 Extending the principle, the Court in Miller v. Pate 1036 overturned a conviction obtained after the prosecution had represented to the jury that a pair of men’s shorts found near the scene of a sex attack belonged to the defendant and that they were stained with blood; the defendant showed in a habeas corpus proceeding that no evidence connected him with the shorts and furthermore that the shorts were not in fact blood-stained, and that the prosecution had known these facts.

This line of reasoning has even resulted in the disclosure to the defense of information not relied upon by the prosecution during trial. 1037 In Brady v. Maryland, 1038 the Court held “that the

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1033 The Court dismissed the petitioner’s suit on the ground that adequate process existed in the state courts to correct any wrong and that petitioner had not availed himself of it. A state court subsequently appraised the evidence and ruled that the allegations had not been proved in Ex parte Mooney, 10 Cal. 2d 1, 73 P.2d 554 (1937), cert. denied 305 U.S. 598 (1938).
1037 In the former case, the principal prosecution witness was defendant’s accomplice, and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but did nothing to correct the false testimony. See also Giglio v. United States, 405 U.S. 150 (1972) (same). In the latter case, involving a husband’s killing of his wife because of her infidelity, a prosecution witness testified at the habeas corpus hearing that he told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant’s guilt. What if the prosecution should become aware of the perjury of a prosecution witness following the trial? Cf. Durley v. Mayo, 351 U.S. 277 (1956). But see Smith v. Phillips, 455 U.S. 209, 218–21 (1982) (prosecutor’s failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated).
1038 386 U.S. 1 (1967).
1037 It should be noted that the obligations discussed below regarding a prosecutor’s obligation to provide information to a defendant do not appear to apply where the defendant has agreed to plead guilty, even though such information might have affected a defendant’s decision as to whether to accept a plea bargain. United States v. Ruiz, 122 S. Ct. 2450 (2002).
1039 373 U.S. 83, 87 (1963). In Jencks v. United States, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that
suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” In that case, the prosecution had suppressed an extrajudicial confession of defendant’s accomplice that he had actually committed the murder.1039 “The heart of the holding in Brady is the prosecution’s suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence’s favorable character for the defense, and (c) the materiality of the evidence.”

In United States v. Agurs,1041 the Court summarized and somewhat expanded the prosecutor’s obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. First, as noted, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.1042 Second, as established in Brady, if the defense specifically requested certain evidence and the prosecutor withheld it, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.1043 Third (the new law created in Agurs), if the defense did not make a request at all, or simply asked for “all Brady material”

the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory stage. Cf. Scales v. United States, 367 U.S. 203, 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. Palermo v. United States, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

While the state court in Brady had allowed a partial retrial so that the accomplice’s confession could be considered in the jury’s determination of whether to impose capital punishment, it had declined to order a retrial of the guilt phase of the trial. The defendant’s appeal of this latter decisions was rejected, as the issue, as seen by the Court, was whether the state court could have excluded the defendant’s confessed participation in the crime on evidentiary grounds, as the defendant had confessed to facts sufficient to establish grounds for the crime charged.

Moore v. Illinois 408 U.S. 786, 794–95 (1972) (finding Brady inapplicable because the evidence withheld was not material and not exculpatory). Joining Justice Blackmun’s opinion were Justices Brennan, White, Rehnquist, and Chief Justice Burger. Dissenting were Justices Douglas, Stewart, Marshall, and Powell. Id. at 800. See also Wood v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no Due Process violation where prosecutor’s failure to disclose the result of a witness’ polygraph test would not have affected the outcome of the case). The beginning in Brady toward a general requirement of criminal discovery was not carried forward. See the division of opinion in Giles v. Maryland, 386 U.S. 66 (1967).

427 U.S. at 103-04. This situation is the Mooney v. Holohan type of case.

427 U.S. at 104-06. This the Brady situation.
or for “anything exculpatory,” a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence; if the prosecutor does not reveal it, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant’s guilt.\footnote{427 U.S. at 106-14. This was the \textit{Agurs} fact situation. Similarly, there is no obligation that law enforcement officials preserve breath samples which have been utilized in a breath-analysis test; the \textit{Agurs} materiality standard is met only by evidence which “possess[es] an exculpatory value . . . apparent before [it] was destroyed, and also [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” California v. Trombetta, 467 U.S. 479, 489 (1984). See also Arizona v. Youngblood, 488 U.S. 51 (1988) (negligent failure to refrigerate and otherwise preserve potentially exculpatory physical evidence from sexual assault kit does not violate a defendant’s due process rights absent bad faith on the part of the police).}

This tripartite formulation, however, suffered from two apparent defects. First, it added a new level of complexity to a \textit{Brady} inquiry by requiring a reviewing court to establish the appropriate level of materiality by classifying the situation under which the exculpating information was withheld. Secondly, it was not clear, if the fairness of the trial was at issue, why the circumstances of the failure to disclose should affect the evaluation of the impact that such information would have had on the trial. Ultimately, the Court addressed these issues in \textit{United States v. Bagley}\footnote{473 U.S. at 667 (1985).}.\footnote{473 U.S. at 682.}

In \textit{Bagley}, the Court established a uniform test for materiality, choosing the most stringent requirement that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different.\footnote{473 U.S. at 676-77.} This materiality standard, found in contexts outside of \textit{Brady} inquiries,\footnote{See \textit{United States v. Malenzuela-Bernal}, 458 U.S. 858 (1982) (testimony made unavailable by Government deportation of witnesses); \textit{Strickland v. Washington}, 466 U.S. 668 (1984) (incompetence of counsel).} is applied not only to exculpatory material, but also to material which would be relevant to the impeachment of witnesses.\footnote{473 U.S. at 682.} Thus, where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and of the punishment, finally concluding that there was no reasonable probability that the jury would have reached a different result.\footnote{Strickler v. Greene, 527 U.S. 263 (1999).}

**Proof, Burden of Proof, and Presumptions.**—In 1970, the Court held in \textit{In re Winship} that the due process clauses of the Fifth and Fourteenth Amendments “[p]rotect the accused against
conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’” In many past cases, this standard was assumed to be the required one, but because it was so widely accepted only recently has the Court had the opportunity to pronounce it guaranteed by due process. The presumption of innocence is valuable in assuring defendants a fair trial, and it operates to ensure that the jury considers the case solely on the evidence.

The Court had long held that, under the due process clause, it would set aside convictions that are supported by no evidence at all. The Winship case, however, necessitated a consideration of

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1051 397 U.S. at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). Justice Harlan’s Winship concurrence, id. at 368, proceeded on the basis that inasmuch as there is likelihood of error in any system of reconstructing past events, the error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard.


1054 E.g., Deutch v. United States, 367 U.S. 456, 471 (1961). See also Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (jury instruction that explains “reasonable doubt” as doubt that would give rise to a “grave uncertainty,” as equivalent to a “substantial doubt,” and as requiring “a moral certainty,” suggests a higher degree of certainty than is required for acquittal, and therefore violates the Due Process Clause). But see Victor v. Nebraska, 511 U.S. 1 (1994) (considered as a whole, jury instructions that define “reasonable doubt” as requiring a “moral certainty” or as equivalent to “substantial doubt” did not violate due process because other clarifying language was included.)

1055 Holt v. United States, 218 U.S. 245 (1910); Agnew v. United States, 165 U.S. 36 (1897). These cases overturned Coffin v. United States, 156 U.S. 432, 460 (1895), in which the Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt.

1056 Thompson v. City of Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961); Taylor v. Louisiana, 370 U.S. 154 (1962); Barr v. City of Co-
whether reviewing courts should weigh the sufficiency of trial evidence. Thus, in *Jackson v. Virginia*, 1057 it held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The question the reviewing court is to ask itself is not whether it believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 1058

Inasmuch as due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, the Court held in *Mullaney v. Wilbur* 1059 that it was unconstitutional to require a defendant charged with murder to prove that he acted “in the heat of passion on sudden provocation” in order to reduce the homicide to manslaughter. The Court indicated that a balancing of interests test was to be employed to determine when the due process clause required the prosecution to carry the burden and when some part of the burden might be shifted to the defendant, but the decision called into question the practice in many States under which some burdens of persuasion were borne by the defense, and raised the prospect that the prosecution must bear all burdens of persuasion, a significant and weighty task given the large numbers of affirmative defenses.

The Court, however, summarily rejected the argument that *Mullaney* means that the prosecution must negate an insanity defense, 1060 and later, in *Patterson v. New York*, 1061 upheld a state statute that provided that required a defendant asserting “extreme
emotional disturbance” as an affirmative defense to murder\footnote{Proving the defense would reduce a murder offense to manslaughter.} to prove such by a preponderance of the evidence. According to the Court, the constitutional deficiency in \textit{Mullaney} was that the statute made malice an element of the offense, permitted malice to be presumed upon proof of the other elements and then required the defendant to prove the absence of malice. In \textit{Patterson}, by contrast, the statute obligated the State to prove each element of the offense (the death, the intent to kill, and the causation) beyond a reasonable doubt, while allowing the defendant to prove an affirmative defense by preponderance of the evidence that would reduce the degree of the offense.\footnote{The decisive issue, then, was whether the statute required the state to prove beyond a reasonable doubt each element of the offense.} This distinction has been criticized as formalistic, as the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses.\footnote{Dissenting in \textit{Patterson}, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts which historically have made a substantial difference in the punishment and stigma flowing from a criminal act the State always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. Patterson was followed in \textit{Martin v. Ohio}, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is “prior calculation and design”). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. Id. at 236, 240.}

Another important distinction which can substantially affect a prosecutor’s burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. While a criminal conviction is generally established by a jury using the “beyond a reasonable doubt” standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient “preponderance of the evidence” standard. The Court has taken a formalistic approach to this issue, allowing states to essentially designate which facts fall under which of these two categories. For instance, the Court has held that whether a defendant “visibly possessed a gun” during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence.\footnote{Another important distinction which can substantially affect a prosecutor’s burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. While a criminal conviction is generally established by a jury using the “beyond a reasonable doubt” standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient “preponderance of the evidence” standard. The Court has taken a formalistic approach to this issue, allowing states to essentially designate which facts fall under which of these two categories. For instance, the Court has held that whether a defendant “visibly possessed a gun” during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence.}

Although the Court has generally deferred to the legislature’s characterizations in this area, it limited this principle in \textit{Apprendi}...
v. New Jersey. In Apprendi the Court held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime. This led, in turn, to the Court overruling conflicting prior case law which had held constitutional the use of aggravating sentencing factors by judges when imposing capital punishment. These holding are subject to at least one exception, however, and the decisions might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

Another closely related issue is statutory presumptions, where proof of a “presumed fact” which is a required element of a crime, is established by another fact, the “basic fact.” In Tot v. United States, the Court held that a statutory presumption was valid under the due process clause only if it met a “rational connection” test. In that case, the Court struck down a presumption that a person possessing an illegal firearm had shipped, transported, or received such in interstate commerce. “Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience.”

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1066 530 U.S. 466, 490 (2000) (interpreting New Jersey’s “hate crime” law). It should be noted that prior to its decision in Apprendi the Court had held that sentencing factors determinative of minimum sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of McMillan was put in doubt by Apprendi, McMillan was subsequently reaffirmed in Harris v. United States, 122 S. Ct. 2406 (2002).


1068 This limiting principle does not apply to sentencing enhancements based on recidivism. Apprendi, 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of twenty years). See also Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

1069 See, e.g., Yee Hem v. United States, 268 U.S. 178 (1925) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); Manley v. Georgia, 279 U.S. 1 (1929) (invalidating statutory presumption that every insolvency of a bank shall be deemed fraudulent).

1070 319 U.S. 463, 467-68 (1943). Compare United States v. Gainey, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was “carrying on” or aiding in “carrying on” its operation), with United States v. Romano, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).
In *Leary v. United States*, 395 U.S. 6, 36 (1969), this due process test was stiffened to require that for such a “rational connection” to exist, it must “at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” Thus, a provision which permitted a jury to infer from defendant’s possession of marijuana his knowledge of its illegal importation was voided. A lengthy canvass of factual materials established to the Court’s satisfaction that while the greater part of marijuana consumed here is of foreign origin, there was still a good amount produced domestically and there was thus no way to assure that the majority of those possessing marijuana have any reason to know their marijuana is imported. The Court left open the question whether a presumption which survived the “rational connection” test “must also satisfy the criminal ‘reasonable doubt’ standard if proof of the crime charged or an essential element thereof depends upon its use.”

In its most recent case, a closely divided Court drew a further distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, “since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt.” But, with respect to permissive presumptions, “the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted.” Thus, because the jury was told it had to believe in defendants’ guilt beyond a reasonable doubt and that it could consider the inference, due process was not violated by the application of the statutory presumption that the presence of a firearm in an

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1072 395 U.S. at 37-54. While some of the reasoning in *Yee Hem*, supra, was disapproved, it was factually distinguished as involving users of “hard” narcotics.
1073 395 U.S. at 36 n.64. The matter was also left open in *Turner v. United States*, 396 U.S. 398 (1970) (judged by either “rational connection” or “reasonable doubt,” a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the “rational connection” test because a great deal of the substance was produced domestically), and in *Barnes v. United States*, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process).
The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168 (Justices Powell, Brennan, Stewart, and Marshall).

The division of the Court in these cases and in the Mullaney v. Wilbur line of cases clearly shows the unsettled doctrinal nature of the issues.

The Problem of the Incompetent or Insane Defendant or Convict.—It is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial. 1076 When it becomes evident during the trial that a defendant is or has become insane or incompetent to stand trial, the court on its own initiative must conduct a hearing on the issue. 1077 Although there is no constitutional requirement that the state assume the burden of proving the defendant competent, the state must provide the defendant with a chance to prove that he is incompetent to stand trial. Thus, a statutory presumption that a criminal defendant is competent to stand trial or a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence does not violate due process 1078.

When a State determines that a person charged with a criminal offense is incompetent to stand trial he cannot be committed indefinitely for that reason. The court’s power is to commit him to a period no longer than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that this is not the case, then the State must either release the defendant or institute the customary civil commitment proceeding that would be required to commit any other citizen. 1079

Commitment to a mental hospital of a criminal defendant acquitted by reason of insanity does not offend due process, and the period of confinement may extend beyond the period for which the

1075 The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168 (Justices Powell, Brennan, Stewart, and Marshall). See also Estelle v. McGuire, 502 U.S. 62 (1991) (upholding a jury instruction that, to dissenting Justices O’Connor and Stevens, id. at 75, seemed to direct the jury to draw the inference that evidence that a child had been “battered” in the past meant that the defendant, the child’s father, had necessarily done the battering).
1077Pate v. Robinson, 383 U.S. 375, 378 (1966). For treatment of the circumstances when a trial court should inquire into the mental competency of the defendant, see Drope v. Missouri, 420 U.S. 162 (1975). Also, an indigent who makes a preliminary showing that his sanity at the time of his offense will be a substantial factor in his trial is entitled to a court-appointed psychiatrist to assist in presenting the defense. Ake v. Oklahoma, 470 U.S. 68 (1985).
1078 Medina v. California, 112 S. Ct. 2572 (1992). It is a violation of due process, however, for a state to require that a defendant must prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).
person could have been sentenced if convicted. The purpose of the confinement is not punishment, but treatment, and the Court explained that the length of a possible criminal sentence “therefore is irrelevant to the purposes of . . . commitment.” Thus, the insanity acquittee may be confined for treatment “until such time as he has regained his sanity or is no longer a danger to himself or society.” It follows, however, that a state may not indefinitely confine an insanity acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.

The Court held in Ford v. Wainwright that the Eighth Amendment prohibits the state from executing an individual who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding satisfying the minimum requirements of due process. Those minimum standards are not met when the decision on sanity is left to the unfettered discretion of the governor; rather, due process requires the opportunity to be heard before an impartial officer or board.

**Guilty Pleas.**—A defendant may plead guilty instead of insisting that the prosecution prove him guilty. Often the defendant does so as part of a “plea bargain” with the prosecution, where the defendant is guaranteed a light sentence or is allowed to plead to a lesser offense. While the government may not structure its system so as to coerce a guilty plea, a guilty plea that is entered

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1080 Jones v. United States, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere idiosyncratic behavior.

1081 463 U.S. at 368.

1082 463 U.S. at 370.


1085 There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that “the ascertainment of a prisoner’s sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.” 477 U.S. at 411-12. Concurring Justice Powell thought that due process might be met by a proceeding “far less formal than a trial,” that the state “should provide an impartial officer or board that can receive evidence and argument from the prisoner’s counsel.” Id. at 427. Concurring Justice O’Connor, joined by Justice White, emphasized Florida’s denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell’s opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court’s holding.

1086 There are a number of other reasons why a defendant may be willing to plead guilty. There may be overwhelming evidence against him or his sentence after trial will be more severe than if he pleads guilty.

voluntarily, knowingly, and understandingly, even to obtain an advantage, is sufficient to overcome constitutional objections.\footnote{1088} The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,\footnote{1089} and it is permissible for a prosecutor during such plea bargains to require a defendant to forego his right to go to trial in return for escaping additional charges which are likely to result in a much more severe penalty.\footnote{1090} But the prosecutor does deny due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.\footnote{1091}

In accepting a guilty pleas, the court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly,\footnote{1092} and "the adjudicative element inherent in accepting a


\footnote{1090} Bordenkircher v. Hayes, 434 U.S. 357 (1978). Charged with forgery, Hayes was informed during plea negotiations that if he would plead guilty the prosecutor would recommend a five-year sentence; if he did not plead guilty, the prosecutor would also seek an indictment under the habitual criminal statute under which Hayes, because of two prior felony convictions, would receive a mandatory life sentence if convicted. Hayes refused to plead, was reindicted, and upon conviction was sentenced to life. Four Justices dissented, id. at 365, 368, contending that the Court had watered down North Carolina v. Pearce, 395 U.S. 711 (1969). See also United States v. Goodwin, 457 U.S. 368 (1982) (after defendant was charged with a misdemeanor, refused to plead guilty and sought a jury trial in district court, the Government obtained a four-count felony indictment and conviction).

\footnote{1091} Blackledge v. Perry, 417 U.S. 21 (1974). Defendant was convicted in an inferior court of a misdemeanor. He had a right to a de novo trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based upon the same conduct. The distinction the Court draws between this case and Bordenkircher and Goodwin is that of pretrial conduct, in which vindictiveness is not likely, and posttrial conduct, in which vindictiveness is more likely and is not permitted. Accord, Thigpen v. Roberts, 468 U.S. 27 (1984). The distinction appears to represent very fine line-drawing, but it appears to be one the Court is committed to.

\footnote{1092} Boykin v. Alabama, 395 U.S. 238 (1969). In Henderson v. Morgan, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree; consequently no showing was made that he knowingly was admitting such intent. "A plea may be involuntary either because
plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.\textsuperscript{1093}

\textbf{Sentencing.}—In the absence errors by the sentencing judge,\textsuperscript{1094} or of sentencing jurors considering invalid factors,\textsuperscript{1095} the significance of procedural due process at sentencing is limited.\textsuperscript{1096} In \textit{Williams v. New York},\textsuperscript{1097} the Court upheld the imposition of the death penalty, despite a jury's recommendation of mercy, where the judge acted based on information in a presentence report not shown to the defendant or his counsel. The
In Gardner v. Florida, however, the Court limited the application of Williams to capital cases. In United States v. Grayson, a noncapital case, the Court relied heavily on Williams in holding that a sentencing judge may properly consider his belief that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed. The Court declared that under the current scheme of individualized indeterminate sentencing, the judge must be free to consider the broadest range of information in assessing the defendant’s prospects for rehabilitation; defendant’s truthfulness, as assessed by the trial judge from his own observations, is relevant information.

There are various sentencing proceedings, however, which so implicate substantial rights that additional procedural protections are required. Thus, in Specht v. Patterson, the Court consid-

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1099 In Gardner, the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report which he did not characterize or make available to defense or prosecution. Justices Stevens, Stewart, and Powell found that because death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when Williams was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. 430 U.S. at 357-61. All but one of the other Justices joined the result on various other bases. Justice Brennan without elaboration thought the result was compelled by due process, id. at 364, while Justices White and Blackmun thought the result was necessitated by the Eighth Amendment, id. at 362, 364, as did Justice Marshall in a different manner. Id. at 365. Chief Justice Burger concurred only in the result, id. at 362, and Justice Rehnquist dissented. Id. at 371. See also Lankford v. Idaho, 500 U.S. 110 (1991) (due process denied where judge sentenced defendant to death after judge’s and prosecutor’s actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing).

1102 See, e.g., Kent v. United States, 383 U.S. 541, 554, 561, 563 (1966), where the Court required that before a juvenile court decided to waive jurisdiction and transfer a juvenile to an adult court it must hold a hearing and permit defense counsel to examine the probation officer’s report which formed the basis for the court’s decision. Kent was ambiguous whether it was based on statutory interpretation or constitutional analysis. In re Gault, 387 U.S. 1 (1967), however, appears to have constitutionalized the language.
1103 386 U.S. 605 (1967).
erred a defendant who had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offenders statute to an indefinite term of one day to life. The sex offenders law, the Court observed, did not make the commission of the particular offense the basis for sentencing. Instead, by triggering a new hearing to determine whether the convicted person was a public threat, a habitual offender, or mentally ill, the law in effect constituted a new charge that must be accompanied by procedural safeguards. And in Mempa v. Rhay, the Court held that when sentencing is deferred subject to probation and the terms of probation are allegedly violated so that the convicted defendant is returned for sentencing, he must then be represented by counsel, inasmuch as it is a point in the process where substantial rights of the defendant may be affected.

Due process considerations can also come into play in sentencing if the State attempts to withhold relevant information from the jury. For instance, in Simmons v. South Carolina, the Court held that due process requires that if prosecutor makes an argument for the death penalty based on the future dangerousness of the defendant to society, the jury must then be informed if the only alternative to a death sentence is a life sentence without possibility of parole. But in Ramdass v. Angelone, the Court refused to apply the reasoning of Simmons because the defendant was not technically parole ineligible at the time of sentencing.

A defendant should not be penalized for exercising a right to appeal. Thus, it is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals by others. If the judge does impose a longer sentence the second time, he must justify it on the

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1106 530 U.S. 156 (2000).
1107 North Carolina v. Pearce, 395 U.S. 711 (1969). Pearce was held to be non-retroactive in Michigan v. Payne, 412 U.S. 47 (1973). When a State provides a two-tier court system in which one may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial de novo in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in Pearce, inasmuch as the potential for vindictiveness and inclination to deter is not present. Colten v. Kentucky, 407 U.S. 104 (1972). But see Blackledge v. Perry, 417 U.S. 21 (1974), discussed supra.
Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury that sentences, however, the requirement of justifying a more severe sentence upon resentencing is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence. The presumption of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea. Here the Court reasoned that a trial may well afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.

**Corrective Process: Appeals and Other Remedies.**—"An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review." This holding has been reaffirmed although the Court has also held that when a State does provide appellate process it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.

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1108 An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. Wasman v. United States, 468 U.S. 559 (1984).
1109 Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials. Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id. at 35, 38. Justice Douglas dissented on other grounds. Id. at 35. The *Pearce* presumption that an increased, judge-imposed second sentence represents vindictiveness also is inapplicable if the first sentence was imposed following a guilty plea. Here the Court reasoned that a trial may well afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.
1112 Griffin v. Illinois, 351 U.S. 12, 18 (1956); id. at 21 (Justice Frankfurter concurring); 27 (dissenting opinion); Ross v. Moffitt, 417 U.S. 600 (1974).
1113 The line of cases begins with Griffin v. Illinois, 351 U.S. 12 (1956), in which it was deemed to violate both the due process and the equal protection clauses for a State to deny to indigent defendants free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions. See
But it is not the case that a State is free to have no corrective process at all in which defendants may pursue remedies for federal constitutional violations. In *Frank v. Mangum*,\(^{1114}\) the Court asserted that a conviction obtained in a mob-dominated trial was contrary to due process: "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.” Consequently, it has been stated numerous times that the absence of some form of corrective process when the convicted defendant alleges a federal constitutional violation contravene the Fourteenth Amendment,\(^{1115}\) and it has been held that to burden this process, such as limiting the right to petition for *habeas corpus*, is to deny the convicted defendant his constitutional rights.\(^{1116}\)

The mode by which federal constitutional rights are to be vindicated after conviction is for the government concerned to determine. “Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them . . . States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at a place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.”\(^{1117}\) If a State provides a mode of redress, a defendant must first exhaust that mode, and if unsuccessful may seek relief in federal court; if there is no adequate remedy in state court, the defendant may petition a federal court for relief through a writ of *habeas corpus*.\(^{1118}\)

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\(^{1114}\)237 U.S. 309, 335 (1915).


\(^{1116}\)Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945).


\(^{1118}\)Note that in Case v. Nebraska, 381 U.S. 336 (1965), the Court had taken for review a case which raised the issue whether a State could simply omit any corrective process for hearing and determining claims of federal constitutional viola-
When appellate or other corrective process is made available, inasmuch as it is no less a part of the process of law under which a defendant is held in custody, it becomes subject to scrutiny for any alleged unconstitutional deprivation of life or liberty. At first, the Court seemed content to assume that when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the conclusion by the appellate court that the trial court’s sentence of execution should be affirmed was ample assurance that life would not be forfeited without due process of law.1119 But in Moore v. Dempsey,1120 while insisting that it was not departing from precedent, the Court directed a federal district court in which petitioners had sought a writ of habeas corpus to make an independent investigation of the facts alleged by the petitioners—mob domination of their trial—notwithstanding that the state appellate court had ruled against the legal sufficiency of these same allegations. Indubitably, Moore marked the abandonment of the Supreme Court’s deference, founded upon considerations of comity, to decisions of state appellate tribunals on issues of constitutionality, and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair, an abandonment soon made even clearer in Brown v. Mississippi1121 and now taken for granted.

Rights of Prisoners.—Until relatively recently the view prevailed that a prisoner “has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state.”1122 This view is not now the law, and may never have been wholly correct.1123 In 1948 the Court declared that “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights”;1124 “many,” indicated less than “all,” and it was clear that the due process and equal protection clauses to some extent do apply to prisoners.1125

More direct acknowledgment of constitutional protection came in 1972: “[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons,’ which include prisoners. We are
not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances . . . .”

However, while the Court affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, at the same time concerns of federalism and of judicial restraint caused the Court to emphasize the necessity of deference to the judgments of prison officials and others with responsibility for administering such systems.

Save for challenges to conditions of confinement of pretrial detainees, the Court has generally treated challenges to prison conditions as a whole under the cruel and unusual punishments clause of the Eighth Amendment, while challenges to particular incidents and practices are pursued under the due process clause or more specific provisions, such as the First Amendment speech and religion clauses. Prior to formulating its current approach, the Court recognized several rights of prisoners. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline. They have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints.

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1128 Bell v. Wolfish, 441 U.S. 520 (1979). Persons not yet convicted of a crime may be detained by government upon the appropriate determination of probable cause and the detention may be effectuated through subjection of the prisoner to the restrictions and conditions of the detention facility. But a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. Therefore, unconvicted detainees may not be subjected to conditions and restrictions that amount to punishment. However, the Court limited its concept of punishment to practices intentionally inflicted by prison authorities and to practices which were arbitrary or purposeless and unrelated to legitimate institutional objectives.

1129 See “Prisons and Punishment,” supra.


1133 Ex parte Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1978). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim.
and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators.\textsuperscript{1134} And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration.

In \textit{Turner v. Safley},\textsuperscript{1135} the Court announced a general standard for measuring prisoners’ claims of deprivation of constitutional rights. “\textit{W}hen a regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”\textsuperscript{1136} Several considerations, the Court indicated, are appropriate in determining reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security, broadly defined. Availability of other avenues for exercise of the inmate right suggests reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation “that fully accommodated the prisoner’s rights at \textit{de minimis} cost to valid penological interests” suggests unreasonableness.\textsuperscript{1137}

Fourth Amendment protection is incompatible with “the concept of incarceration and the needs and objectives of penal institutions,” hence a prisoner has no reasonable expectation of privacy in his prison cell protecting him from “shakedown” searches designed to root out weapons, drugs, and other contraband.\textsuperscript{1138} Avenues of redress “for calculated harassment unrelated to prison needs” are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment or in state tort law.\textsuperscript{1139} Existence of “a meaningful postdeprivation remedy” for unauthorized, intentional deprivation of an inmate’s property by prison personnel protects the inmate’s due process rights.\textsuperscript{1140} Due process is not impli-

\textsuperscript{1134} See \textit{Lewis v. Casey}, 518 U.S. 343 (1996) (no requirement that the State “enable [a] prisoner to discover grievances, and to litigate effectively”).


\textsuperscript{1136} \textit{482 U.S. 78} (1987) (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child).

\textsuperscript{1137} \textit{482 U.S.} at 91.


\textsuperscript{1140} \textit{Hudson v. Palmer}, 468 U.S. 517, 533 (1984) (holding that state tort law provided adequate postdeprivation remedies). \textit{But see Zinermon v. Burch}, 494 U.S. 113 (1990) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not “unauthorized”).
cated at all by negligent deprivation of life, liberty, or property by prison officials. 141

In Wolff v. McDonnell, 142 the Court promulgated due process standards to govern the imposition of discipline upon prisoners. Due process applies, but since prison disciplinary proceedings are not part of a criminal prosecution the full panoply of rights of a defendant is not available. Rather, the analysis must proceed on a basis of identifying the interest in "liberty" which the clause protects.

Thus, where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to those minimum procedures appropriate under the circumstances. 143 What the minimum procedures consist of is to be determined by balancing the prisoner’s interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions. The Court held in Wolff that the prison must afford the subject of a disciplinary proceeding advance written notice of the claimed violation and a written statement of the fact findings as to the evidence relied upon and the reasons for the action taken; also, the inmate should be allowed to call witnesses and present documentary evidence in defense when permitting him to do so will not hazard the institution's interests. 144 Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt hazard valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a partial right to an impartial tribunal was recognized, the Court ruling that limitations imposed on the discretion of a committee of prison officials sufficed for this purpose. 145 Revocation of good time credits, the Court later ruled, must be supported

143 418 U.S. at 557. This analysis, of course tracks the interest analysis discussed under “The Interests Protected: Entitlements and Positivist Recognition,” supra.
144 However, the Court later ruled, reasons for denying an inmate’s request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985).
by “some evidence in the record,” but an amount that “might be characterized as meager” is constitutionally sufficient.\footnote{1146 Superintendant v. Hill, 472 U.S. 445, 454, 457 (1985).} Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer from one prison to another prison in which the conditions were substantially less favorable. Since the State had not conferred any right to remain in the facility to which the prisoner was first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about.\footnote{1147 Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).} The same principles govern interstate prison transfers.\footnote{1148 Olim v. Wakinekona, 461 U.S. 238 (1983).}

On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a “mental disease or defect” must be preceded by a hearing for two alternative reasons. First, the statute gave the inmate a liberty interest since it presumed he would not be moved absent a finding he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner’s sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.\footnote{1149 Vitek v. Jones, 445 U.S. 480 (1980).}

What kind of a hearing is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will was at issue in Washington v. Harper.\footnote{1150 494 U.S. 210 (1990).} There the Court held that a judicial hearing was not required. Instead, the inmate’s substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which hearing the inmate has the right to a lay advisor but not an attorney.

\textit{Probation and Parole.}—Sometimes convicted defendants are not sentenced to jail, but instead are placed on probation subject to incarceration upon violation of the conditions which are imposed; others who are jailed may subsequently qualify for release on pa-
role before completing their sentence, and are subject to reincarceration upon violation of imposed conditions. Because both of these dispositions are statutory privileges granted by the governmental authority, it was long assumed that the administrators of the systems did not have to accord procedural due process either in the granting stage or in the revocation stage. Now, both granting and revocation are subject to due process analysis, although the results tend to be disparate. Thus, in *Mempa v. Rhay*, the trial judge had deferred sentencing and placed the convicted defendant on probation; when facts subsequently developed which indicated a violation of the conditions of probation, he was summoned and summarily sentenced to prison. The Court held that he was entitled to counsel at the deferred sentencing hearing.

In *Morrissey v. Brewer* a unanimous Court held that parole revocations must be accompanied by the usual due process hearing and notice requirements. “[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation. . . . [But] the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a ‘grievous loss’ on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee’s liberty is a ‘right’ or a ‘privilege.’ By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.” What process is due, then, turned upon the State’s interests. Its principal interest was that having once convicted a defendant, imprisoned him, and released him for rehabilitation purposes at some risk, it should “be able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.” But the State has no interest in revoking parole without some informal procedural guarantees, inasmuch as this will not interfere with its reasonable interest.

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1151 Ugbanks v. Armstrong, 208 U.S. 481 (1908), held that parole is not a constitutional right but instead is a “present” from government to the prisoner. In *Escoe v. Zerbst*, 295 U.S. 490 (1935), the Court’s premise was that as a matter of grace the parolee was being granted a privilege and that he should neither expect nor seek due process. Then-Judge Burger in *Hyser v. Reed*, 318 F. 2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963), reasoned that due process was inapplicable because the parole board’s function was to assist the prisoner’s rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee.

1153 408 U.S. 471 (1972).
1154 408 U.S. at 480, 482.
1155 408 U.S. at 483-84.
Minimal due process, the Court held, requires that at both stages of the revocation process—the arrest of the parolee and the formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole; this preliminary hearing should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available, and should be conducted by someone not directly involved in the case, though he need not be a judicial officer. The parolee should be given adequate notice that the hearing will take place and what violations are alleged, he should be able to appear and speak in his own behalf and produce other evidence, and he should be allowed to examine those who have given adverse evidence against him unless it is determined that the identity of such informant should not be revealed. Also, the hearing officer should prepare a digest of the hearing and base his decision upon the evidence adduced at the hearing.\textsuperscript{1156}

Prior to the final decision on revocation, there should be a more formal revocation hearing at which there would be a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody and he must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the States to develop but the Court specified minimum requirements of due process. “They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole.”\textsuperscript{1157} Ordinarily the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,\textsuperscript{1158} but a sentencing court must consider such alternatives if the probation

\textsuperscript{1156} 408 U.S. at 484-87.
\textsuperscript{1157} 408 U.S. at 487-89.
\textsuperscript{1158} Black v. Romano, 471 U.S. 606 (1985).
violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.\footnote{1159}

The Court has applied a flexible due process standard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The State should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.\footnote{1160} With respect to the granting of parole, the Court's analysis of the due process clause's meaning in \textit{Greenholtz v. Nebraska Penal Inmates}\footnote{1161} is much more problematical. The theory was rejected that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize that a parole statute could create an expectancy of release entitled to some measure of constitutional protection, although a determination would need to be made on a case-by-case basis,\footnote{1162} and the full panoply of due process guarantees is not required.\footnote{1163} Where, however, government by its statutes and regulations creates no obligation of the pardoning authority and thus creates no legitimate expectancy of release, the prisoner may not by showing the favorable exercise of the authority in the great number of cases demonstrate such a legitimate expect-

\footnote{1161} 442 U.S. 1 (1979). Justice Powell thought that creation of a parole system did create a legitimate expectancy of fair procedure protected by due process, but, save in one respect, he agreed with the Court that the procedure followed was adequate. Id. at 18. Justices Marshall, Brennan, and Stevens argued in dissent that the Court's analysis of the liberty interest was faulty and that due process required more than the board provided. Id. at 22.
\footnote{1162} Following \textit{Greenholtz}, the Court held in Board of Pardons \textit{v. Allen}, 482 U.S. 369 (1987), that a liberty interest was created by a Montana statute providing that a prisoner "shall" be released upon certain findings by a parole board.
\footnote{1163} The Court in \textit{Greenholtz} held that procedures designed to elicit specific facts were inappropriate under the circumstances, and minimizing the risk of error should be the prime consideration. This goal may be achieved by the board's largely informal methods; eschewing formal hearings, notice, and specification of particular evidence in the record. The inmate in this case was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due.
The power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.  

**The Problem of the Juvenile Offender.**—All of the States of the Union and the District of Columbia make provision for dealing with juvenile offenders outside of the criminal system for adult offenders. These juvenile justice systems apply both to offenses that would be criminal if committed by an adult and to delinquent behavior not recognizable under laws dealing with adults, such as habitual truancy, deportment endangering the morals or health of the juvenile or others, or disobedience making the juvenile uncontrollable by his parents. The reforms of the early part of this century provided not only for segregating juveniles from adult offenders in the adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules surrounding criminal trials which were mandated by due process. Justification for this abandonment of constitutional guarantees was offered by describing juvenile courts as civil not criminal and as not dispensing criminal punishment, and offering the theory that the state was acting as *parens patriae* for the juvenile offender and was in no sense his adversary.

Disillusionment with the results of juvenile reforms coupled with judicial emphasis on constitutional protection of the accused led in the 1960s to a substantial restriction of these elements of juvenile jurisprudence. After tracing in much detail this history of juvenile courts, the Court held in *In re Gault* that the application of due process to juvenile proceedings would not endanger the good intentions vested in the system nor diminish the features of the system which were deemed desirable—emphasis upon rehabilitation rather than punishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the proc-
Thus, the Court in *Gault* required that notice of charges be given in time for the juvenile to prepare a defense, required a hearing in which the juvenile could be represented by retained or appointed counsel, required observance of the rights of confrontation and cross-examination, and required that the juvenile be protected against self-incrimination. It did not pass upon the right of appeal or the failure to make transcripts of hearings. Earlier, the Court had held that before a juvenile could be “waived” to an adult court for trial, there had to be a hearing and findings of reasons, a result based on statutory interpretation but apparently constitutionalized in *Gault*. Subsequently, it was held that the “essentials of due process and fair treatment” required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult, but still later the Court held that jury trials were not constitutionally required in juvenile trials.

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1168 "Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours. . . . ' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." 387 U.S. at 27-28.

1169 387 U.S. at 31-35. Justice Harlan concurred in part and dissented in part, id. at 65, agreeing on the applicability of due process but disagreeing with the standards of the Court. Justice Stewart dissented wholly, arguing that the application of procedures developed for adversary criminal proceedings to juvenile proceedings would endanger their objectives and contending that the decision was a backward step toward undoing the reforms instituted in the past. Id. at 78.


1171 In re Winship, 397 U.S. 358 (1970). Chief Justice Burger and Justice Stewart dissented, following essentially the Stewart reasoning in *Gault*. “The Court’s opinion today rests entirely on the assumption that all juvenile proceedings are ‘criminal prosecutions,’ hence subject to constitutional limitation. . . . What the juvenile court systems need is not more but less of the trappings of legal procedure and judicial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.” Id. at 375, 376. Justice Black dissented because he did not think the reasonable doubt standard a constitutional requirement at all. Id. at 377.

1172 McKeiver v. Pennsylvania, 403 U.S. 528 (1971). No opinion was concurred in by a majority of the Justices. Justice Blackmun’s opinion of the Court, which was
On a few occasions the Court has considered whether rights accorded to adults during investigation of crime are to be accorded juveniles. In one such case the Court ruled that a juvenile undergoing custodial interrogation by police had not invoked a *Miranda* right to remain silent by requesting permission to consult with his probation officer, since a probation officer could not be equated with an attorney, but indicated as well that a juvenile’s waiver of *Miranda* rights was to be evaluated under the same totality-of-the-circumstances approach applicable to adults. That approach “permits—indeed it mandates—inquiry into all the circumstances surrounding the interrogation . . . includ[ing] evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him . . . .” 1173 In another case the Court ruled that, while the Fourth Amendment applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate. 1174 Instead, a simple reasonableness standard governs all searches of students’ persons and effects by school authorities. 1175

The Court ruled in *Schall v. Martin* 1176 that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, when the terms of confinement serve those legitimate purposes and are nonpunitive, and when procedures provide sufficient protection against erroneous
and unnecessary detentions. A statute authorizing pretrial detention of accused juvenile delinquents on a finding of “serious risk” that the juvenile would commit crimes prior to trial, providing for expedited hearings (the maximum possible detention was 17 days), and guaranteeing a formal, adversarial probable cause hearing within that period, was found to satisfy these requirements.

Each state has a procedure by which juveniles may be tried as adults. With the Court having clarified the constitutional requirements for imposition of capital punishment, it was only a matter of time before the Court would have to determine whether states may subject juveniles to capital punishment. In Stanford v. Kentucky, the Court held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17; earlier the Court had invalidated a statutory scheme permitting capital punishment for crimes committed before age 16. In weighing validity under the Eighth Amendment, the Court has looked to state practice to determine whether a consensus against execution exists. Still to be considered by the Court are such questions as the substantive and procedural guarantees to be applied in proceedings when the matter at issue is non-criminal delinquent behavior.

The Problem of Civil Commitment.—As is the case with juvenile offenders, several other classes of persons are subject to confinement by court processes deemed civil rather than criminal. Within this category of “protective commitment” are involuntary commitments for treatment of insanity and other degrees of mental incompetence, retardation, alcoholism, narcotics addiction, sexual psychopathy, and the like. Inasmuch as the deprivation of liberty is as severe as that experienced by juveniles adjudged delinquent, can be accompanied with harm to reputation, it is surprising that the Court has only recently dealt with the issue.

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1180 See analysis of Eighth Amendment principles, under “Capital Punishment,” supra.
In *O'Connor v. Donaldson*, the Court held that “a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” The trial jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally confined. Left to another day were such questions as “when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness” and the right, if any, to receive treatment for the confined person’s illness. To conform to due process requirements, procedures for voluntary admission should recognize the possibility that persons in need of treatment may not be competent to give informed consent; this is not a situation where availability of a meaningful postdeprivation remedy can cure the due process violation.

Procedurally, it is clear that an individual’s liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of beyond a reasonable doubt is not necessary because the state’s aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment.

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1182 422 U.S. 563 (1975). The Court bypassed “the difficult issues of constitutional law” raised by the lower courts’ resolution of the case, that is, the right to treatment of the involuntarily committed, discussed under “Liberty Interests of Retarded and Mentally Ill: Commitment and Treatment,” supra.
1183 422 U.S. at 576.


442 U.S. at 598-617. The dissenters agreed on this point. Id. at 626–37.

442 U.S. at 617-20. The dissenters would have required a preadmission hearing. Id. at 637–38.

442 U.S. at 625–26. The dissent would have mandated a formal postadmission hearing. Id. at 625–26.

Shelley v. Kraemer, 334 U.S. 1, 13 (1948). Similarly, the due process clause of the Fifth Amendment, with its equal protection component, limits only federal governmental action and not that of private parties, as is true of each of the provisions of the Bill of Rights. The scope and reach of the “state action” doctrine is thus

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**EQUAL PROTECTION OF THE LAWS**

**Scope and Application**

**State Action.**—“T[he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrong-ful.” 1192 The Amendment by its express terms provides that “no...
State . . .” and “nor shall any State . . .” engage in the proscribed conduct. “It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.”

While the state action doctrine is equally applicable to denials of privileges or immunities, due process, and equal protection, it is actually only with the last great right of the Fourteenth Amendment that the doctrine is invariably associated.

“The vital requirement is State responsibility,” Justice Frankfurter once wrote, “that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme” to deny protected rights. Certainly, state legislation commanding a discriminatory result is state action condemned by the first section of the Fourteenth Amendment, and is void. But the difficulty for the Court has begun when the conduct complained of is not so clearly the action of a State but is, perhaps, the action of a minor state official not authorized or perhaps forbidden by state law so to act, or is, perhaps on the other hand, the action of a private party who nonetheless has some relationship with governmental authority.

The continuum of state action ranges from obvious legislated denial of equal protection to private action that is no longer so sign-
significantly related to state action that the Amendment applies. The prohibitions of the Amendment “have reference to actions of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.”

“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.” That the doctrine serves certain values and disserves others is not a criticism of it but a recognition that in formulating and applying the several tests by which the presence of “state action” is discerned, the Court has considerable discretion and the weights of the opposing values and interests will lead to substantially different applications of the tests. Thus, following the Civil War, when the Court sought to reassert federalism values, it imposed a rather rigid state action standard. During the civil rights movement of the 1950s and 1960s, when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As

1197 Ex parte Virginia, 100 U.S. 339, 346–47 (1880).
1198 Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982). “Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.” Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Justice Harlan concurring).
it grew more sympathetic to federalism concerns in the late 1970s and 1980s, the Court began to reassert a strengthened state action doctrine, primarily but hardly exclusively in nonracial cases.

Operation of the state action doctrine was critical in determining whether school systems were segregated unconstitutionally by race. The original Brown cases and subsequent ones arose in the context of statutorily mandated separation of the races and occasioned therefore no controversy in finding state action. The aftermath in the South involved not so much state action as the determination of the remedies necessary to achieve a unitary system. But if racial segregation is not the result of state action in some aspect, then its existence is not subject to constitutional remedy. Distinguishing between the two situations has occasioned much controversy.

Confronting in a case arising from Denver, Colorado, the issue of a school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that racial segregation caused by “intentionally segregative school board actions” is de jure and not de facto, just as if it had been mandated by statute. “[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.” Where it is proved that a meaningful portion of a school system is segregated as a result of official action, the official agency must bear the burden of proving that other school segregation within the system is adventitious and not the result of official action. It is not the responsibility of complainants to show that each school in a system is de jure segregated to be entitled to a system-wide desegregation plan. Moreover, the Court has also apparently adopted a rule to the effect that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can be said to have devolved upon the agency at that earlier point so that its subsequent actions can be held to a standard of having promoted desegregation or of not having promoted it, so that facially neutral or ambiguous school board policies

1201 See “Brown’s Aftermath,” supra.

Different results, however, follow when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. “Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantive cause of inter-district segregation.”\footnote{Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).} The de jure de facto distinction is thus well established in school cases and is firmly grounded upon the “state action” language of the Fourteenth Amendment.

It has long been established that the actions of state officers and agents are attributable to the State. Thus, application of a federal statute imposing a criminal penalty on a state judge who excluded African Americans from jury duty was upheld as within congressional power under the Fourteenth Amendment; the judge’s action constituted state action even though state law did not authorize him to select the jury in a racially discriminatory manner.\footnote{Ex parte Virginia, 100 U.S. 356 (1886).} The fact that the “state action” category is not limited to situations in which state law affirmatively authorizes discriminatory action was made clearer in\footnote{Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966). See also United States v. Raines, 362 U.S. 17, 25 (1960). As Justice Brandeis noted in Iowa-Des Moines} Yick Wo v. Hopkins,\footnote{Yick Wo v. Hopkins, 118 U.S. 356 (1886).} in which the Court found unconstitutional state action in the discriminatory administration of an ordinance fair and non-discriminatory on its face. Not even the fact that the actions of the state agents are illegal under state law makes the action nonattributable to the State for purposes of the Fourteenth Amendment.\footnote{Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966). See also United States v. Raines, 362 U.S. 17, 25 (1960). As Justice Brandeis noted in Iowa-Des Moines} “Misuse of power, pos-
amended by virtue of state law and made possible only because the
wrongdoer is clothed with the authority of state law, is action
taken 'under color of' state law."\textsuperscript{1210} When the denial of equal
protection is not commanded by law or by administrative regulation
but is nonetheless accomplished through police enforcement of
"custom"\textsuperscript{1211} or through hortatory admonitions by public officials to
private parties to act in a discriminatory manner,\textsuperscript{1212} the action is
state action. When a State clothes a private party with official au-
thority, he may not engage in conduct forbidden the State.\textsuperscript{1213}

Beyond this point the discriminatory intent is that of a private
individual and the question is whether a State has encouraged the
effort or has impermissibly aided it.\textsuperscript{1214} Of notable importance and
a subject of controversy since it was decided is \textit{Shelley v. Kraemer},\textsuperscript{1215} There, property owners brought suit to enforce a
racially restrictive covenant, seeking to enjoin the sale of a home by
white sellers to black buyers. The covenants standing alone, Chief
Justice Vinson said, violated no rights protected by the Fourteenth
Amendment. "So long as the purposes of those agreements are ef-
fectuated by voluntary adherence to their terms, it would appear
clear that there has been no action by the State and the provisions
of the Amendment have not been violated." However, that was not
all. "These are cases in which the purposes of the agreements were
secured only by judicial enforcement by state courts of the restric-
tive terms of the agreements."\textsuperscript{1216} Establishing that the precedents

\textsuperscript{1210} Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931), "acts done 'by virtue of public posi-
tion under a State government . . . and . . . in the name and for the State' . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law." Note that for purposes of being amenable to suit in federal court, however, the immunity of the States does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. Ex parte Young, 209 U.S. 123 (1908). \textit{Cf. Screws v. United States}, 313 U.S. 299, 326 (1941).

\textsuperscript{1211} When the denial of equal pro-
tection is not commanded by law or by administrative regulation
but is nonetheless accomplished through police enforcement of
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private parties to act in a discriminatory manner, the action is
state action. When a State clothes a private party with official au-
thority, he may not engage in conduct forbidden the State.

\textsuperscript{1212} Lombard v. Louisiana, 373 U.S. 267 (1963). No statute or ordinance man-
dated segregation at lunch counters but both the mayor and the chief of police had recently issued statements announcing their intention to maintain the existing pol-
icy of separation. Thus, the conviction of African Americans for trespass because they refused to leave a segregated lunch counter was voided.

\textsuperscript{1213} Griffin v. Maryland, 378 U.S. 130 (1964). Guard at private entertain-
ment ground was also deputy sheriff; he could not execute the racially discriminatory poli-

\textsuperscript{1214} Of notable importance and
a subject of controversy since it was decided is \textit{Shelley v. Kraemer}. There, property owners brought suit to enforce a
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\textsuperscript{1215} Lombard v. Louisiana, 373 U.S. 267 (1963). No statute or ordinance man-
dated segregation at lunch counters but both the mayor and the chief of police had recently issued statements announcing their intention to maintain the existing pol-
icy of separation. Thus, the conviction of African Americans for trespass because they refused to leave a segregated lunch counter was voided.

\textsuperscript{1216} Griffin v. Maryland, 378 U.S. 130 (1964). Guard at private entertain-
ment ground was also deputy sheriff; he could not execute the racially discriminatory poli-

\textsuperscript{1214} Examples already alluded to include Lombard v. Louisiana, 373 U.S. 267
(1963), in which certain officials had advocated continued segregation, Peterson v. City of Greenville, 373 U.S. 244 (1963), in which there were segregation-requiring ordinances and customs of separation, and Robinson v. Florida, 378 U.S. 153 (1964), in which health regulations required separate restroom facilities in any establish-
ment serving both races.

\textsuperscript{1215} 334 U.S. 1 (1948).

\textsuperscript{1216} 334 U.S. at 13-14.
were to the effect that judicial action of state courts was state action, the Court continued to find that judicial enforcement of these covenants was forbidden. "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desire to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. . . ."

"These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."

Arguments about the scope of Shelley began immediately. Did the rationale mean that no private decision to discriminate could be effectuated in any manner by action of the State, as by enforcement of trespass laws or judicial enforcement of discrimination in wills? Or did it rather forbid the action of the State in interfering with the willingness of two private parties to deal with each other? Disposition of several early cases possibly governed by Shelley left this issue unanswered. But the Court has experienced no difficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules. It may be that the substantive rule that is being enforced is the dispositive issue, rather than the mere existence of state action. Thus,

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1218 Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W. 2d 110 (1953), aff’d by an equally divided Court, 349 U.S. 880 (1954), rehearing granted, judgment vacated & certiorari dismissed, 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956). The central issue in the "sit-in" cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. Compare Bell v. Maryland, 378 U.S. 226, 255–60 (1964) (opinion of Justice Douglas), with id. at 326 (Justices Black, Harlan, and White dissenting).

1219 In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights and Court imposed varying limiting rules on such rules of law. See id. at 265 (finding state action). Similarly, in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), a civil lawsuit between private parties, the application of state common-law rules to assess damages for actions in a boycott and picketing was found to constitute state action. Id. at 916 n.51.
in *Evans v. Abney*, a state court, asked to enforce a discriminatory stipulation in a will that property devised to a city for use as a public park should never be used by African Americans, ruled that the city could not operate the park in a segregated fashion; instead of striking the segregation requirement from the will, the court ordered return of the property to the decedent’s heirs, inasmuch as the trust had failed. The Supreme Court held the decision permissible, inasmuch as the state court had merely carried out the testator’s intent with no racial motivation itself, and distinguished *Shelley* on the basis that African Americans were not discriminated against by the reversion, because everyone was deprived of use of the park.

Similar to *Shelley* in controversy and the indefiniteness of its rationale, the latter element of which appears to have undergone a modifying rationalization, is *Reitman v. Mulkey*, in which, following enactment of an “open housing” law by the California legislature, an initiative and referendum measure was passed that repealed the law and amended the state constitution to prevent any agency of the State or of local government from henceforth forbidding racial discrimination in private housing. Upholding a state court invalidation of this amendment, the Court appeared to ground its decision on two lines of reasoning, either on the state court’s premise that passage of the provision encouraged private racial discrimination impossibly or on the basis that the provision made discriminatory racial practices immune from the ordinary legislative process, while not so limiting other processes, and thus impossibly burdened minorities in the achievement of legitimate aims in a way other classes of persons were not burdened. In a subsequent case, the latter rationale was utilized in a unanimous decision voiding an Akron ordinance, which suspended an “open housing” ordinance and provided that any future ordinance regulating transactions in real property “on the basis of race, color, religion, national origin or ancestry” must be submitted to a vote of the people before it could become effective, while any

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1222 387 U.S. 369 (1967). The decision was 5-to-4, Justices Harlan, Black, Clark, and Stewart dissenting. Id. at 387.

1223 See, e.g., 387 U.S. at 377 (language suggesting both lines of reasoning).
other ordinance would become effective when passed, except that it could be petitioned to referendum.\footnote{1224}

That Mulkey and Hunter stand for the proposition that imposing a barrier to racial amelioration legislation is the decisive and condemning factor is evident from two recent decisions with respect to state referendum decisions on busing for integration.\footnote{1225} Both cases agree that “the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.”\footnote{1226} It is thus not impermissible to overturn a previous governmental decision, or to defeat the effort initially to arrive at such a decision, simply because the state action may conceivably encourage private discrimination.

In other instances in which the discrimination is being practiced by private parties, the question essentially is whether there has been sufficient state involvement to bring the Fourteenth Amendment into play; that is, the private discrimination is not constitutionally forbidden “unless to some significant extent the State in any of its manifestations has been found to have become involved in it.”\footnote{1227} There is no clear formula. “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”\footnote{1228} State action was found in a number of circumstances. The “White Primary” was outlawed by the Court not because the party’s discrimination was commanded by statute but because the party operated under the authority of the State and it in fact controlled the outcome of elections.\footnote{1229} Although the City of Philadelphia was act-

\footnote{1224 Hunter v. Erickson, 393 U.S. 385 (1969). In Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff’d, 402 U.S. 935 (1971), New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance, unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner’s program to ameliorate de facto segregation. The federal court held the law void, holding in reliance on Mulkey that the statute encouraged racial discrimination and that by treating educational matters involving racial criteria differently than it treated other educational matters it made more difficult a resolution of the de facto segregation problem.}

\footnote{1225 Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). A five-to-four majority in Seattle found the fault to be a racially-based structuring of the political process making it more difficult to undertake actions designed to improve racial conditions than to undertake any other educational action. An 8-to-1 majority in Crawford found that repeal of a measure to bus to undo de facto segregation, without imposing any barrier to other remedial devices, was permissible.}


\footnote{1227 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).}

\footnote{1228 365 U.S. at 722.}

\footnote{1229 Smith v. Allwright, 321 U.S. 649 (1944).}
ing as trustee in administering and carrying out the will of someone who had left money for a college, admission to which was stipulated to be for white boys only, the city was held to be engaged in forbidden state action in discriminating against African Americans in admission. When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park that had been left in trust for such use in a will, and appointed new trustees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park. In a significant case in which the Court explored a lengthy list of contacts between the State and a private corporation, it held that the lessee of property within an off-street parking building owned and operated by a municipality could not exclude African Americans from its restaurant. It was emphasized that the building was publicly built and owned, that the restaurant was an integral part of the complex, that the restaurant and the parking facilities complemented each other, that the parking authority had regulatory power over the lessee and had made stipulations but nothing related to racial discrimination, and that the financial success of the restaurant benefited the governmental agency; “the degree of state participation and involvement in discriminatory action” was sufficient to condemn it.

The question arose, then, what degree of state participation was “significant”? Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement of state trespass laws be invalid if it effectuated discrimination? The “sit-in” cases of the early 1960’s presented all these questions and more but did not resolve them. The basics of an answer came in Moose Lodge No. 107 v. Irvis, in which the Court held that the fact that a private club was required to have a liquor license to serve alcoholic drinks and did have such a license did not


1233 See, e.g., the various opinions in Bell v. Maryland, 378 U.S. 226 (1964).

1234 407 U.S. 163 (1972). One provision of the state law was, however, held unconstitutional. That provision required a licensee to observe all its by-laws and therefore mandated the Moose Lodge to follow the discrimination provision of its by-laws. Id. at 177–79.
bar it from discriminating against African Americans. It denied
that private discrimination became constitutionally impermissible
“if the private entity receives any sort of benefit or service at all
from the State, or if it is subject to state regulation in any degree
whatever,” since any such rule would eviscerate the state action
doctrine. Rather, “where the impetus for the discrimination is pri-

tive, the State must have ‘significantly involved itself with invidi-

ous discrimination.’”1235 Moreover, while the State had extensive
powers to regulate in detail the liquor dealings of its licensees, “it
cannot be said to in any way foster or encourage racial discrimina-

tion. Nor can it be said to make the State in any realistic sense
a partner or even a joint venturer in the club’s enterprise.”1236 And
there was nothing in the licensing relationship here that appre-
ached “the symbiotic relationship between lessor and lessee”
which the Court had found in Burton.1237

The Court subsequently made clear that governmental involve-
ment with private persons or private corporations is not the critical
factor in determining the existence of “state action.” Rather, “the
inquiry must be whether there is a sufficiently close nexus between
the State and the challenged action of the regulated entity so that
the action of the latter may be fairly treated as that of the State
itself.”1238 Or, to quote Judge Friendly, who first enunciated the
test this way, the “essential point” is “that the state must be in-

olved not simply with some activity of the institution alleged to
have inflicted injury upon a plaintiff but with the activity that
caused the injury. Putting the point another way, the state action,
not the private, must be the subject of the complaint.”1239 There-
fore, the Court found no such nexus between the State and a public
utility’s action in terminating service to a customer. Neither the
fact that the business was subject to state regulation, nor that the
State had conferred in effect a monopoly status upon the utility,
nor that in reviewing the company’s tariff schedules the regulatory
commission had in effect approved the termination provision in-
cluded therein (but had not required the practice, had “not put its

1235 407 U.S. at 173.
1236 407 U.S. at 176-77.
1237 407 U.S. at 174-75.
1238 Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (under the due
process clause).
1239 Powe v. Miles, 407 F.2d. 73, 81 (2d Cir. 1968). See also NCAA v. Tarkanian,
488 U.S. 179 (1988) (where individual state has minimal influence over national col-
lege athletic association’s activities, the application of association rules leading to
a state university’s suspending its basketball coach could not be ascribed to the
state.). But see Brentwood Academy v. Tennessee Secondary School Athletic Associa-
tion, 531 U.S. 288 (2001) (where statewide public school scholastic association is
“overwhelmingly” composed of public school officials for that state, this
“entwinement” is sufficient to ascribe actions of association to state).
own weight on the side of the proposed practice by ordering it".) 1240
operated to make the utility's action the State's action. 1241
Significantly tightening the standard further against a finding of "state
action," the Court asserted that plaintiffs must establish not only
that a private party "acted under color of the challenged statute,
but also that its actions are properly attributable to the State. . .
.” 1242 And the actions are to be attributable to the State apparently
only if the State compelled the actions and not if the State merely
established the process through statute or regulation under which
the private party acted. Thus, when a private party, having some-
one's goods in his possession and seeking to recover the charges
owed on storage of the goods, acts under a permissive state statute
to sell the goods and retain his charges out of the proceeds, his
actions are not governmental action and need not follow the dictates
of the due process clause. 1243 Or, where a state worker's compensa-
tion statute was amended to allow, but not require, an insurer to
suspend payment for medical treatment while the necessity of the
treatment was being evaluated by an independent evaluator, this
action was not fairly attributable to the state, and thus pre-depri-
vation notice of the suspension was not required. 1244 In the context
of regulated nursing home situations, in which the homes were
closely regulated and state officials reduced or withdrew Medicaid
benefits paid to patients when they were discharged or transferred
to institutions providing a lower level of care, the Court found that
the actions of the homes in discharging or transferring were not
thereby rendered the actions of the government. 1245

In a few cases, the Court has indicated that discriminatory ac-
tion by private parties may be precluded by the Fourteenth Amend-
ment if the particular party involved is exercising a "public func-
tion." This rationale is one of those which emerges from the various

1240 Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In dissent,
Justice Marshall protested that the quoted language marked "a sharp departure"
from precedent, "that state authorization and approval of 'private' conduct has been
held to support a finding of state action." Id. at 369. Note that in Cantor v. Detroit
Edison Co., 428 U.S. 579 (1976), the plurality opinion used much the same analysis
to deny antitrust immunity to a utility practice merely approved but not required
by the regulating commission, but most of the Justices were on different sides of
the same question in the two cases.
due process limitations on the conduct of public utilities, see Memphis Light, Gas
1243 436 U.S. at 164-66. If, however, a state officer acts with the private party
in securing the property in dispute, that is sufficient to create the requisite state
action and the private party may be subjected to suit if the seizure does not comport
opinions in Terry v. Adams. 1246 In Marsh v. Alabama, 1247 a Jehova'h's Witness had been convicted of trespass after passing out literature on the streets of a company-owned town and the Court reversed. It is not at all clear from the opinion of the Court what it was that made the privately-owned town one to which the Constitution applied. In essence, it appears to have been that the town “had all the characteristics of any other American town,” that it was “like” a State. “The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.” 1248 Subsequent efforts to expand upon Marsh were at first successful and then turned back, and the “public function” theory in the context of privately-owned shopping centers was sharply curtailed. 1249

Attempts to apply such a theory to other kinds of private conduct, such as to private utilities, 1250 to private utilization of permissive state laws to secure property claimed to belong to creditors, 1251 to the operation of schools for “problem” children referred by public institutions, 1252 to private insurance companies providing worker’s compensation coverage, 1253 and to the operations of nursing homes the patients of which are practically all funded by public resources, 1254 proved unavailing. The “public function” doctrine is to be limited to a delegation of “a power ‘traditionally exclusively reserved to the State.’” 1255 Therefore, the question is not “whether a private group is serving a ‘public function.’ . . . That a private entity performs a function which serves the public does not make its acts state action.” 1256 Public function did play an important part, however, in the Court’s finding state action in exercise of peremptory challenges in jury selection by non-governmental parties.

In finding state action in the racially discriminatory use of peremptory challenges by a private party during voir dire in a civil case, 1257 the Court applied tests developed in an earlier case in-

1246 345 U.S. 461 (1953).
1248 326 U.S. at 506.
1249 See Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), limited in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and overruled in Hudgens v. NLRB, 424 U.S. 507 (1976). The Marsh principle is good only when private property has taken on all the attributes of a municipality. Id. at 516–17.
volving garnishment and attachment. The Court first asks “whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority,” and then “whether the private party charged with the deprivation could be described in all fairness as a state actor.” In answering the second question, the Court considers three factors: “the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”

There was no question that exercise of peremptory challenges derives from governmental authority (either state or federal, as the case may be); exercise of peremptory challenges is authorized by law, and the number is limited. Similarly, the Court easily concluded that private parties exercise peremptory challenges with the “overt” and “significant” assistance of the court. So too, jury selection is the performance of a traditional governmental function: the jury “is a quintessential governmental body, having no attributes of a private actor,” and it followed, so the Court majority believed, that selection of individuals to serve on that body is also a governmental function whether or not it is delegated to or shared with private individuals.

Finally, the Court concluded that “the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself.” Dissenting Justice O’Connor complained that the Court was wiping away centuries of adversary practice in which “unrestrained private choice” has been recognized in exercise of peremptory challenges; “[i]t is antithetical to the nature of our adversarial process,” the Justice contended, “to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes.”

Even though in a criminal case it is the government and the defendant who are adversaries, rather than two private parties, as is ordinarily the case in civil actions, the Court soon applied these same principles to hold that exercise of peremptory challenges by the defense in a criminal case also constitutes state action. The same generalities apply with at least equal force: there is overt and
significant governmental assistance in creating and structuring the process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, the Court emphasizing that “exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant’s defense,” since it involves selection of persons to wield governmental power.

The rules developed by the Court for business regulation are that (1) the “mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment,” and (2) “a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State.”

Previously, the Court’s decisions with respect to state “involvement” in the private activities of individuals and entities raised the question whether financial assistance and tax benefits provided to private parties would so clothe them with state action that discrimination by them and other conduct would be subjected to constitutional constraints. Many lower courts had held state action to exist in such circumstances. However the question might have

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1265 505 U.S. at 54. Justice O’Connor, again dissenting, pointed out that the Court’s distinction was inconsistent with Dodson’s declaration that public defenders are not vested with state authority “when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.” Id. at 65-66. Justice Scalia, also dissenting again, decried reduction of Edmonson “to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state.” Id. at 69-70. Chief Justice Rehnquist, who had dissented in Edmonson, concurred in McCollum in the belief that it was controlled by Edmonson, and Justice Thomas, who had not participated in Edmonson, expressed similar views in a concurrence.
been answered under the older cases, it is evident that a negative answer flows from the premises of the more recent cases. In *Rendell-Baker v. Kohn*, the private school received “problem” students referred to it by public institutions, it was heavily regulated, and it received between 90 and 99% of its operating budget from public funds. In *Blum v. Yaretsky*, the nursing home had practically all of its operating and capital costs subsidized by public funds and more than 90% of its residents had their medical expenses paid from public funds; in setting reimbursement rates, the State included a formula to assure the home a profit. Nevertheless, in both cases the Court found that the entities remained private, and required plaintiffs to show that as to the complained of actions the State was involved, either through coercion or encouragement. “That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.”

In the social welfare area, the Court has drawn a sharp distinction between governmental action subject to substantive due process requirements, and governmental inaction, not so constrained. There being “no affirmative right to governmental aid,” the Court announced in *DeShaney v. Winnebago County Social Services Department* that “as a general matter, . . . a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” Before there can be state involvement creating an affirmative duty to protect an individual, the Court explained, the state must have taken a person into its custody and held him there against his will so as to restrict his freedom to act on his own behalf. Thus, while the Court had recognized due process violations for failure to provide adequate medical care to incarcerated prisoners, and for failure to ensure reasonable safety for involuntarily committed mental patients, no such affirmative duty arose from the failure of social services agents to protect an abused child from further abuse from his parent. Even though possible abuse had been reported to the agency and confirmed and monitored by the agency, and the agency

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had done nothing to protect the child, the Court emphasized that the actual injury was inflicted by the parent and “did not occur while [the child] was in the State’s custody.” While the State may have incurred liability in tort through the negligence of its social workers, “[n]ot every tort committed by a state actor is a constitutional violation.” “[I]t is well to remember . . . that the harm was inflicted not by the State of Wisconsin, but by [the child’s] father.”

Judicial inquiry into the existence of “state action” may be directed toward the implementation of either of two remedies, and this may well lead to some difference in the search. In the cases considered here suits were against a private actor to compel him to halt his discriminatory action, to enjoin him to admit blacks to a lunch counter, for example. But one could just as readily bring suit against the government to compel it to cease aiding the private actor in his discriminatory conduct. Recurrence to the latter remedy might well avoid constitutional issues that an order directed to the private party would raise. In any event, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy; in a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints, while in a suit against the government agency it must be determined whether the government’s action “impermissibly fostered” the private conduct.

Thus, in *Norwood v. Harrison*, the Court struck down the provision of free textbooks by the State to private schools set up as racially segregated institutions to avoid desegregated public schools, even though the textbook program predated the establishment of these schools. “[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has ‘a significant tendency to facilitate, reinforce, and support private discrimination.’ . . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or

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1275 489 U.S. at 201.  
1276 489 U.S. at 202.  
1277 489 U.S. at 203.  
other invidious discriminations.” 1280 And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools so that the district court could determine whether such uses “involve government so directly in the actions of those users as to warrant court intervention on constitutional grounds.” 1281 Unlike the situation in which private club discrimination is attacked directly, “the question of the existence of state action centers in the extent of the city’s involvement in discriminatory actions by private agencies using public facilities. . . .” Receipt of just any sort of benefit or service at all does not by the mere provision—electricity, water, and police and fire protection, access generally to municipal recreational facilities—constitute a showing of state involvement in discrimination and the lower court’s order was too broad because not predicated upon a proper finding of state action. “If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation.” The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations. 1282

It should be noted, however, that the Court has interposed, without mentioning these cases, a potentially significant barrier to utilization of the principle set out in them. In a 1976 decision, which it has expanded since, it held that plaintiffs, seeking disallowal of governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must in order to bring the suit show that revocation of the benefit would cause the institutions to cease the complained-of conduct. 1283

1282 417 U.S. at 573-74. In Blum v. Yaretsky, 457 U.S. 991 (1982), plaintiffs, objecting to decisions of the nursing home in discharging or transferring patients, sued public officials, but they objected to the discharges and transfers, not to the changes in Medicaid benefits made by the officials.
“Person”.—In the case in which it was first called upon to interpret this clause, the Court doubted whether “any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.” Nonetheless, in deciding the Granger Cases shortly thereafter, the Justices seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the clause. Nine years later, Chief Justice Waite announced from the bench that the Court would not hear argument on the question whether the equal protection clause applied to corporations. “We are all of the opinion that it does.” The word has been given the broadest possible meaning. “These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality…” The only qualification is that a municipal corporation cannot invoke the clause against its State.

“Within Its Jurisdiction”.—Persons “within its jurisdiction” are entitled to equal protection from a State. Largely because Article IV, § 2, has from the beginning guaranteed the privileges and immunities of citizens in the several States, the Court has rarely construed the phrase in relation to natural persons. It was first held that a foreign corporation not doing business in a State under conditions that subjected it to process issuing from the courts of that State was not “within the jurisdiction” and could not complain of the preferences granted resident creditors in the distribution of

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1288 City of Newark v. New Jersey, 262 U.S. 192 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

1289 See Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (explicating meaning of the phrase in the context of holding that aliens illegally present in a State are “within its jurisdiction” and may thus raise equal protection claims).
assets of an insolvent corporation, but this holding was subsequently qualified, the Court holding that a foreign corporation which sued in a court of a State in which it was not licensed to do business to recover possession of property wrongfully taken from it in another State was “within the jurisdiction” and could not be subjected to unequal burdens in the maintenance of the suit. The test of amenability to service of process within the State was ignored in a later case dealing with discriminatory assessment of property belonging to a nonresident individual. When a State has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws but not necessarily to identical treatment with domestic corporations.

Equal Protection: Judging Classifications by Law

A guarantee of equal protection of the laws was contained in every draft leading up to the final version of section 1 of the Fourteenth Amendment. Important to its sponsors was the desire to provide a firm constitutional basis for already-enacted civil rights legislation, and, by amending the Constitution, to place repeal beyond the accomplishment of a simple majority in a future Congress. No doubt there were conflicting interpretations of the phrase “equal protection” among sponsors and supporters and the legislative history does little to clarify whether any sort of consensus was accomplished and if so what it was. While the Court

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1296 As in fact much of the legislation which survived challenge in the courts was repealed in 1894 and 1909. 28 Stat. 36; 35 Stat. 1088. See R. Carr, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 45–46 (1947).
1297 See H. Graham, EVERYMAN'S CONSTITUTION—HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY" AND AMERICAN CONSTITUTIONALISM (1968). In calling for reargument in Brown v. Board of Education, 345 U.S. 972 (1952), the Court asked for and received
The Traditional Standard: Restrained Review.—The traditional standard of review of equal protection challenges of classifications developed largely though not entirely in the context of economic regulation. It is still most validly applied there, although it appears in many other contexts as well. A more active review has been developed for classifications based on a “suspect” indicium or affecting a “fundamental” interest.

“The Fourteenth Amendment enjoins ‘the equal protection of the laws,’ and laws are not abstract propositions.” Justice Frankfurter once wrote. “They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”

The mere fact of classification will not void legislation, then, because in the exercise of its powers a legislature has considerable discretion in recognizing the differences between and among persons and situations.

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1299 In Buck v. Bell, 274 U.S. 200, 208 (1927), Justice Holmes characterized the equal protection clause as “the last resort of constitutional arguments.”
1300 See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).
1301 Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and patients who are not on life support systems and are not allowed to hasten death by self-administering prescribed drugs).
1302 Tigner v. Texas, 310 U.S. 141, 147 (1940).
nating against some and favoring others, is prohibited; but legisla-
tion which, in carrying out a public purpose, is limited in its appli-
cation, if within the sphere of its operation it affects alike all per-
sons similarly situated, is not within the amendment.” 1305 Or, more
succinctly, “statutes create many classifications which do not deny
equal protection; it is only ‘invidious discrimination’ which offends
the Constitution.” 1306

How then is the line between permissible and invidious classi-
fication to be determined? In Lindsley v. Natural Carbonic Gas
Co., 1307 the Court summarized one version of the rules still pre-
vailing. “1. The equal protection clause of the Fourteenth Amend-
dment does not take from the State the power to classify in the
adoption of police laws, but admits of the exercise of a wide scope
of discretion in that regard, and avoids what is done only when it
is without any reasonable basis and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend
against that clause merely because it is not made with mathema-
tical nicety or because in practice it results in some inequality.
3. When the classification in such a law is called in question, if any
state of facts reasonably can be conceived that would sustain it, the
existence of that state of facts at the time the law was enacted
must be assumed. 4. One who assails the classification in such a
law must carry the burden of showing that it does not rest upon
any reasonable basis, but is essentially arbitrary.” Especially be-
cause of the emphasis upon the necessity for total arbitrariness,
utter irrationality, and the fact that the Court will strain to con-
ceive of a set of facts that will justify the classification, the test is
extremely lenient and, assuming the existence of a constitutionally
permissible goal, no classification will ever be upset. But, contem-
poraneously with this test, the Court also pronounced another le-
nient standard which did leave to the courts a judgmental role. In
this test, “the classification must be reasonable, not arbitrary, and
must rest upon some ground of difference having a fair and sub-
stantial relation to the object of the legislation, so that all persons

1305 Barbier v. Connolly, 113 U.S. 27, 32 (1885).
1306 Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical
1307 220 U.S. 61, 78–79 (1911), quoted in full in Morey v. Doud, 354 U.S. 457,
463–64 (1957). Classifications which are purposefully discriminatory fall before the
equal protection clause without more, E.g., Barbier v. Connolly, 113 U.S. 27, 30
Auth. v. Beazer, 440 U.S. 568, 593 n.40 (1979). Explicit in all the formulations is
that a legislature must have had a permissible purpose, a requirement which is sel-
don failed, given the leniency of judicial review. But see Zobel v. Williams, 457 U.S.
55, 63–64 (1982), and id. at 65 (Justice Brennan concurring).
similarly circumstanced shall be treated alike.”  

But then, coincident with the demise of substantive due process in the area of economic regulation, the Court reverted to the former standard, deferring to the legislative judgment on questions of economics and related matters; even when an impermissible purpose could have been attributed to the classifiers it was usually possible to conceive of a reason that would justify the classification. Strengthening the deference was the recognition of discretion in the legislature not to try to deal with an evil or a class of evils all within the scope of one enactment but to approach the problem piecemeal, to learn from experience, and to ameliorate the harmful results of two evils differently, resulting in permissible over- and under-inclusive classifications.

In recent years, the Court has been remarkably inconsistent in setting forth the standard which it is using, and the results have reflected this. It has upheld economic classifications that suggested impermissible intention to discriminate, reciting at length the Lindsley standard, complete with the conceiving-of-a-basis and the one-step-at-a-time rationale, and it has applied this relaxed standard to social welfare regulations. In other cases, it has utilized the Royster Guano standard and has looked to the actual goal articulated by the legislature in determining whether the classification had a reasonable relationship to that goal, although it has


1310 In Nebbia v. New York, 291 U.S. 502, 537 (1934), speaking of the limits of the due process clause, the Court observed that “in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare.”


1315 E.g., McGinnis v. Royster, 410 U.S. 263, 270–77 (1973); Johnson v. Robison, 415 U.S. 361, 374–83 (1974); City of Charlotte v. International Ass’n of Firefighters, 426 U.S. 283, 286–89 (1976). It is significant that these opinions were written by Justices who subsequently dissented from more relaxed standard of review cases
usually ended up upholding the classification. Finally, purportedly applying the rational basis test, the Court has invalidated some classifications in the areas traditionally most subject to total deference.\footnote{\textit{Lindsey v. Normet}, 405 U.S. 56, 74–79 (1972); \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972); \textit{Department of Agriculture v. Moreno}, 413 U.S. 528 (1973); \textit{City of Cleburne v. Cleburne Living Center}, 473 U.S. 432 (1985) (rejecting various justifications offered for exclusion of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses were permitted). The Court in \textit{Reed v. Reed}, 404 U.S. 71, 76 (1971), utilized the \textit{Royster Guano} formulation and purported to strike down a sex classification on the rational basis standard, but, whether the standard was actually used or not, the case was the beginning of the decisions applying a higher standard to sex classifications.\textit{Schweiker v. Wilson}, 450 U.S. 221, 230–39 (1981). Nonetheless, the four dissenters thought that the purpose discerned by the Court was not the actual purpose, that it had in fact no purpose in mind, and that the classification was not rational. Id. at 239.}

Attempts to develop a consistent principle have so far been unsuccessful. In \textit{Railroad Retirement Board v. Fritz},\footnote{\textit{Schweiker v. Wilson}, 450 U.S. 221, 230–39 (1981). Nonetheless, the four dissenters thought that the purpose discerned by the Court was not the actual purpose, that it had in fact no purpose in mind, and that the classification was not rational. Id. at 239.} the Court acknowledged that “[t]he most arrogant legal scholar would not claim that all of these cases cited applied a uniform or consistent test under equal protection principles,” but then went on to note the differences between \textit{Lindsey} and \textit{Royster Guano} and chose the former. But, shortly, in \textit{Schweiker v. Wilson},\footnote{\textit{Justice Blackmun wrote the Court’s opinion in Wilson, Justice Rehnquist in Fritz.}} in an opinion written by a different Justice,\footnote{\textit{Justice Blackmun wrote the Court’s opinion in Wilson, Justice Rehnquist in Fritz.}} the Court sustained another classification, using the \textit{Royster Guano} standard to evaluate whether the classification bore a substantial relationship to the goal actually chosen and articulated by Congress. In between these decisions, the Court approved a state classification after satisfying itself that the legislature had pursued a permissible goal, but setting aside and urged adherence to at least a standard requiring articulation of the goals sought to be achieved and an evaluation of the “fit” of the relationship between goal and classification. \textit{Railroad Retirement Bd. v. Fritz}, 449 U.S. 166, 182 (1980) (Justices Brennan and Marshall dissenting); \textit{Schweiker v. Wilson}, 450 U.S. 221, 239 (1981) (Justices Powell, Brennan, Marshall, and Stevens dissenting). \textit{See also New York City Transit Auth. v. Beazer}, 440 U.S. 568, 594 (1979) (Justice Powell concurring in part and dissenting in part), and id. at 597, 602 (Justices White and Marshall dissenting).
the decision of the state court that the classification would not promote that goal; the Court announced that it was irrelevant whether in fact the goal would be promoted, the question instead being whether the legislature "could rationally have decided" that it would. 1320

In short, it is uncertain which formulation of the rational basis standard the Court will adhere to. 1321 In the main, the issues in recent years have not involved the validity of classifications, but rather the care with which the Court has reviewed the facts and the legislation with its legislative history to uphold the challenged classifications. The recent decisions voiding classifications have not clearly set out which standard they have been using. 1322 Determination in this area, then, must await presentation to the Court of a classification which it would sustain under the Lindsley standard and invalidate under Royster Guano.

The New Standards: Active Review.—When government legislates or acts either on the basis of a "suspect" classification or with regard to a "fundamental" interest, the traditional standard of equal protection review is abandoned, and the Court exercises a "strict scrutiny." Under this standard government must demonstrate a high degree of need, and usually little or no presumption favoring the classification is to be expected. After much initial controversy within the Court, it has now created a third category, finding several classifications to be worthy of a degree of "intermediate" scrutiny requiring a showing of important governmental purposes and a close fit between the classification and the purposes.

Paradigmatic of "suspect" categories is classification by race. First in the line of cases dealing with this issue is Korematsu v. United States, 1323 concerning the wartime evacuation of Japanese-Americans from the West Coast, in which the Court said that because only a single ethnic-racial group was involved the measure

1321 In City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 294 (1982), the Court observed that it was not clear whether it would apply Royster Guano to the classification at issue, citing Fritz as well as Craig v. Boren, 429 U.S. 190 (1976), an intermediate standard case involving gender. Justice Powell denied that Royster Guano or Reed v. Reed had ever been rejected. Id. at 301 n.6 (dissenting). See also id. at 296–97 (Justice White).
1322 The exception is Reed v. Reed, 404 U.S. 71 (1971), which, though it purported to apply Royster Guano, may have applied heightened scrutiny. See Zobel v. Williams, 457 U.S. 55, 61–63 (1982), in which it found the classifications not rationally related to the goals, without discussing which standard it was using.
1323 323 U.S. 214, 216 (1944). In applying "rigid scrutiny," however, the Court was deferential to the judgment of military authorities, and to congressional judgment in exercising its war powers.
was “immediately suspect” and subject to “rigid scrutiny.” The
school segregation cases purposed to enunciate no per se rule, however, although subsequent summary treatment of a host of seg-
regation measures may have implicitly done so, until in striking
down state laws prohibiting interracial marriage or cohabitation
the Court declared that racial classifications “bear a far heavier
burden of justification” than other classifications and were invalid
because no “overriding statutory purpose” was shown and they
were not necessary to some “legitimate overriding purpose.”
“A racial classification, regardless of purported motivation, is
presumptively invalid and can be upheld only upon an extraordinary
justification.” Remedial racial classifications, that is, the develop-
ment of “affirmative action” or similar programs that classify on
the basis of race for the purpose of ameliorating conditions result-
ing from past discrimination, are subject to more than traditional
review scrutiny, but whether the highest or some intermediate
standard is the applicable test is uncertain. A measure that
does not draw a distinction explicitly on race but that does draw
a line between those who seek to use the law to do away with or
modify racial discrimination and those who oppose such efforts
does in fact create an explicit racial classification and is constitu-
tionally suspect.

Toward the end of the Warren Court, there emerged a trend
to treat classifications on the basis of nationality or alienage as
suspect, to accord sex classifications a somewhat heightened
traditional review while hinting that a higher standard might be
appropriate if such classifications passed lenient review, and to
pass on statutory and administrative treatments of illegitimates in-

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1326 Loving v. Virginia, 388 U.S. 1, 11 (1967). In Lee v. Washington, 390 U.S. 333 (1968), it was indicated that preservation of discipline and order in a jail might justify racial segregation there if shown to be necessary.
1328 Regents of the Univ. of California v. Bakke, 438 U.S. 265, 287–20 (1978) (Justice Powell announcing judgment of Court) (suspect), and id. at 355–79 (Justices Brennan, White, Marshall, and Blackmun concurring in part and dissenting in part) (intermediate scrutiny); Fullilove v. Klutznick, 448 U.S. 448, 491–92 (1980) (Chief Justice Burger announcing judgment of Court) (“a most searching examination” but not choosing a particular analysis), and id. at 495 (Justice Powell concurring), 523 (Justice Stewart dissenting) (suspect), 548 (Justice Stevens dissenting) (searching scrutiny).
1331 Reed v. Reed, 404 U.S. 71 (1971); for the hint, see Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).
Language in a number of opinions appeared to suggest that poverty was a suspect condition, so that treating the poor adversely might call for heightened equal protection review. However, in a major evaluation of equal protection analysis early in this period, Justice Powell for the Court utilized solely the two-tier approach, determining that because the interests involved did not occasion strict scrutiny the Court would thus decide the case on minimum rationality standards. Decisively rejected was the contention that a de facto wealth classification, with an adverse impact on the poor, was either a suspect classification or merited some scrutiny other than the traditional basis, a holding that has several times been strongly reaffirmed by the Court. But the Court’s rejection of some form of intermediate scrutiny did not long survive.

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, “serve important governmental objectives and must be substantially related to achievement of those objectives.” And classifications that disadvantage illegitimates are

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1335 411 U.S. at 44-45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. Id. at 20.


1337 Craig v. Boren, 429 U.S. 190, 197 (1976). Justice Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when “fundamental” rights and “suspect classes” are absent, id. at 210 (concurring), and added: “As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the ‘two-tier’ approach that has been prominent in the Court’s decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach— with its narrowly limited ‘upper tier’—now has substantial precedential support. As has been true of Reed and its progeny, our decision today will be viewed by some as a ‘middle-tier’ approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential ‘rational basis’ standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much
subject to a similar though less exacting scrutiny of purpose and fit. The period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification, so that some discriminations against aliens based on the nature of the political order, rather than economics or social interests, need pass only the lenient review standard.

Expansion of the characteristics which when used as a basis for classification must be justified by a higher showing than ordinary economic classifications has so far been resisted, the Court holding, for example, that age classifications are neither suspect nor entitled to intermediate scrutiny. While resisting creation of new suspect or "quasi-suspect" classifications, however, the Court may nonetheless apply the Royster Guano rather than the Lindsley standard of rationality.

The other phase of active review of classifications holds that when certain fundamental liberties and interests are involved, gov-
ernment classifications which adversely affect them must be justi-

fied by a showing of a compelling interest necessitating the classi-
fication and by a showing that the distinctions are required to fur-
ther the governmental purpose. The effect of applying the test, as
in the other branch of active review, is to deny to legislative judg-
ments the deference usually accorded them and to dispense with
the general presumption of constitutionality usually given state
classifications.\textsuperscript{1342}

It is thought\textsuperscript{1343} that the “fundamental right” theory had its
origins in \textit{Skinner v. Oklahoma ex rel. Williamson},\textsuperscript{1344} in which the
Court subjected to “strict scrutiny” a state statute providing for
compulsory sterilization of habitual criminals, such scrutiny being
thought necessary because the law affected “one of the basic civil
rights.” In the apportionment decisions, Chief Justice Warren ob-
erved that “since the right to exercise the franchise in a free and
unimpaired manner is preservative of other basic civil and political
rights, any alleged infringement of the right of citizens to vote
must be carefully and meticulously scrutinized.”\textsuperscript{1345} A stiffening
of the traditional test could be noted in the opinion of the Court strik-
down certain restrictions on voting eligibility\textsuperscript{1346} and the
phrase “compelling state interest” was used several times in Just-
tice Brennan’s opinion in \textit{Shapiro v. Thompson}.\textsuperscript{1347} Thereafter, the
phrase was used in several voting cases in which restrictions were
voided, and the doctrine was asserted in other cases.\textsuperscript{1348}

While no opinion of the Court attempted to delineate the proc-
ress by which certain “fundamental” rights were differentiated from
others,\textsuperscript{1349} it was evident from the cases that the right to vote,\textsuperscript{1350}
the right of interstate travel,\textsuperscript{1351} the right to be free of wealth dis-
tinctions in the criminal process,\textsuperscript{1352} and the right of
procreation\textsuperscript{1353} were at least some of those interests that triggered

\begin{footnotesize}
\begin{enumerate}
\item Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v.
\item Shapiro v. Thompson, 394 U.S. at 660 (Justice Harlan dissenting).
\item 316 U.S. 535, 541 (1942).
\item Reynolds v. Sims, 377 U.S. 533, 562 (1964).
\item Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Bd. of Elections,
\item 394 U.S. 618, 627, 634, 638 (1969).
\item Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City
of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970);
\item This indefiniteness has been a recurring theme in dissents. \textit{E.g.}, Shapiro v.
Thompson, 394 U.S. 618, 655 (1969) (Justice Harlan); Weber v. Aetna Casualty &
\item \textit{E.g.}, Dunn v. Blumstein, 405 U.S. 330 (1972).
\item \textit{E.g.}, Shapiro v. Thompson, 394 U.S. 618 (1969).
\item \textit{E.g.}, Tate v. Short, 401 U.S. 395 (1971).
\end{enumerate}
\end{footnotesize}
active review when de jure or de facto official distinctions were made with respect to them. This branch of active review the Court also sought to rationalize and restrict in Rodriguez, which involved both a claim of de facto wealth classifications being suspect and a claim that education was a fundamental interest so that affording less of it to people because they were poor activated the compelling state interest standard. The Court readily agreed that education was an important value in our society. “But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.” A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undeniable importance.

But just as Rodriguez was unable to prevent the Court’s adoption of a “three-tier” or “sliding-tier” standard of review in the first phase of the active-review doctrine, so it did not by stressing the requirement that an interest be expressly or impliedly protected by the Constitution prevent the addition of other interests to the list of “fundamental” interests. The difficulty was that the Court decisions on the right to vote, the right to travel, the right to procreate, as well as others, premise the constitutional violation to be of the equal protection clause, which does not itself guarantee the right but prevents the differential governmental treatment of those attempting to exercise the right. Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right which required a compelling justification. While denials of public funding of abortions were held to implicate no fundamental interest—abortion being a fundamental interest—and no suspect classification—because only poor women needed public funding—other denials of public assistance because of illegitimacy, alienage, or sex have been deemed governed by the same standard of review as affirmative harms imposed on those

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1355 411 U.S. at 30, 33-34. But see id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).
1356 Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–80 (Justice O'Connor concurring) (travel).
grounds. The complete denial of education to the children of illegal aliens was found subject to intermediate scrutiny and invalidated.

Thus, the nature of active review in equal protection jurisprudence remains in flux, subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. But the cases, more fully reviewed hereafter, clearly indicate that a sliding scale of review is a fact of the Court’s cases, however much its doctrinal explanation lags behind.

Testing Facially Neutral Classifications Which Impact on Minorities

A classification expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or illegitimacy triggers the level of scrutiny appropriate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation. But when it is contended that a law, which is in effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the equal protection clause, a much more difficult case is presented.

It is necessary that one claiming harm through the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate. “[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”

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The principal case was Palmer v. Thompson, 403 U.S. 217 (1971), in which a 5-to-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, id. at 224–26, but it also, and the Davis Court so read it as actually deciding, drew the conclusion that since the pools were closed for both whites and blacks there was no discrimination. The city's avowed reason for closing the pools—to avoid violence and economic loss—could not be impeached by allegations of a racial motive. See also Wright v. Council of City of Emporia, 407 U.S. 451 (1972).


See Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases not cited by the Court included the Fifth Circuit's wrestling with the de facto/ de jure segregation distinction. In Cisneros v. Corpus Christi Indep. School Dist., 467 F.2d 142, 148–50 (5th Cir. 1972) (en banc), cert. denied, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the “de facto and de jure nomenclature” to be “meaningless.” After the distinction was reiterated in Keyes v. Denver School District, 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decisionmaker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and thus that a school board decision, whatever its facial motivation, that results in segregation is intentional in the constitutional sense. United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir.), vacated and remanded for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976), modified and adhered to, 564 F.2d 162, reh. denied, 579 F.2d 910 (5th Cir. 1977–78), cert. denied, 443 U.S. 915 (1979). See also United States v. Texas Educ. Agency, 600 F.2d 518 (5th Cir. 1979). This form of analysis was, however, substantially cabined in Massachusetts Personnel Adm' r v. Feeney, 442 U.S. 256, 278–80 (1979), although foreseeability as one kind of proof was acknowledged by Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979).
>Davis; but the Court did note that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”

Both elucidation and not a little confusion followed upon application of Davis in the following Terms. Looking to a challenged zoning decision of a local board which had a harsher impact upon blacks and low-income persons than on others, the Court explained in some detail how inquiry into motivation would work. First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; establishing “a discriminatory purpose” among permissible purposes shifts the burden to the defendant to show that the same decision would have resulted absent the impermissible motive. Second, determining whether a discriminatory purpose was a motivating factor “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” Impact provides a starting point and “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face,” but this is a rare case. In the absence of such a stark pattern, a court will look to such factors as the “historical background of the decision,” especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose, as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decisionmakers may be examined, and “[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privi-
In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

Strengthening of the intent standard was evidenced in a decision sustaining against sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all non-veterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender based; too many men are non-veterans to permit such a conclusion and there are women veterans. That the preference implicitly incorporated past official discrimination against women was held not to detract from the fact that rewarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. “Discriminatory purpose... implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”

Moreover, in *City of Mobile v. Bolden* a plurality of the Court apparently attempted to do away with the totality of circumstances test and to evaluate standing on its own each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against blacks and Hispanics, without considering whether its ruling was pre-
mised on discriminatory purpose or adverse impact but listing and weighing a series of factors the totality of which caused the Court to find invidious discrimination. But in the plurality opinion in *Mobile*, each of the factors, viewed “alone,” was deemed insufficient to show purposeful discrimination. Moreover, the plurality suggested that some of the factors thought to be derived from its precedents and forming part of the totality test in opinions of the lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent. But, contemporaneously with Congress’ statutory rejection of the *Mobile* plurality standards, the Court, in *Rogers v. Lodge*, appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of “circumstantial evidence” that is more reminiscent of pre-*Washington v. Davis* cases than of the more recent decisions.

*Rogers v. Lodge* was also a multimember electoral district case brought under the equal protection clause and the Fifteenth Amendment. The fact that the system operated to cancel out or di-

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1373 White v. Regester, 412 U. S. 755 (1972), was the prior case. See also Whitcomb v. Chavis, 403 U. S. 124 (1971). Justice White, the author of *Register*, dissented in *Mobile*, 446 U. S. at 94, on the basis that “the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White v. Register*.” Justice Blackmun, id. at 80, and Justices Brennan and Marshall, agreed with him as alternate holdings, id. at 94, 103.

1374 446 U. S. at 65-74. The principal formulation of the test was in *Zimmer v. McKeithen*, 485 F. 2d 1297, 1305 (5th Cir. 1973), aff’d on other grounds sub nom. East Carroll Parish School Bd. v. Marshall, 424 U. S. 636 (1976), and its components are thus frequently referred to as the *Zimmer* factors.


1376 458 U. S. 613 (1982). The decision, handed down within days of final congressional passage of the Voting Rights Act Amendments, was written by Justice White and joined by Chief Justice Burger and Justices Brennan, Marshall, Blackmun, and O’Connor. Justices Powell and Rehnquist dissented, id. at 628, as did Justice Stevens, id. at 631.

1377 458 U. S. at 618-22 (describing and disagreeing with the Mobile plurality, which had used the phrase at 446 U. S. 74). The Lodge Court approved the prior reference that motive analysis required an analysis of “such circumstantial and direct evidence” as was available. Id. at 618 (quoting Arlington Heights, 429 U. S. at 266).

1378 The Court confirmed the Mobile analysis that the “fundamental interest” side of heightened equal protection analysis requires a showing of intent when the criteria of classification are neutral and did not reach the Fifteenth Amendment issue in this case. 458 U. S. at 619 n.6.
lute black voting strength, standing alone, was insufficient to condemn it; discriminatory intent in creating or maintaining the system was necessary. But direct proof of such intent is not required. “[A]n invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”

Turning to the lower court’s enunciation of standards, the Court approved the Zimmer formulation. The fact that no black had ever been elected in the county, in which blacks were a majority of the population but a minority of registered voters, was “important evidence of purposeful exclusion.”

Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of blacks from the political process as well as educational segregation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the black community, indicated the presence of discriminatory motivation. The Court also looked to the “depressed socio-economic status” of the black population as being both a result of past discrimination and a barrier to black access to voting power.

As for the district court’s application of the test, the Court reviewed it under the deferential “clearly erroneous” standard and affirmed it.

The Court in a jury discrimination case has also seemed to allow what it had said in Davis and Arlington Heights it would not permit. Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that plaintiff’s showing that 79 percent of the county’s population was Spanish-surnamed while jurors selected in recent years ranged from 39 to 50 percent Spanish-surnamed was sufficient to establish a prima facie case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are

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1380 458 U.S. at 618 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).


1382 458 U.S. at 624-27. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of blacks, including the large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.

1383 Castaneda v. Partida, 430 U.S. 482 (1977). The decision was 5-to-4, Justice Blackmun writing the opinion of the Court and Chief Justice Burger and Justices Stewart, Powell, and Rehnquist dissenting. Id. at 504-07.
not random.\textsuperscript{1384} Second, the jury selection process was “highly subjective” and thus easily manipulated for discriminatory purposes, unlike the process in \textit{Davis} and \textit{Arlington Heights} which was regularized and open to inspection.\textsuperscript{1385} Thus, jury cases are likely to continue to be special cases and in the usual fact situation, at least where the process is open, plaintiffs will bear a heavy and substantial burden in showing discriminatory racial and other animus.

\section*{TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWER}

\subsection*{Taxation}

At the outset, the Court did not regard the equal protection clause as having any bearing on taxation.\textsuperscript{1386} It soon, however, took jurisdiction of cases assailing specific tax laws under this provision,\textsuperscript{1387} and in 1890 it cautiously conceded that “clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition.”\textsuperscript{1388} But it observed that the equal protection clause “was not intended to compel the States to adopt an iron rule of equal taxation” and propounded some conclusions that remain valid today.\textsuperscript{1389} In succeeding years the clause has been invoked but sparingly to invalidate state levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) discrimination in assessments, and (2) discrimination against foreign corporations. In addition, there are a handful of cases in-

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\textsuperscript{1386} Davidson v. City of New Orleans, 96 U.S. 97, 106 (1878).
\textsuperscript{1389} The State “may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon various trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution.” 134 U.S. at 237. See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).
validating, because of inequality, state laws imposing income, gross receipts, sales and license taxes.

Classification for Purpose of Taxation. — The power of the State to classify for purposes of taxation is "of wide range and flexibility." \(^{1390}\) A State may adjust its taxing system in such a way as

\(^{1390}\) Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). Classifications for purpose of taxation have been held valid in the following situations:

Banks: a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. First Nat'l Bank v. Tax Comm'n, 289 U.S. 60 (1933).

Bank deposits: a tax of 50 cents per $100 on deposits in banks outside a State in contrast with a rate of 10 cents per $100 on deposits in the State. Madden v. Kentucky, 309 U.S. 83 (1940).


Gasoline: a graduated severance tax on oils sold primarily for their gasoline content, measured by resort to Baume gravity. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

Chain stores: a privilege tax graduated according to the number of stores maintained, Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Fox v. Standard Oil Co., 294 U.S. 87 (1935); a license tax based on the number of stores both within and without the State, Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) (distinguishing Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)).

Electricity: municipal systems may be exempted. Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

Insurance companies: license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).


Public utilities: a gross receipts tax at a higher rate for railroads than for other public utilities, Ohio Tax Cases, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, Nashville & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938).

Wine: exemption of wine from grapes grown in the State while in the hands of the producer, Cox v. Texas, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:


Commission merchants: requirements that dealers in farm products on commission procure a license, Payne v. Kansas, 248 U.S. 112 (1918).

Elevators and warehouses: license limited to certain elevators and warehouses on right-of-way of railroad, Cargill Co. v. Minnesota, 180 U.S. 452 (1901); a license
to favor certain industries or forms of industry and may tax different types of taxpayers differently, despite the fact that they compete. It does not follow, however, that because “some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed.” Classification may not be arbitrary. It must be based on a real and substantial difference and the difference need not be great or conspicuous, but there must be no discrimination in favor of one as against another of the same class. Also, discriminations of an unusual character are scrutinized with special care. A gross sales tax graduated at increasing rates with the volume of sales, a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one country, and a gross receipts tax levied on corporations operating taxicabs, but not on individuals, have been held to be a repugnant to the equal protection clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which

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prompted the adoption of the statute. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.

One not within the class claimed to be discriminated against cannot raise the question of constitutionality of a statute on the ground that it denies equal protection of the law. If a tax applies to a class which may be separately taxed, those within the class may not complain because the class might have been more aptly defined nor because others, not of the class, are taxed improperly.

**Foreign Corporations and Nonresidents.**—The equal protection clause does not require identical taxes upon all foreign and domestic corporations in every case. In 1886, a Pennsylvania corporation previously licensed to do business in New York challenged an increased annual license tax imposed by that State in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the State, having power to exclude entirely, could change the conditions of admission for the future and could demand the payment of a new or further tax as a license fee. Later cases whittled down this rule considerably. The Court decided that “after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind,” and that where it has acquired property of a fixed and permanent nature in a State, it cannot be subjected to a more onerous tax for the privilege of doing business than is imposed on domestic corporations. A state statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business, was held invalid under the equal protection clause where foreign companies writing only casualty insurance were not subject to a similar tax. Later, the doctrine of *Philadelphia Fire Association v. New York* was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from

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1405 Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 88 (1913). See also Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 157 (1918).
foreign but not from domestic corporations.\footnote{Lincoln Nat'l Life Ins. Co. v. Read, 325 U.S. 673 (1945). This decision was described as "an anachronism" in Western & Southern Life Ins. Co. v. State Bd. Of Equalization, 451 U.S. 648, 667 (1981), the Court reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose.} Even though the right of a foreign corporation to do business in a State rests on a license, yet the equal protection clause is held to insure it equality of treatment, at least so far as ad valorem taxation is concerned.\footnote{Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571, 572 (1949).} The Court, in \textit{WHYY v. Glassboro}\footnote{393 U.S. 117 (1968).} held that a foreign nonprofit corporation licensed to do business in the taxing State is denied equal treatment in violation of the equal protection clause where an exemption from state property taxes granted to domestic corporations is denied to a foreign corporation solely because it was organized under the laws of a sister State and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing State.

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In \textit{Metropolitan Life Ins. Co. v. Ward},\footnote{470 U.S. 869, 878 (1985). The vote was 5–4, with Justice Powell’s opinion for the Court being joined by Chief Justice Burger and by Justices White, Blackmun, and Stevens. Justice O’Connor’s dissent was joined by Justices Brennan, Marshall, and Rehnquist.} the Court concluded that taxation favoring domestic over foreign corporations “constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.” Rejecting the assertion that it was merely imposing “Commerce Clause rhetoric in equal protection clothing,” the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.\footnote{470 U.S. at 880.} However, the Court’s holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.\footnote{Income Taxes.—A state law which taxes the entire income of domestic corporations which do business in the State, including

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  \item foreign but not from domestic corporations.
  \item Even though the right of a foreign corporation to do business in a State rests on a license, yet the equal protection clause is held to insure it equality of treatment, at least so far as ad valorem taxation is concerned.
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that derived within the State, while exempting entirely the income received outside the State by domestic corporations which do no local business, is arbitrary and invalid. In taxing the income of a nonresident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the State, although residents are permitted to deduct all losses, wherever incurred. A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year which were deductible from gross income under the law in effect when they were received, does not violate the equal protection clause.

**Inheritance Taxes.**—There is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred and unrelated persons, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases. A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the remainder passes to collateral heirs. There is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or daughter-in-law. Vested and contingent remainders may be treated differently. The exemption of property bequeathed to charitable or educational institutions may be limited to those within the State. In computing the tax collectible from a nonresident decedent’s property within the State, a State may apply the pertinent rates to the whole estate wherever located and take that proportion thereof which the property within the State bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident, does not invalidate the result.

**Motor Vehicle Taxes.**—In demanding compensation for the use of highways, a State may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax.

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1420 Billings v. Illinois, 188 U.S. 97 (1903).
1421 Campbell v. California, 200 U.S. 87 (1906).
on carriers.\textsuperscript{1425} A state maintenance tax act, which taxes vehicle property carriers for hire at greater rates than similar vehicles carrying property not for hire is reasonable, since the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less than that of one engaged in business as a common carrier.\textsuperscript{1426} A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways may be measured by gross receipts and be assessed at a higher rate than taxes on property not so employed.\textsuperscript{1427} Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and private.\textsuperscript{1428} A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the State for purpose of sale does not violate the equal protection clause as applied to cars moving in caravans.\textsuperscript{1429} The exemption from a tax for a permit to bring cars into the State in caravans of cars moved for sale between zones in the State is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt.\textsuperscript{1430} Also sustained as valid have been exemptions of vehicles weighing less than 3000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the exempt vehicles, when loaded, may outweigh those taxed;\textsuperscript{1431} and exemptions from vehicle license taxes levied on private motor carriers of persons whose vehicles haul passengers and farm products between points not having railroad facilities or farm and dairy products for producers thereof.\textsuperscript{1432}

\textbf{Property Taxes}.—The State’s latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy,\textsuperscript{1433} whether the exemption results from the terms of the statute itself or the conduct of a state official implementing state policy.\textsuperscript{1434} A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist

\textsuperscript{1425}Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).
\textsuperscript{1426}Dixie Ohio Express Co. v. State Revenue Comm’n, 306 U.S. 72, 78 (1939).
\textsuperscript{1427}Alward v. Johnson, 282 U.S. 509 (1931).
\textsuperscript{1428}Bekins Van Lines v. Riley, 280 U.S. 80 (1929).
\textsuperscript{1429}Morf v. Bingaman, 298 U.S. 407 (1936).
\textsuperscript{1433}F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
\textsuperscript{1434}Missouri v. Dockery, 191 U.S. 165 (1903).
only in a part of the State.\footnote{Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911).} Also, differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.\footnote{Charleston Fed. S. & L. Ass'n v. Alderson, 324 U.S. 182 (1945); Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).} Early cases drew the distinction between intentional and systematic discriminatory action by state officials in undervaluing some property while taxing at full value other property in the same class—an action that could be invalidated under the equal protection clause—and mere errors in judgment resulting in unequal valuation or undervaluation—actions that did not support a claim of discrimination.\footnote{Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918); Raymond v. Chicago Traction Co., 207 U.S. 20, 35, 37 (1907); Coutler v. Louisville & Nashville R.R., 196 U.S. 599 (1905). See also Chicago, B. & Q. Ry. v. Babcock, 204 U.S. 585 (1907).} More recently, however, the Court in Allegheny Pittsburgh Coal Co. v. Webster County Commission,\footnote{488 U.S. 336 (1989).} found a denial of equal protection to property owners whose assessments, based on recent purchase prices, ranged from 8 to 35 times higher than comparable neighboring property for which the assessor failed over a 10-year period to readjust appraisals. Then, only a few years later, the Court upheld a California ballot initiative that imposed a quite similar result: property that is sold is appraised at purchase price, while assessments on property that has stayed in the same hands since 1976 may rise no more that 2% per year.\footnote{Nordlinger v. Hahn, 505 U.S. 1 (1992).} Allegheny Pittsburgh was distinguished, the disparity in assessments being said to result from administrative failure to implement state policy rather than from implementation of a coherent state policy.\footnote{505 U.S. at 14-15.} California’s acquisition-value system favoring those who hold on to property over those who purchase and sell property was viewed as furthering rational state interests in promoting “local neighborhood preservation, continuity, and stability,” and in protecting reasonable reliance interests of existing homeowners.\footnote{Sioux City Bridge v. Dakota County, 260 U.S. 441, 446 (1923).} An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.\footnote{505 U.S. at 12-13.} Equal protection is denied if a State does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is directed the burden of seeking an upward revision of the assessment of other members of the class.\footnote{Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946); Allegheny Pittsburgh Coal Co. v. Webster County Comm’n, 488 U.S. 336 (1989).} A corporation whose valuations were accepted by the assessing commission cannot complain that it
was taxed disproportionately, as compared with others, if the commission did not act fraudulently. 1444

**Special Assessment.**—A special assessment is not discriminatory because apportioned on an *ad valorem* basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community. 1445 Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. 1446 A special highway assessment against railroads based on real property, rolling stock, and other personal property is unjustly discriminatory when other assessments for the same improvement are based on real property alone. 1447 A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property. 1448 In taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having less than 25 miles of main line within the district than for those having more. 1449

**Police Power Regulation**

**Classification.**—Justice Holmes’ characterization of the equal protection clause as the “usual last refuge of constitutional arguments” 1450 was no doubt made with the practice in mind of contest-ants tacking on an equal protection argument to a due process challenge of state economic regulation. Few police regulations have been held unconstitutional on this ground.

“[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” 1451 The Court has made it

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1449 *Columbus & Greenville Ry. v. Miller*, 283 U.S. 96 (1931).
clear that only the totally irrational classification in the economic field will be struck down,\textsuperscript{1452} and it has held that legislative classifications that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.\textsuperscript{1453} So deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislature “could rationally have decided” that its classification would foster its goal.\textsuperscript{1454} The Court

\textsuperscript{1452}City of New Orleans v. Dukes, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operation for more than eight years, the Court summarized its method of decision here. “When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a super-legislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.” Id. at 303–04.

\textsuperscript{1453}The “grandfather” clause upheld in \textit{Dukes} preserved the operations of two concerns that had operated in the Quarter for 20 years. The classification was sustained on the basis of (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both “grandfathered” vending interests had themselves become part of the distinctive character and charm of the Quarter. 427 U.S. at 305-06. \textit{See also} Friedman v. Rogers, 440 U.S. 1, 17–18 (1979); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970).

\textsuperscript{1454}Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466 (emphasis by Court). Purporting to promote the purposes of resource conservation, easing solid waste disposal problems, and conserving energy, the legislature had banned plastic nonreturnable milk cartons but permitted all other nonplastic nonreturnable containers, such as paperboard cartons. The state court had thought the distinction irrational, but the Supreme Court thought the legislature could have believed a basis for the distinction existed. Courts will receive evidence that a distinction is wholly irrational. United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

Classifications under police regulations have been held valid as follows:

Amendment 14—Rights Guaranteed

against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books, Halter v. Nebraska, 205 U.S. 34 (1907).

Amusement: prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. Murphy v. California, 225 U.S. 623 (1912).

Attorneys: Kansas law and court regulations requiring resident of Kansas, licensed to practice in Kansas and Missouri and maintaining law offices in both States, but who practices regularly in Missouri, to obtain local associate counsel as a condition of appearing in a Kansas court. Martin v. Walton, 368 U.S. 25 (1961). Two dissenters, Justices Douglas and Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single-owner.


Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporation Comm’n v. Lowe, 281 U.S. 431 (1930).


Eye glasses: law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Co. v. Gentry, 297 U.S. 427 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger v. Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price v. Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding one, three or five pounds or some whole multiple thereof, Armour & Co. v. North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, Lieberman v. Van De Carr, 199 U.S. 552 (1906); vendors producing milk outside city may be classified separately, Adams v. Milwaukee, 228 U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John v. New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, Nebbia v. New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden’s Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, Corn Products Rfg. Co. v. Eddy, 249 U.S. 427 (1919)

Geographical discriminations: legislation limited in application to a particular geographical or political subdivision of a State, Ft. Smith Co. v. Paving Dist., 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, Hadacheck v. Sebastian, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, Welch v. Swasey, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd char-


Landlord-tenant: requiring trial no later than six days after service of complaint and limiting triable issues to the tenant’s default, provisions applicable in no other legal action, under procedure allowing landlord to sue to evict tenants for non-payment of rent, inasmuch as prompt and peaceful resolution of the dispute is proper objective and tenants have other means to pursue other relief. Lindsey v. Normet, 405 U.S. 56 (1972).

Lodging houses: requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. Queenside Hills Co v. Saxl, 328 U.S. 80 (1946).


Medicine: a uniform standard of professional attainment and conduct for all physicians. Hurwitz v. North, 271 U.S. 40 (1926); reasonable exemptions from medical registration law. Watson v. Maryland, 218 U.S. 173 (1910); exemption of persons who heal by prayer from regulations applicable to drugless physicians, Crane v. Johnson, 242 U.S 339 (1917); exclusion of osteopathic physicians from public hospitals, Hayman v. Galveston, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by use of drugs, who are regulated under a different statute, McNaughton v. Johnson, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, Slemor v. Dental Examiners, 294 U.S. 608 (1935).

Motor vehicles: guest passenger regulation applicable to automobiles but not to other classes of vehicles. Silver v. Silver, 280 U.S. 117 (1929); exemption of vehicles from other States from registration requirement. Storaasli v. Minnesota, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance. Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); exemption from limitations on hours of labor for drivers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, Welch Co. v. New Hampshire, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, Sproles v. Binford, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, Bradley v. Public Utility Comm’n, 289 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, Hicklin v. Coney, 290 U.S. 169 (1933); exemption of private vehicles, street cars and omnibuses from insurance requirements applicable to taxicabs, Packard v. Banton, 264 U.S. 140 (1924).

Peddlers and solicitors: a State may classify and regulate itinerant vendors and peddlers, Emert v. Missouri, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, Baccus v. Louisiana, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, and the like, Williams v. Arkansas, 217 U.S. 79 (1910); or solicitation of employment to prosecute
has condemned a variety of statutory classifications as failing to survive the rational basis test, although some of the cases are of doubtful vitality today and some have been questioned. Thus, the Court invalidated a statute which forbade stock insurance companies to act through agents who were their salaried employees but

or collect claims, McCloskey v. Tobin, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. Breard v. City of Alexandria, 341 U.S. 622 (1951).

Property destruction: destruction of cedar trees to protect apple orchards from cedar rust, Miller v. Schoene, 276 U.S. 272 (1928).

Railroads: prohibition on operation on a certain street, Railroad Co. v. Richmond, 96 U.S. 521 (1878); requirement that fences and cattle guards and allow recovery of multiple damages for failure to comply, Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885); Minneapolis Ry. v. Beckwith, 129 U.S. 26 (1889); Minneapolis & St. Louis Ry. v. Emmons, 149 U.S. 364 (1893); assessing railroads with entire expense of altering a grade crossing, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894); liability for fire communicated by locomotive engines, St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897); required weed cutting; Missouri, Kan., & Tex. Ry. v. May, 194 U.S. 267 (1904); presumption against a railroad failing to give prescribed warning signals, Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933); required use of locomotive headlights of a specified form and power, Atlantic Coast Line Ry. v. Georgia, 234 U.S. 280 (1914); presumption that railroads are liable for damage caused by operation of their locomotives, Seaboard Air Line Ry. v. Watson, 287 U.S. 86 (1932); required sprinkling of streets between tracks to lay the dust, Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919). State "full-crew" laws do not violate the equal protection clause by singling out the railroads for regulation and by making no provision for minimum crews on any other segment of the transportation industry, Firemen v. Chicago, R.I. & P. Ry. 393 U.S. 129 (1968).

Sales in bulk: requirement of notice of bulk sales applicable only to retail dealers, Lemieux v. Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of 20 or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, e.g., cotton, grain. Otis v. Parker, 187 U.S. 606 (1903).

Sunday closing law: notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961). See also Soon Hing v. Crowley, 113 U.S. 703 (1885); Petit v. Minnesota, 177 U.S. 164 (1900).

Telegraph companies: a statute prohibiting stipulation against liability for negligence in the delivery of interstate messages, which did not forbid express companies and other common carriers to limit their liability by contract. Western Union Telegraph Co. v. Milling Co., 218 U.S. 406 (1910).
permitted mutual companies to operate in this manner.\textsuperscript{1455} A law which required private motor vehicle carriers to obtain certificates of convenience and necessity and to furnish security for the protection of the public was held invalid because of the exemption of carriers of fish, farm, and dairy products.\textsuperscript{1456} The same result befell a statute which permitted mill dealers without well advertised trade names the benefit of a price differential but which restricted this benefit to such dealers entering the business before a certain date.\textsuperscript{1457} In a decision since overruled, the Court struck down a law which exempted by name the American Express Company from the terms pertaining to the licensing, bonding, regulation, and inspection of “currency exchanges” engaged in the sale of money orders.\textsuperscript{1458}

**Other Business and Employment Relations**

**Labor Relations.**—Objections to labor legislation on the ground that the limitation of particular regulations to specified industries was obnoxious to the equal protection clause have been consistently overruled.\textsuperscript{1459} Statutes limiting hours of labor for employees in mines, smelters,\textsuperscript{1460} mills, factories,\textsuperscript{1461} or on public works\textsuperscript{1462} have been sustained. And a statute forbidding persons engaged in mining and manufacturing to issue orders for payment of labor unless redeemable at face value in cash was similarly held unobjectionable.\textsuperscript{1463} The exemption of mines employing less than ten persons from a law pertaining to measurement of coal to determine a miner’s wages is not unreasonable.\textsuperscript{1464} All corporations\textsuperscript{1465} or public service corporations\textsuperscript{1466} may be required to issue to employees who leave their service letters stating the nature of the

\textsuperscript{1455} Hartford Ins. Co. v. Harrison, 301 U.S. 459 (1937).
\textsuperscript{1456} Smith v. Cahoon, 283 U.S. 553 (1931).
\textsuperscript{1457} Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936).
\textsuperscript{1458} See United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 7 n.2 (1970) (reserving question of case’s validity, but interpreting it as standing for the proposition that no showing of a valid legislative purpose had been made).
\textsuperscript{1459} Morey v. Doud, 354 U.S. 457 (1957), overruled by City of New Orleans v. Dukes, 427 U.S. 297 (1976), where the exemption of one concern had been by precise description rather than by name.
\textsuperscript{1462} Bunting v. Oregon, 243 U.S. 426 (1917).
\textsuperscript{1463} Atkin v. Kansas, 191 U.S. 207 (1903).
\textsuperscript{1464} Keokue Ck Co. v. Taylor, 234 U.S. 224 (1914). See also Knoxville Iron Co. v. Harrison, 183 U.S. 13 (1901).
\textsuperscript{1465} McLean v. Arkansas, 211 U.S. 539 (1909).
\textsuperscript{1466} Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).
\textsuperscript{1467} Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922).
service and the cause of leaving even though other employers are not so required.

Industries may be classified in a workmen’s compensation act according to the respective hazards of each, and the exemption of farm laborers and domestic servants does not render such an act invalid. A statute providing that no person shall be denied opportunity for employment because he is not a member of a labor union does not offend the equal protection clause. At a time when protective labor legislation generally was falling under “liberty of contract” applications of the due process clause, the Court generally approved protective legislation directed solely to women workers and this solicitude continued into present times in the approval of laws which were more questionable, but passage of the sex discrimination provision of the 1964 Civil Rights Act has generally called into question all such protective legislation addressed solely to women.

**Monopolies and Unfair Trade Practices.**—On the principle that the law may hit the evil where it is most felt, state antitrust laws applicable to corporations but not to individuals, or to vendors of commodities but not to vendors of labor, have been upheld. Contrary to its earlier view, the Court now holds that an antitrust act which exempts agricultural products in the hands of the producer is valid. Diversity with respect to penalties also has been sustained. Corporations violating the law may be proceeded against by bill in equity, while individuals are indicted and tried. A provision, superimposed upon the general antitrust law, for revocation of the licenses of fire insurance companies that enter into illegal combinations, does not violate the equal protec-

1469 *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). Neither is it a denial of equal protection for a city to refuse to withhold from its employees’ paychecks dues owing their union, although it withholds for taxes, retirement-insurance programs, saving programs, and certain charities, because its offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method to avoid the burden of withholding money for all persons or organizations that request a checkoff. *City of Charlotte v. Firefighters*, 426 U.S. 283 (1976).
1475 *Tigner v. Texas*, 310 U.S. 141 (1940) (overruling *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)).
tion clause.\textsuperscript{1477} A grant of monopoly privileges, if otherwise an appropriate exercise of the police power, is immune to attack under that clause.\textsuperscript{1478} Likewise, enforcement of an unfair sales act, whereby merchants are privileged to give trading stamps, worth two and one-half percent of the price, with goods sold at or near statutory cost, while a competing merchant, not issuing stamps, is precluded from making an equivalent price reduction, effects no discrimination. There is a reasonable basis for concluding that destructive, deceptive competition results from selective loss-leader selling whereas such abuses do not attend issuance of trading stamps “across the board,” as a discount for payment in cash.\textsuperscript{1479}

\textbf{Administrative Discretion.}—A municipal ordinance which vests in supervisory authorities a naked and arbitrary power to grant or withhold consent to the operation of laundries in wooden buildings, without consideration of the circumstances of individual cases, constitutes a denial of equal protection of the law when consent is withheld from certain persons solely on the basis of nationality.\textsuperscript{1480} But a city council may reserve to itself the power to make exceptions from a ban on the operation of a dairy within the city,\textsuperscript{1481} or from building line restrictions.\textsuperscript{1482} Written permission of the mayor or president of the city council may be required before any person shall move a building on a street.\textsuperscript{1483} The mayor may be empowered to determine whether an applicant has a good character and reputation and is a suitable person to receive a license for the sale of cigarettes.\textsuperscript{1484} In a later case,\textsuperscript{1485} the Court held that the unfettered discretion of river pilots to select their apprentices, which was almost invariably exercised in favor of their relatives and friends, was not a denial of equal protection to persons not selected despite the fact that such apprenticeship was requisite for appointment as a pilot.

\textbf{Social Welfare.}—The traditional “reasonable basis” standard of equal protection adjudication developed in the main in cases involving state regulation of business and industry. “The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and

\begin{footnotesize}
\begin{enumerate}
  \item[1480] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
  \item[1481] Fischer v. St. Louis, 194 U.S. 361 (1904).
  \item[1482] Gorieb v. Fox, 274 U.S. 603 (1927).
  \item[1484] Gundling v. Chicago, 177 U.S. 183 (1900).
\end{enumerate}
\end{footnotesize}
this one, but we can find no basis for applying a different constitutional standard."1486 Thus, a formula for dispensing aid to dependent children which imposed an upper limit on the amount one family could receive, regardless of the number of children in the family, so that the more children in a family the less money per child was received, was found to be rationally related to the legitimate state interest in encouraging employment and in maintaining an equitable balance between welfare families and the families of the working poor.1487 Similarly, a state welfare assistance formula which, after calculation of individual need, provided less of the determined amount to families with dependent children than to those persons in the aged and infirm categories did not violate equal protection because a State could reasonably believe that the aged and infirm are the least able to bear the hardships of an inadequate standard of living, and that the apportionment of limited funds was therefore rational.1488 While reiterating that this standard of review is "not a toothless one," the Court has nonetheless sustained a variety of distinctions on the basis that Congress could rationally have believed them justified,1489 acting to invalidate a provision only once and then on the premise that Congress was actuated by an improper purpose.1490

Similarly, the Court has rejected the contention that access to housing, despite its great importance, is of any fundamental interest which would place a bar upon the legislature's giving landlords a much more favorable and summary process of judicially-con-
trolled eviction actions than was available in other kinds of litigation.\footnote{Lindsey v. Normet, 405 U.S. 56 (1972).}

However, a statute which prohibited the dispensing of contraceptive devices to single persons for birth control but not for disease prevention purposes and which contained no limitation on dispensation to married persons was held to violate the equal protection clause on several grounds. On the basis of the right infringed by the limitation, the Court saw no rational basis for the State to distinguish between married and unmarried persons. Similarly, the exemption from the prohibition for purposes of disease prevention nullified the argument that the rational basis for the law was the deterrence of fornication, the rationality of which the Court doubted in any case.\footnote{Eisenstadt v. Baird, 405 U.S. 438 (1972).}

Also denying equal protection was a law affording married parents, divorced parents, and unmarried mothers an opportunity to be heard with regard to the issue of their fitness to continue or to take custody of their children, an opportunity the Court decided was mandated by due process, but presuming the unfitness of the unmarried father and giving him no hearing.\footnote{Stanley v. Illinois, 405 U.S. 645, 658 (1972).}

\textbf{Punishment of Crime}.—Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances.\footnote{Pace v. Alabama, 106 U.S. 583 (1883). See Salzburg v. Maryland, 346 U.S. 545 (1954), sustaining law rendering illegally seized evidence inadmissible in prosecutions in state courts for misdemeanors but permitting use of such evidence in one county in prosecutions for certain gambling misdemeanors. Distinctions based on county areas were deemed reasonable. In North v. Russell, 427 U.S. 328 (1976), the Court sustained the provision of law-trained judges for some police courts and lay judges for others, depending upon the state constitutional classification of cities according to population, since as long as all people within each classified area are treated equally, the different classifications within the court system are justifiable.}


\footnote{Carlesi v. New York, 233 U.S. 51 (1914).}

Comparative gravity of criminal offenses is, however, largely a matter of state discretion, and the fact that some offenses are punished with less severity than others does not deny equal protection.\footnote{McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895); Graham v. West Virginia, 224 U.S. 616 (1912).}

Heavier penalties may be imposed upon habitual criminals for like offenses,\footnote{Carlesi v. New York, 233 U.S. 51 (1914).} even after a pardon for an earlier offense,\footnote{Carlesi v. New York, 233 U.S. 51 (1914).} and such persons may be made
ineligible for parole. A state law doubling the sentence on prisoners attempting to escape does not deny equal protection by subjecting prisoners who attempt to escape together to different sentences depending on their original sentences.

A statute denying state prisoners good time credit for presentence incarceration but permitting those prisoners who obtain bail or other release immediately to receive good time credit for the entire period which they ultimately spend in custody, good time counting toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection. The distinction is rationally justified by the fact that good time credit is designed to encourage prisoners to engage in rehabilitation courses and activities which exist only in state prisons and not in local jails.

The equal protection clause does, however, render invalid a statute requiring the sterilization of persons convicted of various offenses when the statute draws a line between like offenses, such as between larceny by fraud and embezzlement. A statute which provided that convicted defendants sentenced to imprisonment must reimburse the State for the furnishing of free transcripts of their trial by having amounts deducted from prison pay denied such persons equal protection when it did not require reimbursement of those fined, given suspended sentences, or placed on probation. Similarly, a statute enabling the State to recover the costs of such transcripts and other legal defense fees by a civil action was defective under the equal protection clause because indigent defendants against whom judgment was entered under the statute did not have the benefit of exemptions and benefits afforded other civil judgment debtors. But a bail reform statute which provided for liberalized forms of release and which imposed the costs of operating the system upon one category of released defendants, generally those most indigent, was not invalid because the classification was rational and because the measure was in any event a substantial improvement upon the old bail system.

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prohibit numerous *de jure* and *de facto* distinctions based on wealth or indigency. 1505

**EQUAL PROTECTION AND RACE**

**Overview**

The Fourteenth Amendment "is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments ... cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. ... [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provision by appropriate legislation." 1506 Thus, a state law which on its face worked a discrimination against African Americans was void. 1507 In addition, "[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations

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1507 Strader v. West Virginia, 100 U.S. 303 (1880) (law limiting jury service to white males). Moreover it will not do to argue that a law that segregates the races or prohibits contacts between them discriminates equally against both races. Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance prohibiting blacks from occupying houses in blocks where whites were predominant and whites from occupying houses in blocks where blacks were predominant). Compare Pace v. Alabama, 106 U.S. 583 (1883) (sustaining conviction under statute that imposed a greater penalty for adultery or fornication between a white person and a Negro than was imposed for similar conduct by members of the same race, using "equal application" theory), with McLaughlin v. Florida, 379 U.S. 184, 188 (1964), and Loving v. Virginia, 388 U.S. 1, 10 (1967) (rejecting theory).
between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”

**Education**

*Development and Application of “Separate But Equal”*—Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race, but the Court in *Plessy v. Ferguson* adopted a principle first propounded in litigation attacking racial segregation in the schools of Boston, Massachusetts. *Plessy* concerned not schools but a state law requiring “equal but separate” facilities for rail transportation and requiring the separation of “white and colored” passengers. “The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power.” The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, “even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.”

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1510 163 U.S. 537 (1896).

1511 Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

1512 *Plessy* v. *Ferguson*, 163 U.S. 537, 543–44 (1896). “We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” Id. at 552, 559.

1513 163 U.S. at 544–45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice Harlan’s well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped African Americans with a badge of inferiority. “[T]he view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” Id. at 552, 559.
Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court’s decisions assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with African Americans and sent to school with them rather than with whites,\(^\text{1514}\) and it upheld the refusal of an injunction to require a school board to close a white high school until it opened a high school for African Americans.\(^\text{1515}\) And no violation of the equal protection clause was found when a state law prohibited a private college from teaching whites and African Americans together.\(^\text{1516}\)

In 1938, the Court began to move away from “separate but equal.” It then held that a State which operated a law school open to whites only and which did not operate any law school open to African Americans violated an applicant’s right to equal protection, even though the State offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the State.\(^\text{1517}\) When Texas established a law school for African Americans after the plaintiff had applied and been denied admission to the school maintained for whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the white school necessarily meant that the separate school was unequal.\(^\text{1518}\) Equally objectionable was the fact that when Oklahoma admitted an African American law student to its only law school it required him to remain physically separate from the other students.\(^\text{1519}\)

*Brown v. Board of Education.*—“Separate but equal” was formally abandoned in *Brown v. Board of Education*,\(^\text{1520}\) involving challenges to segregation *per se* in the schools of four States in which the lower courts had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not “turn the clock back to 1867... or even to 1896,” but must rather consider the issue in the context of the vital importance of education in 1954. The Court reasoned that denial of opportunity for an adequate education would often be a denial of the

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\(^\text{1514}\) Gong Lum v. Rice, 275 U.S. 78 (1927).

\(^\text{1515}\) Cummings v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

\(^\text{1516}\) Berea College v. Kentucky, 211 U.S. 45 (1908).


opportunity to succeed in life, that separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore that the equal protection clause was violated by such separation. “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” 1521

After hearing argument on what remedial order should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. “At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis.” The lower courts were directed to “require that the defendants make a prompt and reasonable start toward full compliance,” although “[o]nce such a start has been made,” some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be “in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system.” But in any event the lower courts were to require compliance “with all deliberate speed.” 1522

Brown’s Aftermath.—For the next several years, the Court declined to interfere with the administration of its mandate, ruling only in those years on the efforts of Arkansas to block desegregation of schools in Little Rock. 1523 In the main, these years were taken up with enactment and administration of “pupil placement laws” by which officials assigned each student individually to a school on the basis of formally nondiscriminatory criteria, and which required the exhaustion of state administrative remedies before each pupil seeking reassignment could bring individual litigation. 1524 The lower courts eventually began voiding these laws for discriminatory application, permitting class actions, 1525 and the Supreme Court voided the exhaustion of state remedies require-

1525 E.g., McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667 (4th Cir. 1960); Green v. School Board of Roanoke, 304 F.2d 118 (4th Cir. 1962); Gibson v. Board of Pub. Instruction of Dade County, 272 F.2d 763 (5th Cir. 1959); Northcross v. Board of Educ. of Memphis, 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944 (1962).
In the early 1960's, various state practices—school closings, minority transfer plans, zoning, and the like—were ruled impermissible, and the Court indicated that the time was running out for full implementation of the Brown mandate. 

About this time, “freedom of choice” plans were promulgated under which each child in the school district could choose each year which school he wished to attend, and, subject to space limitations, he could attend that school. These were first approved by the lower courts as acceptable means to implement desegregation, subject to the reservation that they be fairly administered. Enactment of Title VI of the Civil Rights Act of 1964 and HEW enforcement in a manner as to require effective implementation of affirmative actions to desegregate led to a change of attitude in the lower courts and the Supreme Court. In Green v. School Board of New Kent County, the Court posited the principle that the only desegregation plan permissible is one which actually results in the abolition of the dual school, and charged school officials with an af-

1527 Griffin v. Board of Supervisors of Prince Edward County, 377 U.S. 218 (1964) (holding that “under the circumstances” the closing by a county of its schools while all the other schools in the State were open denied equal protection, the circumstances apparently being the state permission and authority for the closing and the existence of state and county tuition grant/tax credit programs making an official connection with the “private” schools operating in the county and holding that a federal court is empowered to direct the appropriate officials to raise and expend money to operate schools). On school closing legislation in another State, see Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), aff’d, 365 U.S. 569 (1961); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La., 1961), aff’d, 368 U.S. 515 (1962).
1528 Goss v. Knoxville Bd. of Educ., 373 U.S. 683 (1963). Such plans permitted as of right a student assigned to a school in which students of his race were a minority to transfer to a school where the student majority was of his race.
1529 Northcross v. Board of Educ. of Memphis, 333 F.2d 661 (6th Cir. 1964).
1531 E.g., Bradley v. School Bd. of City of Richmond, 345 F.2d 310 (4th Cir.), rev’d on other grounds, 382 U.S. 103 (1965); Bowman v. School Bd. of Charles City County, 382 F.2d 326 (4th Cir. 1967).
1532 Pub. L. 88–352, 78 Stat. 252, 42 U.S.C. § 2000d et seq. (prohibiting discrimination in federally assisted programs). HEW guidelines were designed to afford guidance to state-local officials in interpretations of the law and were accepted as authoritative by the courts and utilized. Davis v. Board of School Comm’rs of Mobile County, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).
firmative obligation to achieve it. School boards must present to the district courts “a plan that promises realistically to work and promises realistically to work now,” in such a manner as “to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.” 1534 Furthermore, as the Court and lower courts had by then made clear, school desegregation encompassed not only the abolition of dual attendance systems for students, but also the merging into one system of faculty, 1535 staff, and services, so that no school could be marked as either a “black” or a “white” school. 1536

Implementation of School Desegregation.—In the aftermath of Green, the various Courts of Appeals held inadequate an increasing number of school board plans based on “freedom of choice,” on zoning which followed traditional residential patterns, or on some combination of the two. 1537 The Supreme Court’s next opportunity to speak on the subject came when HEW sought to withdraw desegregation plans it had submitted at court request and asked for a postponement of a court-imposed deadline, which was reluctantly granted by the Fifth Circuit. The Court unanimously reversed and announced that “continued operation of segregated schools under a standard of allowing ‘all deliberate speed’ for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district

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1534 Green, 391 U.S. at 439, 442 (1968). “Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multi-faceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” Id. at 437–38. The case laid to rest the dictum of Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955), that the Constitution “does not require integration” but “merely forbids discrimination.”

1535 Bradley v. School Bd. of City of Richmond, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (upholding district court order requiring assignment of faculty and staff on a ratio based on racial population of district).


is to terminate dual school systems at once and to operate now and hereafter only unitary schools.”

In the October 1970 Term the Court in Swann v. Charlotte-Mecklenburg Board of Education undertook to elaborate the requirements for achieving a unitary school system and delineating the methods which could or must be used to achieve it, and at the same time struck down state inhibitions on the process. The opinion in Swann emphasized that the goal since Brown was the dismantling of an officially-imposed dual school system. “Independent of student assignment, where it is possible to identify a ‘white school’ or a ‘Negro school’ simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown.” While “the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law,” any such situation must be closely scrutinized by the lower courts, and school officials have a heavy burden to prove that the situation is not the result of state-fostered segregation. Any desegregation plan which contemplates such a situation must before a court accepts it be shown not to be affected by present or past discriminatory action on the part of state and local officials. When a federal court has to develop a remedial desegregation plan, it must start with an appreciation of the mathematics of the racial composition of the school district population; its plan may rely to some extent on mathematical ratios but it should exercise care that this use is only a starting point.

Because current attendance patterns may be attributable to past discriminatory actions in site selection and location of school buildings, the Court in Swann determined that it is permissible, and may be required, to resort to altering of attendance boundaries and grouping or pairing schools in noncontiguous fashion in order to promote desegregation and undo past official action; in this re-

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1539 402 U.S. 1 (1971); see also Davis v. Board of School Comm’rs of Mobile County, 402 U.S. 33 (1971).
1541 402 U.S. at 18.
1542 402 U.S. at 25-27.
1543 402 U.S. at 22-25.
medial process, conscious assignment of students and drawing of boundaries on the basis of race is permissible. Transportation of students—busing—is a permissible tool of educational and desegregation policy, inasmuch as a neighborhood attendance policy may be inadequate due to past discrimination. The soundness of any busing plan must be weighed on the basis of many factors, including the age of the students; when the time or distance of travel is so great as to risk the health of children or significantly impinge on the educational process, the weight shifts. Finally, the Court indicated, once a unitary system has been established, no affirmative obligation rests on school boards to adjust attendance year by year to reflect changes in composition of neighborhoods so long as the change is solely attributable to private action.

**Northern Schools: Inter- and Intradistrict Desegregation.**—The appearance in the Court of school cases from large metropolitan areas in which the separation of the races was not mandated by law but allegedly by official connivance through zoning of school boundaries, pupil and teacher assignment policies, and site selections, required the development of standards for determining when segregation was *de jure* and what remedies should be imposed when such official separation was found.

Accepting the findings of lower courts that the actions of local school officials and the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court in *Milliken v. Bradley* set aside a desegregation order which required the formulation of a plan for a metropolitan area including the City and 53 adjacent suburban

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1544 402 U.S. at 27-29.
1545 402 U.S. at 28-31.
1546 402 U.S. at 31-32. In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), the Court held that after a school board has complied with a judicially-imposed desegregation plan in student assignments and thus undone the existing segregation, it is beyond the district court’s power to order it subsequently to implement a new plan to undo the segregative effects of shifting residential patterns. The Court agreed with the dissenters, Justices Marshall and Brennan, id. at 436, 441, that the school board had not complied in other respects, such as in staff hiring and promotion, but it thought that was irrelevant to the issue of neutral student assignments.

1547 The presence or absence of a statute mandating separation provides no talisman indicating the distinction between *de jure* and *de facto* segregation. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979). As early as *Ex parte Virginia*, 100 U.S. 339, 347 (1880), it was said that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition: and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The significance of a statute is that it simplifies in the extreme a complainant's proof.

school districts. The basic holding of the Court was that such a remedy could be implemented only to cure an inter-district constitutional violation, a finding that the actions of state officials and of the suburban school districts were responsible, at least in part, for the interdistrict segregation, through either discriminatory actions within those jurisdictions or constitutional violations within one district that had produced a significant segregative effect in another district. The permissible scope of an inter-district order, however, would have to be considered in light of the Court’s language regarding the value placed upon local educational units. “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.” Too, the complexity of formulating and overseeing the implementation of a plan that would effect a de facto consolidation of multiple school districts, the Court indicated, would impose a task which few, if any, judges are qualified to perform and one which would deprive the people of control of their schools through elected representatives. “The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district.”

“The controlling principle consistently expounded in our holdings,” said the Court in the Detroit case, “is that the scope of the remedy is determined by the nature and extent of the constitutional violation.” While this axiom caused little problem when

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1549 418 U.S. at 745.
1550 418 U.S. at 742-43. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractable areas. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974); O’Shea v. Littleton, 414 U.S. 488, 500-02 (1974). In Hills v. Gautreaux, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of “fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities . . . .” In other places, the Court stressed the absence of interdistrict violations, id. at 294, and in still others paired the two reasons. Id. at 296.
1551 Milliken v. Bradley, 418 U.S. 717, 746 (1974). The four dissenters argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State’s obligation to establish a unitary system, an obligation which could not be met without an inter-district order. Id. at 757, 762, 781.
1552 418 U.S. at 744. See Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) (“[T]he Court’s decision in Milliken was premised on a controlling principle governing the permissible scope of federal judicial power.”); Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Justice Powell concurring) (“a core principle of desegregation cases” is that set out in Milliken).
the violation consisted of statutorily mandated separation, it has required a considerable expenditure of judicial effort and parsing of opinions to work out in the context of systems in which the official practice was nondiscriminatory but official action operated to the contrary. At first, the difficulty was obscured through the creation of presumptions that eased the burden of proof on plaintiffs, but later the Court had appeared to stiffen the requirements on plaintiffs.

Determination of the existence of a constitutional violation and the formulation of remedies, within one district, first was presented to the Court in a northern setting in *Keyes v. Denver School District*. The lower courts had found the school segregation existing within one part of the City to be attributable to official action, but as to the central city they found the separation not to be the result of official action and refused to impose a remedy for those schools. The Supreme Court found this latter holding to be error, holding that when it is proved that a significant portion of a system is officially segregated, the presumption arises that segregation in the remainder or other portions of the system is also similarly contrived. The burden the shifts to the school board or other officials to rebut the presumption by proving, for example, that geographical structure or natural boundaries have caused the dividing of a district into separate identifiable and unrelated units. Thus, a finding that one significant portion of a school system is officially segregated may well be the predicate for finding that the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.

*Keyes* then was consistent with earlier cases requiring a showing of official complicity in segregation and limiting the remedy to

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1554 When an entire school system has been separated into white and black schools by law, disestablishment of the system and integration of the entire system is required. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness." *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971). *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).


1556 413 U.S. at 207-11. Justice Rehnquist argued that imposition of a district-wide segregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id. at 254 (dissenting). Justice Powell cautioned district courts against imposing disruptive desegregation plans, especially substantial busing in large metropolitan areas, and stressed the responsibility to proceed with reason, flexibility, and balance. Id. at 217, 236 (concurring and dissenting). *See his opinion in Austin Indep. School Dist. v. United States*, 429 U.S. 990, 991 (1976) (concurring).
the violation found; by creating presumptions *Keyes* simply afforded plaintiffs a way to surmount the barriers imposed by strict application of the requirements. Following the enunciation in the *Detroit* inter-district case, however, of the “controlling principle” of school desegregation cases, the Court appeared to move away from the *Keyes* approach. First, the Court held that federal equity power was lacking to impose orders to correct demographic shifts “not attributed to any segregative actions on the part of the defendants.” A district court that had ordered implementation of a student assignment plan that resulted in a racially neutral system exceeded its authority, the Court held, by ordering annual readjustments to offset the demographic changes.

Second, in the first *Dayton* case the lower courts had found three constitutional violations that had resulted in some pupil segregation, and, based on these three, viewed as “cumulative violations,” a district-wide transportation plan had been imposed. Reversing, the Supreme Court reiterated that the remedial powers of the federal courts are called forth by violations and are limited by the scope of those violations. “Once a constitutional violation is found, a federal court is required to tailor ‘the scope of the remedy’ to fit ‘the nature and extent of the constitutional violation.’” The goal is to restore the plaintiffs to the position they would have occupied had they not been subject to unconstitutional action. Lower courts “must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.”

The Court then sent the case back to the district court for the taking of evidence, the finding of

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1559 427 U.S. at 436.


1561 *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977). The Court did not discuss the presumptions that had been permitted by *Keyes*. Justice Brennan, the author of *Keyes*, concurred on the basis that the violations found did not justify the remedy imposed, asserting that the methods of proof utilized in *Keyes* were still valid. Id. at 421.
the nature of the violations, and the development of an appropriate remedy.

Surprisingly, however, *Keyes* was reaffirmed and broadly applied in subsequent appeals of the *Dayton* case after remand and in an appeal from Columbus, Ohio. Following the Supreme Court standards, the *Dayton* district court held that the plaintiffs had failed to prove official segregative intent, but was reversed by the appeals court. The *Columbus* district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decision in *Brown v. Board of Education*. The *Keyes* presumption therefore required the school boards to show that systemwide discrimination had not existed, and they failed to do so. Because each system was a dual one in 1954, it was subject to an “affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” Following 1954, segregated schools continued to exist and the school boards had in fact taken actions which had the effect of increasing segregation. In the context of the on-going affirmative duty to desegregate, the foreseeable impact of the actions of the boards could be utilized to infer segregative intent, thus satisfying the *Davis-Arlington Heights* standards. The Court further affirmed the district-wide remedies, holding that its earlier *Dayton* ruling had been premised upon the evidence of only a few isolated discriminatory practices; here, because systemwide impact had been found, systemwide remedies were appropriate.

Reaffirmation of the breadth of federal judicial remedial powers came when, in a second appeal of the *Detroit* case, the Court

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1563 Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (quoting Green v. School Bd. of New Kent County, 391 U.S. 430, 437–38 (1968)). *Contrast* the Court’s more recent decision in *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam), holding that adoption of “a wholly neutral admissions policy” for voluntary membership in state-sponsored 4-H Clubs was sufficient even though single race clubs continued to exist under that policy. There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court concluded; the voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a “wholly different milieu” from public schools. Id. at 408 (concurring opinion of Justice White, endorsed by the Court’s per curiam opinion).
1564 443 U.S. at 461-65.
1565 443 U.S. at 465-67.
unanimously upheld the order of a district court mandating compensatory or remedial educational programs for school children who had been subjected to past acts of *de jure* segregation. So long as the remedy is related to the condition found to violate the Constitution, so long as it is remedial, and so long as it takes into account the interests of state and local authorities in managing their own affairs, federal courts have broad and flexible powers to remedy past wrongs.\footnote{1566\,Milliken v. Bradley, 433 U.S. 267 (1977). The Court also affirmed that part of the order directing the State of Michigan to pay one-half the costs of the mandated programs. Id. at 288–91.}

The broad scope of federal courts’ remedial powers was more recently reaffirmed in *Missouri v. Jenkins*.\footnote{1567\,Milliken v. Bradley, 418 U.S. 717, 744 (1974).} There the Court ruled that a federal district court has the power to order local authorities to impose a tax increase in order to pay to remedy a constitutional violation, and if necessary may enjoin operation of state laws prohibiting such tax increases. However, the Court also held, the district court had abused its discretion by itself imposing an increase in property taxes without first affording local officials “the opportunity to devise their own solutions.”\footnote{1568\,Missouri v. Jenkins.}

**Efforts to Curb Busing and Other Desegregation Remedies.**—Especially during the 1970s, courts and Congress grappled with the appropriateness of various remedies for *de jure* racial separation in the public schools, both North and South. Busing of school children created the greatest amount of controversy. *Swann*, of course, sanctioned an order requiring fairly extensive busing, as did the more recent *Dayton* and *Columbus* cases, but the earlier case cautioned as well that courts must observe limits occasioned by the nature of the educational process and the well-being of children,\footnote{1569\,Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 30–31 (1971).} and subsequent cases declared the principle that the remedy must be no more extensive than the violation found.\footnote{1570\,Milliken v. Bradley, 418 U.S. 717, 744 (1974).}

Congress has enacted several provisions of law, either permanent statutes or annual appropriations limits, that purport to restrict the power of federal courts and administrative agencies to order or to require busing, but these, either because of drafting infelicities or because of modifications required to obtain passage, have been
largely ineffectual.\textsuperscript{1571} Stronger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none passed both Houses.\textsuperscript{1572}

Of considerable importance to the possible validity of any substantial congressional restriction on judicial provision of remedies for \textit{de jure} segregation violations are two decisions contrastingly dealing with referenda-approved restrictions on busing and other remedies in Washington State and California.\textsuperscript{1573} Voters in Washington, following a decision by the school board in Seattle to undertake a mandatory busing program, approved an initiative that prohibited school boards from assigning students to any but the nearest or next nearest school that offered the students' course of study; there were so many exceptions, however, that the prohibition in effect applied only to busing for racial purposes. In California the state courts had interpreted the state constitution to require school systems to eliminate both \textit{de jure} and \textit{de facto} segregation. The voters approved an initiative that prohibited state courts from ordering busing unless the segregation was in violation of the Fourteenth Amendment, and a federal judge would be empowered to order it under United States Supreme Court precedents.

By a narrow division, the Court held unconstitutional the Washington measure, and with near unanimity of result if not of reasoning it sustained the California measure. The constitutional flaw in the Washington measure, the Court held, was that it had chosen a racial classification—busing for desegregation—and imposed more severe burdens upon those seeking to obtain such a policy than it imposed with respect to any other policy. Local school


boards could make education policy on anything but busing. By singling out busing and making it more difficult than anything else, the voters had expressly and knowingly enacted a law that had an intentional impact on a minority. The Court discerned no such impediment in the California measure, a simple repeal of a remedy that had been within the government’s discretion to provide. Moreover, the State continued under an obligation to alleviate de facto segregation by every other feasible means. The initiative had merely foreclosed one particular remedy—court-ordered mandatory busing—as inappropriate.

Termination of Court Supervision.—With most school desegregation decrees having been entered decades ago, the issue arose as to what showing of compliance is necessary for a school district to free itself of continuing court supervision. The Court grappled with the issue, first in a case involving Oklahoma City public schools, then in a case involving the University of Mississippi college system. A desegregation decree may be lifted, the Court said in Oklahoma City Board of Education v. Dowell, upon a showing that the purposes of the litigation have been “fully achieved,”—i.e., that the school district is being operated “in compliance with the commands of the Equal Protection Clause,” that it has been so operated “for a reasonable period of time,” and that it is “unlikely” that the school board would return to its former violations. On remand, the trial court was directed to determine “whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past [de jure] discrimination had been eliminated to the extent practicable.” In United States v. Fordice, the Court determined that the State of Mississippi had not, by adopting and implementing race-neutral policies, eliminated all vestiges of its prior de jure, racially segregated, “dual” system of higher education. The State must also, to the extent practicable and consistent with sound educational practices, eradicate policies and practices that are traceable to the dual system and that continue to have segregative effects. The Court identified several surviving aspects of Mis-
sissippi's prior dual system which are constitutionally suspect, and which must be justified or eliminated. The State's admissions policy, requiring higher test scores for admission to the five historically white institutions than for admission to the three historically black institutions, is suspect because it originated as a means of preserving segregation. Also suspect are the widespread duplication of programs, a possible remnant of the dual “separate-but-equal” system; institutional mission classifications making three historically white schools the flagship “comprehensive” universities; and the retention and operation of all eight schools rather than the possible merger of some.

Juries

It has been established since Strauder v. West Virginia that exclusion of an identifiable racial or ethnic group from a grand jury which indicts a defendant or a petit jury which tries him, or from both, denies a defendant of the excluded race equal protection and necessitates reversal of his conviction or dismissal of his indictment. Even if the defendant's race differs from that of the excluded jurors, the Court has recently held, the defendant has third party standing to assert the rights of jurors ex-
cluded on the basis of race. Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion.” Thus, persons may bring actions seeking affirmative relief to outlaw discrimination in jury selection, instead of depending on defendants to raise the issue.

A *prima facie* case of deliberate and systematic exclusion is made when it is shown that no African Americans have served on juries for a period of years or when it is shown that the number of African Americans who served was grossly disproportionate to the percentage of African Americans in the population and eligible for jury service. Once this *prima facie* showing has been made, the burden is upon the jurisdiction to prove that discrimination was not practiced; it is not adequate that jury selection officials testify under oath that they did not discriminate. Although the Court in connection with a showing of great disparities in the racial makeup of jurors called has voided certain practices which made discrimination easy to accomplish, it has not outlawed discretionary selection pursuant to general standards of educational attainment and character which can be administered fairly. Similarly, it declined to rule that African Americans must

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1584 Powers v. Ohio, 499 U.S. 400, 415 (1991). Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury). See also Peters v. Kiff, 407 U.S. 493 (1972) (defendant entitled to have his conviction or indictment set aside if he proves such exclusion). The Court in 1972 was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of the excluded class—but in Taylor v. Louisiana, 419 U.S. 522 (1975), involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board.


1590 Avery v. Georgia, 345 U.S. 559 (1953) (names of whites and African Americans listed on differently colored paper for drawing for jury duty); Whitus v. Georgia, 385 U.S. 545 (1967) (jurors selected from county tax books, in which names of African Americans were marked with a "c").

be included on all-white jury commissions which administer the jury selection laws in some States.1592

In Swain v. Alabama,1593 African Americans regularly appeared on jury venires but no African American had actually served on a jury. It appeared that the absence was attributable to the action of the prosecutor in peremptorily challenging all potential African American jurors, but the Court refused to set aside the conviction. The use of peremptory challenges to exclude the African Americans in the particular case was permissible, the Court held, regardless of the prosecutor's motive, although it was indicated the consistent use of such challenges to remove African Americans would be unconstitutional. Because the record did not disclose that the prosecution was responsible solely for the fact that no African American had ever served on a jury and that some exclusions were not the result of defense peremptory challenges, defendant's claims were rejected.

The Swain holding as to the evidentiary standard was overruled in Batson v. Kentucky, the Court ruling that “a defendant may establish a prima facie case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial.” To rebut this showing, the prosecutor “must articulate a neutral explanation related to the particular case,” but the explanation “need not rise to the level justifying exercise of a challenge for cause.”1594 The Court has also extended Batson to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation,1595 and by a defendant in a criminal case,1596 the principal issue in these cases being the presence of state action, not the invalidity of purposeful racial discrimination.

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1592 396 U.S. at 340-41.
1594 476 U.S. 79, 96, 98 (1986). The principles were applied in Trevino v. Texas, 503 U.S. 562 (1991), holding that a criminal defendant's allegation of a state's pattern of historical and habitual use of peremptory challenges to exclude members of racial minorities was sufficient to raise an equal protection claim under Swain as well as Batson. In Hernandez v. New York, 500 U.S. 352 (1991), a prosecutor was held to have sustained his burden of providing a race-neutral explanation for using peremptory challenges to strike bilingual Latino jurors; the prosecutor had explained that, based on the answers and demeanor of the prospective jurors, he had doubted whether they would accept the interpreter's official translation of trial testimony by Spanish-speaking witnesses. The Batson ruling applies to cases pending on direct review or not yet final when Batson was decided, Griffith v. Kentucky, 479 U.S. 314 (1987), but does not apply to a case on federal habeas corpus review, Allen v. Hardy, 478 U.S. 255 (1986).
1595 Edmonson v. Leesville Concrete Co., 500 U.S. 614.
Discrimination in the selection of grand jury foremen presents a closer question, answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus the Court had “assumed without deciding” that discrimination in selection of foremen for state grand juries would violate equal protection in a system in which the judge selected a foreman to serve as a thirteenth voting juror, and that foreman exercised significant powers. That situation was distinguished, however, in a due process challenge to the federal system, where the foreman’s responsibilities are “essentially clerical” and where the selection is from among the members of an already-chosen jury.

**Capital Punishment**

In *McCleskey v. Kemp* the Court rejected an equal protection claim of a black defendant who received a death sentence following conviction for murder of a white victim, even though a statistical study showed that blacks charged with murdering whites were more than four times as likely to receive a death sentence in the state than were defendants charged with killing blacks. The Court distinguished *Batson v. Kentucky* by characterizing capital sentencing as “fundamentally different” from jury venire selection; consequently, reliance on statistical proof of discrimination is less rather than more appropriate. “Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.” Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination; jurors may

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1598 Hobby v. United States, 468 U.S. 339 (1984). Note also that in this limited context where injury to the defendant was largely conjectural, the Court seemingly revived the same class rule, holding that a white defendant challenging on due process grounds exclusion of blacks as grand jury foremen could not rely on equal protection principles protecting blacks defendants from “the injuries of stigmatization and prejudice” associated with discrimination. Id. at 347.
1599 481 U.S. 279 (1987). The decision was 5–4, with Justice Powell’s opinion of the Court being joined by Chief Justice Rehnquist and by Justices White, O’Connor, and Scalia, and with Justices Brennan, Blackmun, Stevens, and Marshall dissenting.
1600 481 U.S. at 297. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant’s background or character, or to the nature of the offense; the Court also cited the “traditionally ‘wide discretion’ accorded decisions of prosecutors.” Id. at 296.
not be required to testify as to their motives, and for the most part prosecutors are similarly immune from inquiry. 1602

**Housing**

*Buchanan v. Warley* 1603 invalidated an ordinance which prohibited blacks from occupying houses in blocks where the greater number of houses were occupied by whites and which prohibited whites from doing so where the greater number of houses were occupied by blacks. Although racially restrictive covenants do not themselves violate the equal protection clause, the judicial enforcement of them, either by injunctive relief or through entertaining damage actions, does violate the Fourteenth Amendment. 1604 Referendum passage of a constitutional amendment repealing a “fair housing” law and prohibiting further state or local action in that direction was held unconstitutional in *Reitman v. Mulkey*, 1605 though on somewhat ambiguous grounds, while a state constitutional requirement that decisions of local authorities to build low-rent housing projects in an area must first be submitted to referendum, although other similar decisions were not so limited, was found to accord with the equal protection clause. 1606 Private racial discrimination in the sale or rental of housing is subject to two federal laws prohibiting most such discrimination. 1607 Provision of publicly assisted housing, of course, must be on a nondiscriminatory basis. 1608

**Other Areas of Discrimination**

**Transportation.**—The “separate but equal” doctrine won Supreme Court endorsement in the transportation context, 1609 and its passing in the education field did not long predate its demise in

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1602 The Court distinguished *Batson* by suggesting that the death penalty challenge would require a prosecutor “to rebut a study that analyzes the past conduct of scores of prosecutors” whereas the peremptory challenge inquiry would focus only on the prosecutor’s own acts. 481 U.S. at 296 n.17.


1606 *James v. Valtierra*, 402 U.S. 137 (1971). The Court did not perceive that either on its face or as applied the provision was other than racially neutral. Justices Marshall, Brennan, and Blackmun dissented. Id. at 143.


transportation as well. During the interval, the Court held invalid a state statute which permitted carriers to provide sleeping and dining cars for white persons only, held that a carrier’s provision of unequal, or nonexistent, first class accommodations to African Americans violated the Interstate Commerce Act, and voided both state-required and privately imposed segregation of the races on interstate carriers as burdens on commerce. Boynton v. Virginia voided a trespass conviction of an interstate African American bus passenger who had refused to leave a restaurant which the Court viewed as an integral part of the facilities devoted to interstate commerce and therefore subject to the Interstate Commerce Act.

Public Facilities.—In the aftermath of Brown v. Board of Education, the Court in a lengthy series of per curiam opinions established the invalidity of segregation in publicly provided or supported facilities and of required segregation in any facility or function. A municipality could not operate a racially-segregated park pursuant to a will which left the property for that purpose and which specified that only whites could use the park, but it was permissible for the state courts to hold that the trust had failed and to imply a reverter to the decedent’s heirs. A municipality under court order to desegregate its publicly-owned swim-
ming pools was held to be entitled to close the pools instead, so long as it entirely ceased operation of them. 1618

**Marriage.**—Statutes which forbid the contracting of marriage between persons of different races are unconstitutional 1619 as are statutes which penalize interracial cohabitation. 1620 Similarly, a court may not deny custody of a child based on a parent's remarriage to a person of another race and the presumed "best interests of the child" to be free from the prejudice and stigmatization that might result. 1621

**Judicial System.**—Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience 1622 or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible. 1623 Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order. 1624

**Public Designation.**—It is unconstitutional to designate candidates on the ballot by race 1625 and apparently any sort of designation by race on public records is suspect although not necessarily unlawful. 1626

**Public Accommodations.**—Whether or not discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court's attention considerably in the early 1960's, but it avoided finally deciding one way or the other, generally finding forbidden state ac-

1618 Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that inasmuch as both white and black citizens were deprived of the use of the pools there was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that state action taken solely in opposition to desegregation was impermissible, both in defiance of the lower court order and because it penalized African Americans for asserting their rights. Id. at 240. Justice Douglas also dissented. Id. at 231.


1623 Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).


1626 Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife, but voiding laws requiring separate lists of whites and African American in voting, tax and property records).
tion in some aspect of the situation.\footnote{Passage of the 1964 Civil Rights Act obviated any necessity to resolve the issue.} While, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a series of implementing statutes enacted by Congress, the administration of election statutes so as to treat white and black voters or candidates differently can constitute a denial of equal protection as well.\footnote{Title II, 78 Stat. 243, 42 U.S.C. § 2000a to 2000a–6. See Hamm v. City of Rock Hill, 379 U.S. 306 (1964).} Additionally, cases of gerrymandering of electoral districts and the creation or maintenance of electoral practices that dilute and weaken black and other minority voting strength is subject to Fourteenth and Fifteenth Amendment and statutory attack.\footnote{E.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Turner v. City of Memphis, 369 U.S. 350 (1962); Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964).}

**Permissible Remedial Utilizations of Racial Classifications**

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account in order to formulate and implement a remedy to overcome the effects of past discrimination against the class. Often the issue is framed in terms of “reverse discrimination,” inasmuch as the governmental action deliberately favors members of the class and may simultaneously impact adversely upon nonmembers of the class.\footnote{E.g., Hadnott v. Amos, 394 U.S. 358 (1971); Hunter v. Underwood, 471 U.S. 222 (1985) (disenfranchisement for crimes involving moral turpitude adopted for purpose of racial discrimination).} While the Court in prior cases had accepted both the use of race and other suspect criteria as
valid factors in formulating remedies to overcome discrimination and the according of preferences to class members when the class had previously been the object of discrimination, it had never until recently given plenary review to programs that expressly used race as the prime consideration in the awarding of some public benefit.

In United Jewish Organizations v. Carey the State, in order to comply with the Voting Rights Act and to obtain the United States Attorney General’s approval for a redistricting law, had drawn a plan which consciously used racial criteria to create a certain number of districts with nonwhite populations large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the redistricting, although the fragmented majority of seven concurred in no majority opinion.

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, the Justice argued that compliance with the Act necessarily required States to be race conscious in the drawing of lines so as not to dilute minority voting strength, that this requirement was not dependent upon a showing of past discrimination, and that the States retained discretion to determine just what strength minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.

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1634 Programs to overcome past societal discriminations against women have been approved, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, Morton v. Mancari, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.
1635 The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in DeFunis v. Odegaard, 416 U.S. 312 (1974), but the merits were not reached.
1637 430 U.S. at 155-65. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.
Second, Justice White wrote that, irrespective of what the Voting Rights Act may have required, what the State had done did not violate either the Fourteenth or the Fifteenth Amendment. This was so because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to whites or any other race; the plan did not operate to minimize or unfairly cancel out white voting strength because as a class whites would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.\textsuperscript{1638}

With the Court so divided, light on the constitutionality of affirmative action was anticipated in \textit{Regents of the University of California v. Bakke},\textsuperscript{1639} but again the Court fragmented. The Davis campus medical school each year admitted 100 students; the school set aside 16 of those seats for disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other 84 places. Twice denied admission, Bakke sued, arguing that had not the 16 positions been set aside he could have been admitted. The state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-to-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.

Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964\textsuperscript{1640} outlawed the college's program and made unnecessary any consideration of the Constitution. They thus would admit Bakke and bar use of race in admissions.\textsuperscript{1641} The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the equal protection clause pro-

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\textsuperscript{1638} 430 U.S. at 165-68. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. Id. at 168. Justices Stewart and Powell concurred, agreeing with Justice White that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. Id. at 179.

\textsuperscript{1639} 438 U.S. 265 (1978).


\textsuperscript{1641} 438 U.S. at 408-21 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger).
scribed. They thus reached the constitutional issue but resolved it differently. Four Justices, in an opinion by Justice Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances. But benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny; instead, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down any remedial racial classification that stigmatized any group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.

Justice Powell argued that all racial classifications are suspect and require strict scrutiny. Since none of the justifications asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination. Justice Powell thus joined the first group in agreeing that Bakke should be admitted, but he joined the second group in permitting the college to consider race to some degree in its admissions.

Finally, in Fullilove v. Klutznick, the Court resolved most of the outstanding constitutional question regarding the validity of race-conscious affirmative action programs. Although again there was no majority opinion of the Court, the series of opinions by the six Justices voting to uphold a congressional provision requiring

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that at least ten percent of public works funds be set aside for minority business enterprises all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Judgment of the Court was issued by Chief Justice Burger, who emphasized Congress’ preeminent role under the Commerce clause and under the Fourteenth Amendment to find as a fact the existence of past discrimination and its continuing effects and to implement remedies which were race conscious in order to cure those effects.\textsuperscript{1647} The principal concurring opinion by Justice Marshall applied the Brennan analysis in \textit{Bakke}, utilizing middle-tier scrutiny to hold that the race conscious set-aside was “substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination.”\textsuperscript{1648}

Taken together, the opinions recognize that at least in Congress there resides the clear power to make the findings that will form the basis for a judgment of the necessity to use racial classifications in an affirmative way; these findings need not be extensive or express and may be collected in many ways. Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies was left unsettled but that they have some such power seems evident.\textsuperscript{1649} Further, while the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to these limitations, thus leaving the way open for programs of a scope sufficient to remedy all the identified effects of past discrimination.\textsuperscript{1650} But the most important part of these opinions rests in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. Rejected were the arguments that a stigma attaches to those minority beneficiaries of such programs, that burdens are placed on innocent third parties, and that the program is

\textsuperscript{1647} 448 U.S. at 456-92. Justices White and Powell joined this opinion. Justice Powell also concurred in a separate opinion, id. at 495, which qualified to some extent his agreement with the Chief Justice.

\textsuperscript{1648} 448 U.S. at 517.

\textsuperscript{1649} 448 U.S. at 473-80. The program was an exercise of Congress’ spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress’ regulatory powers, which in this case undergirded the spending power, and found the power to repose in the commerce clause with respect to private contractors and in 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

\textsuperscript{1650} 448 U.S. at 484-85, 489 (Chief Justice Burger), 513–15 (Justice Powell).
The Court remains divided in ruling on constitutional challenges to affirmative action plans. As a general matter, authority to apply racial classifications is at its greatest when Congress is acting pursuant to section 5 of the Fourteenth Amendment or other of its powers, or when a court is acting to remedy proven discrimination. But impact on disadvantaged non-minorities can also be important. Two recent cases illustrate the latter point. In Wygant v. Jackson Board of Education, the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs; in United States v. Paradise, the Court upheld as a remedy for past discrimination a court-ordered racial quota in promotions. Justice White, concurring in Wygant, emphasized the harsh, direct effect of layoffs on affected non-minority employees. By contrast, a plurality of Justices in Paradise viewed the remedy in that case as affecting non-minorities less harshly than did the layoffs in Wygant, since the promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.

A clear distinction has been drawn between federal and state power to apply racial classifications. In City of Richmond v. J.A. Croson Co., the Court invalidated a minority set-aside require-
ment that holders of construction contracts with the city sub-
contract at least 30% of the dollar amount to minority business en-
terprises. Applying strict scrutiny, the Court found Richmond’s pro-
gram to be deficient because it was not tied to evidence of past dis-
 crimination in the city’s construction industry. By contrast, the
Court in *Metro Broadcasting, Inc. v. FCC* applied a more le-
nient standard of review in upholding two racial preference policies
used by the FCC in the award of radio and television broadcast li-
censes. The FCC policies, the Court explained, are “benign, race-
conscious measures” that are “substantially related” to the achieve-
ment of an “important” governmental objective of broadcast diversity.

In *Croson*, the Court ruled that the city had failed to establish
a “compelling” interest in the racial quota system because it failed
to identify past discrimination in its construction industry. Mere
recitation of a “benign” or remedial purpose will not suffice, the
Court concluded, nor will reliance on the disparity between the
number of contracts awarded to minority firms and the minority
population of the city. “[W]here special qualifications are necessary,
the relevant statistical pool for purposes of demonstrating exclusion
must be the number of minorities qualified to undertake the par-
ticular task.” The overinclusive definition of minorities, includ-
ing U.S. citizens who are “Blacks, Spanish-speaking, Orientals, In-
dians, Eskimos, or Aleuts,” also “impugned the city’s claim of re-
medial motivation,” there having been “no evidence” of any past
discrimination against non-Blacks in the Richmond construction in-
dustry.

It followed that Richmond’s set-aside program also was not
“narrowly tailored” to remedy the effects of past discrimination in
the city: an individualized waiver procedure made the quota ap-
proach unnecessary, and a minority entrepreneur “from anywhere
in the country” could obtain an absolute racial preference.

At issue in *Metro Broadcasting* were two minority preference
policies of the FCC, one recognizing an “enhancement” for minority
ownership and participation in management when the FCC con-

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1658 497 U.S. 547 (1990). This was a 5–4 decision. Justice Brennan’s opinion of
the Court being joined by Justices White, Marshall, Blackmun, and Stevens. Justice
O’Connor wrote a dissenting opinion joined by the Chief Justice and by Justices
Scalia and Kennedy, and Justice Kennedy added a separate dissenting opinion
joined by Justice Scalia.

1659 497 U.S. at 564-65.

1660 488 U.S. at 501–02.

1661 488 U.S. at 506.

1662 488 U.S. at 508.
considering competing license applications, and the other authorizing a “distress sale” transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in Fullilove—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore “the imprimatur of longstanding congressional support and direction.”

Metro Broadcasting is noteworthy for several other reasons as well. The Court rejected the dissent’s argument—seemingly accepted by a Croson majority—that Congress’s more extensive authority to adopt racial classifications must trace to section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers. This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be “important” rather than “compelling,” and the means adopted need only be “substantially related” rather than “narrowly tailored” to furthering the interest.

The distinction between federal and state power to apply racial classifications proved ephemeral. The Court ruled in Adarand Constructors, Inc. v. Pena that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled Metro Broadcasting and, to the extent that it applied a review standard less stringent than strict scrutiny, Fullilove v. Klutznick. Strict scrutiny is to be applied regardless of the race of those burdened or benefited by the particular classification; there is no intermediate standard applicable to “benign” racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race “should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection... has not been infringed.”

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1663 497 U.S. at 600. Justice O’Connor’s dissenting opinion contended that the case “does not present ‘a considered decision of the Congress and the President.’” Id. at 607 (quoting Fullilove, 448 U.S. at 473).
1664 497 U.S. at 563 & n.11. For the dissenting views of Justice O’Connor see id. at 606–07. See also Croson, 488 U.S. at 504 (opinion of Court).
1665 515 U.S. 200 (1995). This was a 5–4 decision. Justice O’Connor’s opinion of Court was joined by Chief Justice Rehnquist, and by Justices Kennedy, Thomas, and—to the extent not inconsistent with his own concurring opinion—Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.
1666 515 U.S. at 227 (emphasis original).
THE NEW EQUAL PROTECTION

Classifications Meriting Close Scrutiny

Alienage and Nationality.—"It has long been settled . . . that the term ‘person’ [in the equal protection clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." Thus, one of the earliest equal protection decisions struck down the administration of a facially-lawful licensing ordinance which was being applied to discriminate against Chinese. But the Court in many cases thereafter recognized a permissible state interest in distinguishing between its citizens and aliens by restricting enjoyment of resources and public employment to its own citizens. But in Hirabayashi v. United States, it was announced that “[d]istinctions between citizens solely because of their ancestry” was “odious to a free people whose institutions are founded upon the doctrine of equality.” And in Korematsu v. United States, classificiations based upon race and nationality were said to be suspect and subject to the “most rigid scrutiny.” These dicta resulted in a
1948 decision which appeared to call into question the rationale of the “particular interest” doctrine under which earlier discriminations had been justified. There the Court held void a statute barring issuance of commercial fishing licenses to persons “ineligible to citizenship,” which in effect meant resident alien Japanese.\footnote{1672} “The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under nondiscriminatory laws.” Justice Black said for the Court that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.”\footnote{1673}

Announcing “that classifications based on alienage . . . are inherently suspect and subject to close scrutiny,” the Court struck down state statutes which either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residency requirement on eligibility.\footnote{1674} Thereafter, in a series of decisions, the Court adhered to its conclusion that alienage was a suspect classification and voided a variety of restrictions. More recently, however, it has created a major “political function” exception to strict scrutiny review, which shows some potential of displacing the previous analysis almost entirely.

In \textit{Sugarman v. Dougall},\footnote{1675} the Court voided the total exclusion of aliens from a State’s competitive civil service. A State’s power “to preserve the basic conception of a political community” enables it to prescribe the qualifications of its officers and voters,\footnote{1676} the Court held, and this power would extend “also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.”\footnote{1677} But a flat ban upon much of the State’s career public service, both of policy-making and non-policy-making jobs, ran

\footnote{1672}Takahashi v. Fish & Game Comm’n, 334 U.S. 410 (1948).
\footnote{1673}334 U.S. at 420. The decision was preceded by Oyama v. California, 332 U.S. 633 (1948), which was also susceptible to being read as questioning the premise of the earlier cases.
\footnote{1674}Graham v. Richardson, 403 U.S. 365, 372 (1971).
\footnote{1675}413 U.S. 634 (1973).
\footnote{1677}Sugarman v. Dougall, 413 U.S. 634, 647 (1973). Such state restrictions are “not wholly immune from scrutiny under the Equal Protection Clause.” Id. at 648.
afoul of the requirement that in achieving a valid interest through the use of a suspect classification the State must employ means that are precisely drawn in light of the valid purpose. 1678

State bars against the admission of aliens to the practice of law were also struck down, the Court holding that the State had not met the “heavy burden” of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The State’s admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition. 1679 Nor could Puerto Rico offer a justification for excluding aliens from one of the “common occupations of the community,” hence its bar on licensing aliens as civil engineers was voided. 1680

In Nyquist v. Mauclet, 1681 the Court seemed to expand the doctrine. Challenged was a statute that restricted the receipt of scholarships and similar financial support to citizens or to aliens who were applying for citizenship or who filed a statement affirming their intent to apply as soon as they became eligible. Therefore, since any alien could escape the limitation by a voluntary act, the disqualification was not aimed at aliens as a class, nor was it based on an immutable characteristic possessed by a “discrete and insular minority”—the classification that had been the basis for declaring alienage a suspect category in the first place. But the Court voided the statute. “The important points are that § 661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does

1678 Justice Rehnquist dissented. 413 U.S. at 649. In the course of the opinion, the Court held inapplicable the doctrine of “special public interest,” the idea that a State’s concern with the restriction of the resources of the State to the advancement and profit of its citizens is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not declare the doctrine invalid. Id. at 643–45. The “political function” exception is inapplicable to notaries public, who do not perform functions going to the heart of representative government. Bernal v. Faintier, 467 U.S. 216 (1984).

1679 In re Griffiths, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id. at 730, and 649 (Sugarman dissent also applicable to Griffiths).

1680 Examining Board v. Flores de Otero, 426 U.S. 572 (1976). Since the jurisdiction was Puerto Rico, the Court was not sure whether the requirement should be governed by the Fifth or Fourteenth Amendment but deemed the question immaterial since the same result would be achieved. The quoted expression is from Truax v. Raich, 239 U.S. 33, 41 (1915).

not discriminate against the class.”

However, in the following Term, the Court denied that every exclusion of aliens was subject to strict scrutiny, “because to do so would ‘obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.’” Upholding a state restriction against aliens qualifying as state policemen, the Court reasoned that the permissible distinction between citizen and alien is that the former “is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized ‘a State’s historic power to exclude aliens from participation in its democratic political institutions,’ . . . as part of the sovereign’s obligation ‘to preserve the basic conception of a political community.’ When a State acts thusly by classifying against aliens, its action is not subject to strict scrutiny but rather need only meet the rational basis test. It is therefore permissible to reserve to citizens offices having the “most important policy responsibilities,” a reservation drawn from *Sugarman*, but the critical factor in this case is the analysis finding that the police function is “one of the basic functions of government.” “The execution of the broad powers vested” in police officers “affects members of the public significantly and often in the most sensitive areas of daily life. . . . Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of ‘the common occupations of the community’. . . .”

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1682 432 U.S. at 9. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented. Id. at 12, 15, 17. Justice Rehnquist's dissent argued that the nature of the disqualification precluded it from being considered suspect.


1684 435 U.S. at 295-96. Formally following Sugarman v. Dougall, supra, the opinion considerably enlarged the exception noted in that case; see also Nyquist v. Mauclet, 432 U.S. 1, 11 (1977) (emphasizing the “narrowness of the exception”). Concurring in Foley, 435 U.S. at 300, Justice Stewart observed that “it is difficult if not impossible to reconcile the Court’s judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case.” On the other hand, Justice Blackmun, who had written several of the past decisions, including Mauclet, concurred also, finding the case consistent. Id.

1685 435 U.S. at 297-98. In Elrod v. Burns, 427 U.S. 347 (1976), barring patronage dismissals of police officers, the Court had nonetheless recognized an exception for policymaking officers which it did not extend to the police.
Continuing to enlarge the exception, the Court in *Ambach v. Norwich* 1686 upheld a bar to qualifying as a public school teacher for resident aliens who have not manifested an intention to apply for citizenship. The “governmental function” test took on added significance, the Court saying that the “distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State.” 1687 Thus, “governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.” 1688 Teachers, the Court thought, because of the role of public education in inculcating civic values and in preparing children for participation in society as citizens and because of the responsibility and discretion they have in fulfilling that role, perform a task that “go[es] to the heart of representative government.” 1689 The citizenship requirement need only bear a rational relationship to the state interest, and the Court concluded it clearly did so.

Then, in *Cabell v. Chavez-Salido*, 1690 the Court sustained a state law imposing a citizenship requirement upon all positions designated as “peace officers,” upholding in context that eligibility prerequisite for probation officers. First, the Court held that the extension of the requirement to an enormous range of people who were variously classified as “peace officers” did not reach so far nor was it so broad and haphazard as to belie the claim that the State was attempting to ensure that an important function of government be in the hands of those having a bond of citizenship. “[T]he classifications used need not be precise; there need only be a substantial fit.” 1691 As to the particular positions, the Court held that “they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign’s power to exercise coercive force over the individual that they may be limited to citizens.” 1692

Thus, the Court so far has drawn a tripartite differentiation with respect to governmental restrictions on aliens. First, it has disapproved the earlier line of cases and now would foreclose at-

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1686 411 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. The disqualification standard was of course, that held invalid as a disqualification for receipt of educational assistance in Nyquist v. Mauclet, 432 U.S. 1 (1977).


1688 441 U.S. at 75.

1689 441 U.S. at 75-80. The quotation, id. at 76, is from Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

1690 454 U.S. 432 (1982). Joining the opinion of the Court were Justices White, Powell, Rehnquist, O’Connor, and Chief Justice Burger. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. Id. at 447.

1691 454 U.S. at 442.

1692 454 U.S. at 445.
tempts by the States to retain certain economic benefits, primarily employment and opportunities for livelihood, exclusively for citizens. Second, when government exercises principally its spending functions, such as those with respect to public employment generally and to eligibility for public benefits, its classifications with an adverse impact on aliens will be strictly scrutinized and usually fail. Third, when government acts in its sovereign capacity, when it acts within its constitutional prerogatives and responsibilities to establish and operate its own government, its decisions with respect to the citizenship qualifications of an appropriately designated class of public office holders will be subject only to traditional rational basis scrutiny. However, the “political function” standard is elastic, and so long as disqualifications are attached to specific occupations rather than to the civil service in general, as in Sugarman, the concept seems capable of encompassing the exclusion.

When confronted with a state statute that authorized local school boards to exclude from public schools alien children who were not legally admitted to the United States, the Court determined that an intermediate level of scrutiny was appropriate and found that the proffered justifications did not sustain the classification. Inasmuch as it was clear that the undocumented status of the children was not irrelevant to valid government goals and inasmuch as the Court had previously held that access to education was not a “fundamental interest” which triggered strict scrutiny of governmental distinctions relating to education, the Court’s decision to accord intermediate review was based upon an amalgam of at least three factors. First, alienage was a characteristic that

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1694 Thus, the statute in Chavez-Salido applied to such positions as toll-service employees, cemetery sextons, fish and game wardens, and furniture and bedding inspectors, and yet the overall classification was deemed not so ill-fitting as to require its voiding.
1695 Plyler v. Doe, 457 U.S. 432 (1982). Joining the opinion of the Court were Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Dissenting were Chief Justice Burger and Justices White, Rehnquist, and O’Connor. Id. at 242.
1696 In San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), while holding that education is not a fundamental interest, the Court expressly reserved the question whether a total denial of education to a class of children would infringe upon a fundamental interest. Id. at 18, 25 n. 60, 37. The Plyler Court’s emphasis upon the total denial of education and the generally suspect nature of alienage classifications left ambiguous whether the state discrimination would have been subjected to strict scrutiny if it had survived intermediate scrutiny. Justice Powell thought the Court had rejected strict scrutiny, 457 U.S. at 238 n.2 (concurring), while Justice Blackmun thought it had not reached the question, id. at 239 n.3 (concurring). Indeed, their concurring opinions seem directed more toward the disability visited upon innocent children than the broader complex of factors set out in the opinion of the Court. Id. at 231, 236.
provokes special judicial protection when used as a basis for discrimination. Second, the children were innocent parties who were having a particular onus imposed on them because of the misconduct of their parents. Third, the total denial of an education to these children would stamp them with an “enduring disability” that would harm both them and the State all their lives. The Court evaluated each of the State’s attempted justifications and found none of them satisfying the level of review demanded. It seems evident that Plyler v. Doe is a unique case and that whatever it may doctrinally stand for, a sufficiently similar factual situation calling for application of its standards is unlikely to be replicated.

Sex.—Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court, and the Court rejected the challenge in tones which prevailed well into the twentieth century. “The civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and

\[1697\] 457 U.S. at 223-24.

\[1698\] Rejected state interests included preserving limited resources for its lawful residents, deterring an influx of illegal aliens, avoiding the special burden caused by these children, and serving children who were more likely to remain in the State and contribute to its welfare. 457 U.S. at 227-30.
functions of womanhood.”

On the same premise, a statute restricting the franchise to men was sustained.

The greater number of cases have involved legislation aimed to protect women from oppressive working conditions, as by prescribing maximum hours or minimum wages or by restricting some of the things women could be required to do. A 1961 decision upheld a state law which required jury service of men but which gave women the option of serving or not. “We cannot say that it is constitutionally impermissible for a State acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.”

Another type of protective legislation for women that was sustained by the Court is that premised on protection of morals, as by forbidding the sale of liquor to women. In a highly controversial ruling, the Court sustained a state law which forbade the licensing of any female bartender, except for the wives or daughters of male owners. The Court purported to view the law as one for the protection of the health and morals of women generally, with the exception being justified by the consideration that such women would be under the eyes of a protective male.

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1699 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). The cases involving alleged discrimination against women contain large numbers of quaint quotations from unlikely sources. Upholding a law which imposed a fee upon all persons engaged in the laundry business, but excepting businesses employing not more than two women, Justice Holmes said: “If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference.”

Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912). And upholding a law prohibiting most women from tending bar, Justice Frankfurter said: “The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic . . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.”


1702 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

1703 E.g., Radice v. New York, 264 U.S. 292 (1924) (prohibiting night work by women in restaurants). A similar restriction set a maximum weight that women could be required to lift.


A wide variety of sex discrimination by governmental and private parties, including sex discrimination in employment and even the protective labor legislation previously sustained, is now proscribed by federal law. In addition, federal law requires equal pay for equal work. Some states have followed suit. While the proposed Equal Rights Amendment pended before the States and ultimately failed of ratification, the Supreme Court undertook a major evaluation of sex classification doctrine, first applying a “heightened” traditional standard of review (with bite) to void a discrimination and then, after coming within a vote of making sex a suspect classification, settling upon an intermediate standard. These standards continue, with some uncertainties of application and some tendencies among the Justices both to lessen and to increase the burden of governmental justification, to provide the analysis for evaluation of sex classifications.

In Reed v. Reed, the Court held invalid a state probate law which gave males preference over females when both were equally entitled to administer an estate. Because the statute “provides that different treatment be accorded to the applicants on the basis of their sex,” Chief Justice Burger wrote, “it thus establishes a classification subject to scrutiny under the Equal Protection Clause.” The Court proceeded to hold that under traditional equal protection standards—requiring a classification to be reasonable and not arbitrarily related to a lawful objective—the classification made was an arbitrary way to achieve the objective the State advanced in defense of the law, that is, to reduce the area of controversy between otherwise equally qualified applicants for administration. Thus, the


1709 On the Equal Rights Amendment, see discussion of “Ratification,” supra.

Court used traditional analysis but the holding seems to go somewhat further to say that not all lawful interests of a State may be advanced by a classification based solely on sex. It is now established that sex classifications, in order to withstand equal protection scrutiny, “must serve important governmental objectives and must be substantially related to achievement of those objectives.” Thus, after several years in which sex distinctions were more often voided than sustained without a clear statement of the standard of review, a majority of the Court has arrived at the intermediate standard which many had thought it was applying in any event. The Court first examines the statute similar to that in Reed was before the Court in Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidating statute giving husband unilateral right to dispose of jointly owned community property without wife’s consent).


But see Michael M. v. Superior Court, 450 U.S. 464, 468–69 (1981) (plurality opinion); id. at 483 (Justice Blackmun concurring); Rostker v. Goldberg, 453 U.S. 57, 69–72 (1981). The test is the same whether women or men are disadvantaged by the classification, Orr v. Orr, 440 U.S. at 279; Caban v. Mohammed, 441 U.S. at 394; Mississippi Univ. for Women v. Hogan, 458 U.S. at 724, although Justice Rehnquist and Chief Justice Burger strongly argued that when males are disadvantaged only the rational basis test is appropriate. Craig v. Boren, 429 U.S. at 217, 218–21; Califano v. Goldfarb, 430 U.S. at 224. That adoption of a standard has not eliminated difficulty in deciding such cases should be evident by perusal of the cases following.

In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices were prepared to hold that sex classifications are inherently suspect and must therefore be subjected to strict scrutiny. Id. at 684–87 (Justices Brennan, Douglas, White, and Marshall). Three Justices, reaching the same result, thought the statute failed the traditional test and declined for the moment to consider whether sex was a suspect classification, finding that inappropriate while the Equal Rights Amendment was pending. Id. at 691 (Justices Powell and Blackmun and Chief Justice Burger). Justice Stewart found the statute void under traditional scrutiny and Justice Rehnquist dissented. Id. at 691. In Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), Justice O’Connor for the Court expressly reserved decision whether a classification that survived intermediate scrutiny would be subject to strict scrutiny.

While their concurrences in Craig v. Boren, 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Powell and Stevens have since joined or written opinions stating the test and applying it. E.g., Caban v. Mohammed, 441 U.S. 380, 388 (1979) (Justice Powell writing the opinion of the Court); Parham v. Hughes, 441 U.S. 347, 359 (1979) (Justice Powell concurring); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Justice Stevens concurring); Caban v. Mohammed, 441 U.S. at 401 (Justice Stevens dissenting). Chief Justice Burger and Justice Rehnquist have not clearly stated a test, although their deference to legislative judgment approaches the traditional scrutiny test. But see Califano v. Westcott, 443 U.S. at 93 (joining Court on substantive decision). And cf. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734–35 (1982) (Justice Blackmun dissenting).
utory or administrative scheme to determine if the purpose or objective is permissible and, if it is, whether it is important. Then, having ascertained the actual motivation of the classification, the Court engages in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.\(^{1715}\)

Some sex distinctions were seen to be based solely upon "old notions," no longer valid if ever they were, about the respective roles of the sexes in society, and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as 18 for females and 21 for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.\(^{1716}\) Similarly, a state jury system that in effect excluded almost all women was deemed to be based upon an overbroad generalization about the role of women as a class in society, and the administrative convenience served could not justify it.\(^{1717}\)

Even when the negative "stereotype" which is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In *J. E. B. v. Alabama ex rel. T. B.*,\(^{1718}\) the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would under-

\(^{1715}\) The test is thus the same as is applied to illegitimacy classifications, although with apparently more rigor when sex is involved.


\(^{1717}\) *Taylor v. Louisiana*, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in *Hoyt v. Florida*, 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

\(^{1718}\) *511 U.S. 127* (1994).
mine the litigants’ interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

Assumptions about the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature’s actual intention to deal. But heightened scrutiny requires evidence of the existence of the distinguishing fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case which first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of “non-intoxicating” 3.2 beer to males under 21 and to females under 18. \(^{1719}\) Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that sex is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the State as of value, while cautioning that statistical analysis is a “dubious” business that is in tension with the “normative philosophy that underlies the Equal Protection Clause,” the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of sex as a distinction. \(^{1720}\)

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court acknowledged that assisting needy spouses was a legitimate and important governmental objective and would then have turned to ascertaining whether sex was a sufficiently accurate proxy for dependency, so it could be said that the classification was substantially related to achievement of the objective. \(^{1721}\) However, the Court observed that the State already conducted individualized hearings with respect to the need of the wife, so that with little additional burden needy males could be identified and helped. The use of the sex standard as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need. \(^{1722}\)

\(^{1720}\) 429 U.S. at 198, 199-200, 201-04.
\(^{1722}\) 440 U.S. at 280-83. An administrative convenience justification was not available, therefore. Id. at 281 & n.12. While such an argument has been accepted as a sufficient justification in at least some illegitimacy cases, Mathews v. Lucas, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In Lucas, 427 U.S. at 509–10, the Court interpreted Frontiero v. Richardson, 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 152 (1980), the Court said that “[i]t may be that there are levels of administrative con-
Various forms of discrimination between unwed mothers and unwed fathers received different treatment based on the Court’s perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of an illegitimate child to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and who had maintained a close relationship with his child over the years, the Court could discern no substantial relationship between the classification and some important state interest. Promotion of adoption of illegitimates and their consequent legitimation was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad, as the facts of the case revealed. No barrier existed to the State dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.  

On the other hand, the Court sustained a Georgia statute which permitted the mother of an illegitimate child to sue for the wrongful death of the child but which allowed the father to sue only if he had legitimated the child and there is no mother. Similarly, the Court let stand, under the Fifth Amendment, a federal statute which required that in order for an illegitimate child born overseas to gain citizenship, a citizen father, unlike a citizen...
mother, must acknowledge or legitimate the child before the child's 18th birthday. The Court emphasized the ready availability of proof of a child's maternity as opposed to paternity, but the dissent questioned whether such a distinction was truly justified under strict scrutiny considering the ability of modern techniques of DNA paternity testing to settle concerns about legitimacy.

As in the instance of illegitimacy classifications, the issue of sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a “dependent” for allowances while a servicewoman's spouse was not considered a “dependent” unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of similarly situated men and women, not justified by the administrative convenience rationale. In *Weinberger v. Wiesenfeld*, the Court struck down a Social Security provision that gave survivor's benefits based on the insured's earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker's did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and take care of the children while a man would not. Since the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the sex classification ill fitted the end and was invidiously discriminatory.

But when in *Califano v. Goldfarb* the Court was confronted with a Social Security provision structured much as the benefit sections struck down in *Frontiero* and *Wiesenfeld*, even in the light of an express heightened scrutiny, no majority of the Court could be

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1728 430 U.S. 199 (1977). The dissent argued that whatever the classification utilized, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. Id. at 224 (Justice Rehnquist with Chief Justice Burger and Justices Stewart and Blackmun). In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), voiding a state workers' compensation provision identical to that voided in Goldfarb, only Justice Rehnquist continued to adhere to this view, although the others may have yielded only to precedent.
obtained for the reason for striking down the statute. The section provided that a widow was entitled to receive survivors’ benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners’ taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The sex classification was thus found to be based on an assumption of female dependency which ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy. 1729 Justice Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to the conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a sex classification, neither purpose was served by the sex classification actually used in this statute. 1730

Again, the Court divided closely when it sustained two instances of classifications claimed to constitute sex discrimination. In Rostker v. Goldberg, 1731 rejecting presidential recommendations, Congress provided for registration only of males for a possible future military draft, excluding women altogether. The Court discussed but did not explicitly choose among proffered equal protection standards, but it apparently applied the intermediate test of

1729 430 U.S. at 204-09, 212-17 (Justices Brennan, White, Marshall, and Powell). Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the Goldfarb gender-based dependency classification for a five-year “grace period” was upheld in Heckler v. Mathews, 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-Goldfarb payment levels.

1730 430 U.S. at 217. Justice Stevens adhered to this view in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in voiding in Califano v. Westcott, 443 U.S. 76 (1979), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

1731 453 U.S. 57 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, Blackmun, Powell, and Stevens, and Chief Justice Burger. Dissenting were Justices White, Marshall, and Brennan. Id. at 83, 86.
>Craig v. Boren. However, it did so in the context of its often-stated preference for extreme deference to military decisions and to congressional resolution of military decisions. Evaluating the congressional determination, the Court found that it has not been “unthinking” or “reflexively” based upon traditional notions of the differences between men and women; rather, Congress had extensively deliberated over its decision. It had found, the Court asserted, that the purpose of registration was the creation of a pool from which to draw combat troops when needed, an important and indeed compelling governmental interest, and the exclusion of women was not only “sufficiently but closely” related to that purpose because they were ill-suited for combat, could be excluded from combat, and registering them would be too burdensome to the military system.\footnote{453 U.S. at 69-72, 78-83. The dissent argued that registered persons would fill noncombat positions as well as combat ones and that drafting women would add to women volunteers providing support for combat personnel and would free up men in other positions for combat duty. Both dissents assumed without deciding that exclusion of women from combat served important governmental interests. Id. at 83, 93. The majority's reliance on an administrative convenience argument, it should be noted, id. at 81, was contrary to recent precedent. See supra.}

In \textit{Michael M. v. Superior Court}, the Court did expressly adopt the \textit{Craig v. Boren} intermediate standard, but its application of the test appeared to represent a departure in several respects from prior cases in which it had struck down sex classifications. \textit{Michael M.} involved the constitutionality of a statute that punished males, but not females, for having sexual intercourse with a nonspousal person under 18 years of age. The plurality and the concurrence generally agreed, but with some difference of emphasis, that while the law was founded on a clear sex distinction it was justified because it did serve an important governmental interest, the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additional legal deterrence of a criminal penalty. Thus, the law recognized that for purposes of this classification men and women were not similarly situated, and the statute did not deny equal protection.\footnote{450 U.S. 464 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, and Powell, and Chief Justice Burger, constituting only a plurality. Justice Blackmun concurred in a somewhat more limited opinion. Id. at 481. Dissenting were Justices Brennan, White, Marshall, and Stevens. Id. at 488, 496.}

Cases of “benign” discrimination, that is, statutory classifications that benefit women and disadvantage men in order to over-
come the effects of past societal discrimination against women, have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational basis scrutiny, the more recent cases appear to subject these classifications to the same intermediate standard as any other sex classification. *Kahn v. Shevin*[^1735] upheld a state property tax exemption allowing widows but not widowers a $500 exemption. In justification, the State had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[^1736] And in *Schlesinger v. Ballard*,[^1737] the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard's case meant discharge after nine years of service, whereas women officers were entitled to 13 years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the professed justification of remedial purpose without searching inquiry, later cases caution that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[^1738] Rather, after specifically citing the heightened scrutiny that all sex classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by

[^1736]: 416 U.S. at 355.
women,” it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective. 1739

Many of these lines of cases converged in Mississippi University for Women v. Hogan, 1740 in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefiting women and additionally appeared to apply the intermediate standard itself more strictly. The case involved a male nurse who wished to attend a female-only nursing school located in the city in which he lived and worked; if he could not attend this particular school he would have had to commute 147 miles to another nursing school which did accept men, and he would have had difficulty doing so and retaining his job. The State defended on the basis that the female-only policy was justified as providing “educational affirmative action for females.” Recitation of a benign purpose, the Court said, was not alone sufficient. “[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification.” 1741 But women did not lack opportunities to obtain training in nursing; instead they dominated the field. In the Court’s view, the state policy did not compensate for discriminatory barriers facing women, but it perpetuated the stereotype of nursing as a woman’s job. “[A]lthough the State recited a ‘benign, compensatory purpose,’ it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.” 1742 Even if the classification was premised on the proffered basis, the Court concluded, it did not substantially and directly relate to the objective, because the school permitted men to audit the nursing classes and women could still be adversely affected by the presence of men. 1743

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1739 Califano v. Webster, 430 U.S. 313, 316–18, 320 (1977). There was no doubt that the provision sustained in Webster had been adopted expressly to relieve past societal discrimination. The four Goldfarb dissenters concurred specially, finding no difference between the two provisions. Id. at 321.

1740 458 U.S. 718 (1982). Joining the opinion of the Court were Justices O’Connor, Brennan, White, Marshall, and Stevens. Dissenting were Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Id. at 733, 735.

1741 458 U.S. at 728. 1742 458 U.S. at 730. In addition to obligating the State to show that in fact there was existing discrimination or effects from past discrimination, the Court also appeared to take the substantial step of requiring the State “to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination.” Id. at 730 n.16. A requirement that the proffered purpose be the actual one and that it must be shown that the legislature actually had that purpose in mind would be a notable stiffening of equal protection standards. 1743 In the major dissent, Justice Powell argued that only a rational basis standard ought to be applied to sex classifications that would “expand women’s choices,” but that the exclusion here satisfied intermediate review because it promoted diver-
In a 1996 case, the Court required that a state demonstrate “exceedingly persuasive justification” for gender discrimination. When a female applicant challenged the exclusion of women from the historically male-only Virginia Military Institute (VMI), the State of Virginia defended the exclusion of females as essential to the nature of training at the military school. The State argued that the VMI program, which included rigorous physical training, deprivation of personal privacy, and an “aversative model” that featured minute regulation of behavior, would need to be unacceptable modified to facilitate the admission of women. While recognizing that women’s admission would require accommodation such as different housing assignments and physical training programs, the Court found that the reasons set forth by the State were not “exceedingly persuasive,” and thus the State did not meet its burden of justification. The Court also rejected the argument that a parallel program established by the State at a private women’s college served as an adequate substitute, finding that the program lacked the military-style structure found at VMI, and that it did not equal VMI in faculty, facilities, prestige or alumni network.

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In Cleveland Board of Education v. LaFluer, a case decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining pro-
gram with rates low enough to permit the participation of low-income workers at affordable levels. The absence of supportable reasons in one case and their presence in the other may well have made the significant difference.

**Illegitimacy.**—After wrestling in a number of cases with the question of the permissibility of governmental classifications disadvantaging illegitimates and the standard for determining which classifications are sustainable, the Court arrived at a standard difficult to state and even more difficult to apply. Although "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny.'" The scrutiny to which it is entitled is intermediate, "not a toothless [scrutiny]," but somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim. The common rationale of all the illegitimacy cases is not clear, is in many respects not wholly

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1746 Geduldig v. Aiello, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy, and while only women can become pregnant, that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant woman and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id. at 496 n.20. For a rejection of a similar attempted distinction, see Nyquist v. Mauclet, 432 U.S. 1, 9 (1977); and Trimble v. Gordon, 430 U.S. 762, 774 (1977). See also Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), now extends protection to pregnant women.

1747 The first cases set the stage for the lack of consistency. Compare Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), invalidating laws which precluded wrongful death actions in cases involving the child or the mother when the child was illegitimate, in which scrutiny was strict, with Labine v. Vincent, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), involving a workmen's compensation statute distinguishing between legitimate and illegitimate, in which scrutiny was intermediate.

1748 Mathews v. Lucas, 427 U.S. 495, 503–06 (1976); Trimble v. Gordon, 430 U.S. 762, 766–67 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, Labine v. Vincent, 401 U.S. 532 (1971), to something approaching strictness, Jiminez v. Weinberger, 417 U.S. 628, 631–632 (1974). Mathews itself illustrates the uncertainty of statement, suggesting at one point that the Labine standard may be appropriate, 401 U.S. at 506, and at another that the standard appropriate to sex classifications is to be used, id. at 510, while observing a few pages earlier that illegitimacy is entitled to less exacting scrutiny than either race or sex. Id. at 506. Trimble settles on intermediate scrutiny but does not assess the relationship between its standard and the sex classification standard. See Parham v. Hughes, 441 U.S. 347 (1979), and Caban v. Mohammed, 441 U.S. 380 (1979) (both cases involving classifications reflecting both sex and illegitimacy interests).
consistent,1749 but the theme that seems to be imposed on them by
the more recent cases is that so long as the challenged statute does
not so structure its conferral of rights, benefits, or detriments that
some illegitimates who would otherwise qualify in terms of the
statute’s legitimate purposes are disabled from participation, the
imposition of greater burdens upon illegitimates or some classes of
illegitimates than upon legitimates is permissible.1750

Intestate succession rights for illegitimates has divided the
Court over the entire period. At first adverting to the broad power
of the States over descent of real property, the Court employed re-
laxed scrutiny to sustain a law denying illegitimates the right to
share equally with legitimates in the estate of their common father,
who had acknowledged the illegitimates but who had died intes-
tate.1751 Labine was strongly disapproved, however, and virtually
overruled in Trimble v. Gordon,1752 which found an equal protec-
tion violation in a statute allowing illegitimate children to inherit
by intestate succession from their mothers but from their fathers
only if the father had “acknowledged” the child and the child had
been legitimated by the marriage of the parents. The father in
Trimble had not acknowledged his child, and had not married the
mother, but a court had determined that he was in fact the father
and had ordered that he pay child support. Carefully assessing the
purposes asserted to be the basis of the statutory scheme, the
Court found all but one to be impermissible or inapplicable, and
that one not served closely enough by the restriction. First, it was
impermissible to attempt to influence the conduct of adults not to

1749 The major inconsistency arises from three 5-to-4 decisions. Labine v. Vin-
cent, 401 U.S. 532 (1971), was largely overruled by Trimble v. Gordon, 430 U.S. 762
(1977), which itself was substantially limited by Lalli v. Lalli, 439 U.S. 259 (1978).
Justice Powell was the swing vote for different disposition of the latter two cases.
Thus, while four Justices argued for stricter scrutiny and usually invalidation of
such classifications, Lalli v. Lalli, 439 U.S. at 277 (Justices Brennan, White, Mar-
shall, and Stevens dissenting), and four favor relaxed scrutiny and usually sus-
taining the classifications, Trimble v. Gordon, 430 U.S. at 776, 777 (Chief Justice
Burger and Justices Stewart, Blackmun, and Rehnquist dissenting), Justice Powell
applied his own intermediate scrutiny and selectively voided and sustained. See
Lalli v. Lalli, supra, (plurality opinion by Justice Powell).

1750 A classification that absolutely distinguishes between legitimates and
illegitimates is not alone subject to such review; one that distinguishes among class-
es of illegitimates is also subject to it, Trimble v. Gordon, 430 U.S. 762, 774 (1977),
as indeed are classifications based on other factors. E.g., Nyquist v. Mauclet, 432
U.S. 1, 9 (1977) (alienage).

Co., 406 U.S. 164, 170 (1972), had confined the analysis of Labine to the area of
state inheritance laws in expanding review of illegitimacy classifications.

1752 430 U.S. 762 (1977). Chief Justice Burger and Justices Stewart, Blackmun,
and Rehnquist dissented, finding the statute “constitutionally indistinguishable”
from the one sustained in Labine. Id. at 776. Justice Rehnquist also dissented sepa-
rately. Id. at 777.
engage in illicit sexual activities by visiting the consequences upon the offspring.\textsuperscript{1753} Second, the assertion that the statute mirrored the assumed intent of decedents, in that, knowing of the statute's operation, they would have acted to counteract it through a will or otherwise, was rejected as unproved and unlikely.\textsuperscript{1754} Third, the argument that the law presented no insurmountable barrier to illegitimates inheriting since a decedent could have left a will, married the mother, or taken steps to legitimate the child, was rejected as inapposite.\textsuperscript{1755} Fourth, the statute did address a substantial problem, a permissible state interest, presented by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."\textsuperscript{1756} Because the state law did not follow a reasonable middle ground, it was invalidated.


\textsuperscript{1754} Trimble v. Gordon, 430 U.S. 762, 774–76 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.

\textsuperscript{1755} 430 U.S. at 773-74. This justification had been prominent in Labine v. Vincent, 401 U.S. 532, 539 (1971), and its absence had been deemed critical in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170–71 (1972). The Trimble Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Powell's reasoning in subsequent cases. Lalli v. Lalli, 439 U.S. 259, 266–74 (1978); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring). See also Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (sex); and compare id. at 736 (Justice Powell dissenting).

\textsuperscript{1756} Trimble v. Gordon, 430 U.S. 762, 770–73 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice Rehnquist's dissent is especially critical of this approach. Id. at 777, 781–86. Also not interfering with orderly administration of estates is application of Trimble in a probate proceeding ongoing at the time Trimble was decided; the fact that the death had occurred prior to Trimble was irrelevant. Reed v. Campbell, 476 U.S. 852 (1986).
A reasonable middle ground was discerned, at least by Justice Powell, in *Lalli v. Lalli*, concerning a statute which permitted legitimate children to inherit automatically from both their parents, while illegitimates could inherit automatically only from their mothers, and could inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as “my son” and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father’s lifetime declaring the child as his met the “middle ground” requirement of *Trimble*; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of illegitimate children and avoiding spurious claims against intestate estates. To be sure, some illegitimates who were unquestionably established as children of the deceased would be disqualified because of failure of compliance, but individual fairness is not the test. The test rather is whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed. Also, no doubt the State’s interest could have been served by permitting other kinds of proof, but that too is not the test of the statute’s validity. Hence, the balancing necessitated by the Court’s promulgation of standards in such cases caused it to come to different results on closely related fact patterns, making predictability quite difficult but perhaps manageable.  

The Court’s difficulty in arriving at predictable results has extended outside the area of descent of property. Thus, a Texas child support law affording legitimate children a right to judicial action to obtain support from their fathers while not affording the right

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1757 439 U.S. 259 (1978). The four *Trimble* dissenters joined Justice Powell in the result, although only two joined his opinion. Justices Blackmun and Rehnquist concurred because they thought *Trimble* wrongly decided and ripe for overruling. Id. at 276. The four dissenters, who had joined the *Trimble* majority with Justice Powell, thought the two cases were indistinguishable. Id. at 277.  

1758 Illustrating the difficulty are two cases in which the fathers of illegitimate children challenged statutes treating them differently than mothers of such children were treated. In *Parham v. Hughes*, 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than as an illegitimacy classification and sustained a bar to a wrongful death action by the father of an illegitimate child who had not legitimated him; in *Caban v. Mohammed*, 441 U.S. 380 (1980), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of an illegitimate child to block his adoption by refusing to consent. Both decisions were 5-to-4.
to illegitimate children denied the latter equal protection. “A State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.”

Similarly, a federal Social Security provision was held invalid which made eligible for benefits, because of an insured parent’s disability, all legitimate children as well as those illegitimate children capable of inheriting personal property under state intestacy law and those children who were illegitimate only because of a non-obvious defect in their parents’ marriage, regardless of whether they were born after the onset of the disability, but which made all other illegitimate children eligible only if they were born prior to the onset of disability and if they were dependent upon the parent prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on illigitimates was necessary to avoid fraud.

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1759 Gomez v. Perez, 409 U.S. 535, 538 (1978) (emphasis supplied). Following the decision, Texas authorized illegitimate children to obtain support from their fathers. But the legislature required as a first step that paternity must be judicially determined, and imposed a limitations period within which suit must be brought of one year from birth of the child. If suit is not brought within that period the child could never obtain support at any age from his father. No limitation was imposed on the opportunity of a natural child to seek support, up to age 18. In Mills v. Habluetzel, 456 U.S. 91 (1982), the Court invalidated the one-year limitation. While a State has an interest in avoiding stale or fraudulent claims, the limit must not be so brief as to deny such children a reasonable opportunity to show paternity. Similarly, a 2-year statute of limitations on paternity and support actions was held to deny equal protection to illegitimates in Pickett v. Brown, 462 U.S. 1 (1983), and a 6-year limit was struck down in Clark v. Jeter, 486 U.S. 456 (1988). In both cases the Court pointed to the fact that increasingly sophisticated genetic tests are minimizing the “lurking problems with respect to proof of paternity” referred to in Gomez, 409 U.S. at 538. Also, the state’s interest in imposing the 2-year limit was undercut by exceptions (e.g., for illegitimates receiving public assistance), and by different treatment for minors generally; similarly, the importance of imposing a 6-year limit was belied by that state’s more recent enactment of a non-retroactive 18-year limit for paternity and support actions.

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to give benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all legitimate children as well as those illegitimate children who were able to inherit under state intestacy laws, who were illegitimate only because of the technical invalidity of the parent’s marriage, who had been acknowledged in writing by the father, who had been declared to be the father’s by a court decision, or who had been held entitled to the father’s support by a court. Illegitimate children not covered by these presumptions had to establish that they were living with the insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience which was a permissible device because those illegitimate children who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact and it was irrelevant that other children not dependent in fact also received benefits.1761

Fundamental Interests: The Political Process

“The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . , absent of course the discrimination which the Constitution condemns.”1762 The Constitution provides that the qualifications of electors in congressional elections are to be determined by reference to the qualifications prescribed in the States for the electors of the most numerous branch of the legislature, and the States are authorized to determine the manner in which presidential electors are selected.1763 The second section of the Fourteenth Amendment provides for a proportionate reduction in a State’s representation in the House when it denies the franchise to its qualified male

1761 Mathews v. Lucas, 427 U.S. 495 (1976). It can be seen that the only difference between Jiminez and Lucas is that in the former the Court viewed the benefits as owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlie the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-to-4 decision read the purpose differently, see Califano v. Boles, 443 U.S. 282 (1979).


1763 Article I, § 2, cl. 1 (House of Representatives); Seventeenth Amendment (Senators); Article II, § 1, cl. 2 (presidential electors); Article I, § 4, cl. 1 (times, places, and manner of holding elections).
citizens and specific discriminations on the basis of race, sex, and age are addressed in other Amendments. "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualification of voters. The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot." 

The perspective of this 1959 opinion by Justice Douglas has now been revolutionized. "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized." Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."

"And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. . . . When we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a

1764 Fourteenth Amendment, § 2. Justice Harlan argued that the inclusion of this provision impliedly permitted the States to discriminate with only the prescribed penalty in consequence and that therefore the equal protection clause was wholly inapplicable to state election laws. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissenting); Carrington v. Rash, 380 U.S. 89, 97 (1965) (dissenting); Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (concurring and dissenting). Justice Brennan undertook a rebuttal of this position in Oregon v. Mitchell, 400 U.S. at 229, 250 (concurring and dissenting). But see Richardson v. Ramirez, 418 U.S. 24 (1974), where § 2 was relevant in precluding an equal protection challenge.


‘rational basis’ for the distinctions made are not applicable.”¹⁷⁶⁷
Using this analytical approach, the Court has established a regime of close review of a vast range of state restrictions on the eligibility to vote, on access to the ballot by candidates and parties, and on the weighing of votes cast through the devices of apportionment and districting. Changes in Court membership over the years has led to some relaxation in the application of principles, but even as the Court has drawn back in other areas it has tended to preserve, both doctrinally and in fact, the election cases.¹⁷⁶⁸

Voter Qualifications.—A State may require residency as a qualification to vote but since durational residency requirements impermissibly restrict the right to vote and penalize the assertion of the constitutional right to travel they are invalid.¹⁷⁶⁹ The Court indicated that the States have a justified interest in preventing fraud and in facilitating determination of the eligibility of potential registrants and granted that durational residency requirements furthered these interests, but, it said, the State had not shown that the requirements were “necessary,” that is that the interests could not be furthered by means which imposed a lesser burden on the right to vote. Other asserted interests—knowledgeability of voters, common interests, intelligent voting—were said either not to be served by the requirements or to be impermissible interests.

A 50-day durational residency requirement was sustained in the context of the closing of the registration process at 50 days prior to elections and of the mechanics of the State’s registration process. The period, the Court found, was necessary to achieve the State’s legitimate goals.¹⁷⁷⁰

¹⁷⁶⁸Thus, in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 34–35 nn.74 & 78 (1973), a major doctrinal effort to curb the “fundamental interest” side of the “new” equal protection, the Court acknowledged that the right to vote did not come within its prescription that rights to be deemed fundamental must be explicitly or implicitly guaranteed in the Constitution. Nonetheless, citizens have a “constitutionally protected right to participate in elections” which is protected by the equal protection clause. Dunn v. Blumstein, 405 U.S. 330, 336 (1972). The franchise is the guardian of all other rights. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
¹⁷⁶⁹Dunn v. Blumstein, 405 U.S. 330 (1972). Justice Blackmun concurred specially, id. at 360, Chief Justice Burger dissented, id. at 363, and Justices Powell and Rehnquist did not participate. The voided statute imposed a requirement of one year in the State and three months in the county. The Court did not indicate what duration less than ninety days would be permissible, although it should be noted that in the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. § 1973aa–1, Congress prescribed a thirty-day period for purposes of voting in presidential elections. Note also that it does not matter whether one travels interstate or intrastate. Hadnot v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), aff’d, 405 U.S. 1035 (1972).
¹⁷⁷⁰Marston v. Lewis, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county record-
A State that exercised general criminal, taxing, and other jurisdiction over persons on certain federal enclaves within the State, the Court held, could not treat these persons as nonresidents for voting purposes. A statute which provided that anyone who entered military service outside the State could not establish voting residence in the State so long as he remained in the military was held to deny to such a person the opportunity such as all non-military persons enjoyed of showing that he had established residence. Restricting the suffrage to those persons who had paid a poll tax was an invidious discrimination because it introduced a “capricious or irrelevant factor” of wealth or ability to pay into an area in which it had no place. Extending this ruling, the Court held that the eligibility to vote in local school elections may not be limited to persons owning property in the district or who have children in school, and denied States the right to restrict the vote to property owners in elections on the issuance of revenue bonds or general obligation bonds.

However, the Court held that because the activities of a water storage district fell so disproportionately on landowners as a group, a limitation of the franchise in elections for the district’s board of directors to landowners, whether resident or not and whether natural persons or not, excluding non-landowning residents and lessees of land, and weighing the votes granted according to assessed

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1774 Kramer v. Union Free School Dist., 395 U.S. 621 (1969). The Court assumed without deciding that the franchise in some circumstances could be limited to those “primarily interested” or “primarily affected” by the outcome, but found that the restriction permitted some persons with no interest to vote and disqualified others with an interest. Justices Stewart, Black, and Harlan dissented. Id. at 594.
1776 City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). Justice Stewart and Chief Justice Burger dissented. Id. at 215. In Hill v. Stone, 421 U.S. 289 (1975), the Court struck down a limitation on the right to vote on a general obligation bond issue to persons who have “rendered” or listed real, mixed, or personal property for taxation in the election district. It was not a “special interest” election since a general obligation bond issue is a matter of general interest.
valuation of land, comported with equal protection standards. See also Associated Enterprises v. Toltec Watershed Improv. Dist., 410 U.S. 743 (1973) (limitation of franchise to property owners in the creation and maintenance of district upheld). Justices Douglas, Brennan, and Marshall dissented in both cases. Id. at 735, 745.

The water district cases were distinguished in Quinn v. Millsap, 491 U.S. 95. 109 (1989), the Court holding that a “board of freeholders” appointed to recommend a reorganization of local government had a mandate “far more encompassing” than land use issues, since its recommendations “affect[ ] all citizens . . . regardless of land ownership.”
choice at least 30 days before the general election in order to be eligible to vote in the party’s next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs’ voluntary failure to register that they did not meet the deadline.\footnote{\textit{Rosario v. Rockefeller}, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id. at 763.} But a law which prohibited a person from voting in the primary election of a political party if he has voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, inasmuch as it constituted a severe restriction upon a voter’s right to associate with the party of his choice by requiring him to forgo participation in at least one primary election in order to change parties.\footnote{\textit{Kusper v. Pontikes}, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id. at 61, 65.} A less restrictive “closed primary” system was also invalidated, the Court finding insufficient justification for a state’s preventing a political party from allowing independents to vote in its primary.\footnote{\textit{Tashjian v. Republican Party of Connecticut}, 479 U.S. 208 (1986). Although independents were allowed to register in a party on the day before a primary, the state’s justifications for “protect[ing] the integrity of the Party against the Party itself” were deemed insubstantial. Id. at 224.}

It must not be forgotten, however, that it is only when a State extends the franchise to some and denies it to others that a “right to vote” arises and is protected by the equal protection clause. If a State chooses to fill an office by means other than through an election, neither the equal protection clause nor any other constitutional provision prevents it from doing so. Thus, in \textit{Rodriguez v. Popular Democratic Party},\footnote{\textit{Rodriguez v. Popular Democratic Party}, 457 U.S. 1 (1982). See also \textit{Fortson v. Morris}, 385 U.S. 231 (1966) (legislature could select Governor from two candidates having highest number of votes cast when no candidate received majority); \textit{Sailors v. Board of Elections}, 387 U.S. 105 (1967) (appointment rather than election of county school board); \textit{Valenti v. Rockefeller}, 292 F. Supp. 851 (S.D.N.Y. 1968) (three-judge court), aff’d, 393 U.S. 405 (1969) (gubernatorial appointment to fill United States Senate vacancy).} the Court unanimously sustained a Puerto Rico statute which authorized the political party to which an incumbent legislator belonged to designate his successor in office until the next general election upon his death or resignation. Neither the fact that the seat was filled by appointment nor the fact that the appointment was by the party, rather than by the Governor or some other official, raised a constitutional question.

The right of unconvicted jail inmates and convicted misdemeanants (who typically are under no disability) to vote by absentee ballot remains unsettled. In an early case applying rational basis scrutiny, the Court held that the failure of a State to pro-
vide for absentee balloting by unconvicted jail inmates, when absentee ballots were available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other way. Subsequently, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences, but it is unclear whether the basis was the fact that persons confined in jails outside the county of their residences could register and vote absentee while those confined in the counties of their residences could not, or whether the statute's jumbled distinctions among categories of qualified voters on no rational standard made it wholly arbitrary.

**Access to the Ballot.**—The equal protection clause applies to state specification of qualifications for elective and appointive office. While one may “have no right” to be elected or appointed to an office, all persons “do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.” In *Bullock v. Carter,* the Court utilized a somewhat modified form of the strict test in passing upon a filing fee system for primary election candidates which imposed the cost of the election wholly on the candidates and which made no alternative provision for candidates unable to pay the fees; the reason for application of the standard, however, was that the fee system deprived some classes of voters of the opportunity to vote for certain candidates and it worked its classifications along lines of wealth. The system itself was voided because it was not reasonably connected with the State’s interest in regulating the ballot and did not serve that interest and because the cost of the election could

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be met out of the state treasury, thus avoiding the discrimina-
tion.\footnote{405 U.S. at 144-49.}

Recognizing the state interest in maintaining a ballot of rea-
sonable length in order to promote rational voter choice, the Court
observed nonetheless that filing fees alone do not test the genuine-
ness of a candidacy or the extent of voter support for an aspirant.
Therefore, effectuation of the legitimate state interest must be
achieved by means that do not unfairly or unnecessarily burden the
party’s or the candidate’s “important interest in the continued
availability of political opportunity. The interests involved are not
merely those of parties or individual candidates; the voters can
assert their preferences only through candidates or parties or both
and it is this broad interest that must be weighed in the balance.”
“[T]he process of qualifying candidates for a place on the ballot
may not constitutionally be measured solely in dollars.”\footnote{Lubin v. Panish, 415 U.S. 709, 716 (1974).}

In the absence of reasonable alternative means of ballot access, the Court
held, a State may not disqualify an indigent candidate unable to
pay filing fees.\footnote{Concurring, Justices Blackmun and Rehnquist suggested that a reasonable
alternative would be to permit indigents to seek write-in votes without paying a fil-
ing fee, 415 U.S. at 722, but the Court indicated this would be inadequate. Id. at
719 n.5.}

In \textit{Clements v. Fashing},\footnote{457 U.S. 957 (1982). A plurality of four contended that save in two cir-
cumstances—ballot access classifications based on wealth and ballot access classi-
fications imposing burdens on new or small political parties or independent can-
didates—limitations on candidate access to the ballot merit only traditional rational
basis scrutiny, because candidacy is not a fundamental right. The plurality found
both classifications met the standard. Id. at 962–73 (Justices Rehnquist, Powell,
O’Connor, and Chief Justice Burger). Justice Stevens concurred, rejecting the plu-
rality’s standard, but finding that inasmuch as the disparate treatment was based
solely on the State’s classification of the different offices involved, and not on the
characteristics of the persons who occupy them or seek them, the action did not vio-
late the equal protection clause. Id. at 973. The dissent primarily focused on the
First Amendment but asserted that the classifications failed even a rational basis
test. Id. at 976 (Justices Brennan, White, Marshall, and Blackmun).} the Court sustained two provisions
of state law, one that barred certain officeholders from seeking
election to the legislature during the term of office for which they
had been elected or appointed, but that did not reach other office-
holders whose terms of office expired with the legislators’ terms
and did not bar legislators from seeking other offices during their
terms, and the other that automatically terminated the terms of
certain officeholders who announced for election to other offices,
but that did not apply to other officeholders who could run for an-
other office while continuing to serve. The Court was splintered in
such a way, however, that it is not possible to derive a principle from the decision applicable to other fact situations.

In *Williams v. Rhodes*, a complex statutory structure which had the effect of keeping off the ballot all but the candidates of the two major parties was struck down under the strict test because it deprived the voters of the opportunity of voting for independent and third-party candidates and because it seriously impeded the exercise of the right to associate for political purposes. Similarly, a requirement that an independent candidate for office in order to obtain a ballot position must obtain 25,000 signatures, including 200 signatures from each of at least 50 of the State's 102 counties, was held to discriminate against the political rights of the inhabitants of the most populous counties, when it was shown that 93.4% of the registered voters lived in the 49 most populous counties. But to provide that the candidates of any political organization obtaining 20% or more of the vote in the last gubernatorial or presidential election may obtain a ballot position simply by winning the party's primary election while requiring candidates of other parties or independent candidates to obtain the signatures of less than five percent of those eligible to vote at the last election for the office sought is not to discriminate unlawfully, inasmuch as the State placed no barriers of any sort in the way of obtaining signatures and since write-in votes were also freely permitted.

Reviewing under the strict test the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a modicum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot. “To comply with the...
First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot.\footnote{\textit{Storer v. Brown}, 415 U.S. 724, 746 (1974).} Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, “very much a matter of ‘consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.’”\footnote{\textit{Storer v. Brown}, 415 U.S. 724, 746 (1974).}

Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election had to be nominated by primary elections and went on the ballot automatically, because the prior vote adequately demonstrated support. Candidates whose parties polled less than 200,000 but more than 2 percent could be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two categories had to be nominated in conventions and could obtain ballot space only if the notarized list of participants at the conventions totalled at least one percent of the total votes cast for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters signed petitions to bring the total up to one percent of the gubernatorial vote. “[W]hat is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot,” but the Court thought that one percent, or 22,000 signatures in 1972, “falls within the outer boundaries of support the State may require.”\footnote{\textit{American Party of Texas v. White}, 415 U.S. 767, 787 (1974).}

Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space.\footnote{\textit{American Party of Texas v. White}, 415 U.S. 767, 788–91 (1974).} A State may validly require that each voter participate only once in each year’s nominating process and it may therefore disqualify any person who votes in a primary election.

\footnotetext[1800]{\textit{American Party of Texas v. White}, 415 U.S. 767, 783 (1974).} In \textit{Storer v. Brown}, 415 U.S. 724, 738–40 (1974), the Court remanded so that the district court could determine whether the burden imposed on an independent party was too severe, it being required in 24 days in 1972 to gather 325,000 signatures from a pool of qualified voters who had not voted in that year’s partisan primary elections. \textit{See also} Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (voiding provision that required a larger number of signatures to get on ballot in subdivisions than statewide).
\footnotetext[1801]{\textit{American Party of Texas v. White}, 415 U.S. 767, 788–91 (1974).} The percentages varied with the office but no more than 500 signatures were needed in any event.
from signing nominating or supporting petitions for independent parties or candidates.\textsuperscript{1802} Equally valid is a state requirement that a candidate for elective office, as an independent or in a regular party, must not have been affiliated with a political party, or with one other than the one of which he seeks its nomination, within one year prior to the primary election at which nominations for the general election are made.\textsuperscript{1803} So too, a state may limit access to the general election ballot to candidates who received at least 1\% of the primary votes cast for the particular office.\textsuperscript{1804} But it is impermissible to print the names of the candidates of the two major parties only on the absentee ballots, leaving off independents and other parties.\textsuperscript{1805} Also invalidated was a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot.\textsuperscript{1806}

**Apportionment and Districting.**—Prior to 1962, attacks in federal courts on the drawing of boundaries for congressional and legislative election districts or the apportionment of seats to previously existing units ran afoul of the “political question” doctrine.\textsuperscript{1807} But *Baker v. Carr* \textsuperscript{1808} reinterpreted the doctrine in considerable degree and opened the federal courts to voter complaints founded on unequally populated voting districts. *Wesberry v. Sanders* \textsuperscript{1809} found in Article I, § 2, of the Constitution a command that

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\textsuperscript{1802} 415 U.S. at 785-87.

\textsuperscript{1803} Storer v. Brown, 415 U.S. 724, 728–37 (1974). Dissenting, Justices Brennan, Douglas and Marshall thought the state interest could be adequately served by a shorter time period than a year before the primary election, which meant in effect 17 months before the general election. Id. at 755.

\textsuperscript{1804} Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

\textsuperscript{1805} American Party of Texas v. White, 415 U.S. 767, 794–95 (1974). Upheld, however, was state financing of the primary election expenses that excluded convention expenses of the small parties. Id. at 791–94. But the major parties had to hold conventions simultaneously with the primary elections the cost of which they had to bear. For consideration of similar contentions in the context of federal financing of presidential elections, see Buckley v. Valeo, 424 U.S. 1, 93–97 (1976).

\textsuperscript{1806} Anderson v. Celebrezze, 460 U.S. 780 (1983). State interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters.

\textsuperscript{1807} See discussion, supra. Applicability of the doctrine to cases of this nature was left unresolved in Smiley v. Holm, 285 U.S. 355 (1932), and Wood v. Broom, 287 U.S. 1 (1932), was supported by only a plurality in Colegrove v. Green, 328 U.S. 549 (1946), but became the position of the Court in subsequent cases. Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); MacDougall v. Green, 335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); Hartfield v. Sloan, 357 U.S. 916 (1958).

\textsuperscript{1808} 369 U.S. 186 (1962).

\textsuperscript{1809} 376 U.S. 1 (1964). Striking down a county unit system of electing a governor, the Court, in an opinion by Justice Douglas, had already coined a variant
in the election of Members of the House of Representatives districts were to be made up of substantially equal numbers of persons. In six decisions handed down on June 15, 1964, the Court required the alteration of the election districts for practically all the legislative bodies in the United States.\footnote{Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964). In the last case, the Court held that approval of the apportionment plan in a vote of the people was insufficient to preserve it from constitutional attack. “An individual’s constitutionally protected right to cast an equally weighed vote cannot be denied even by a vote of a majority of a State’s electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause.” Id. at 736. Justice Harlan dissented wholly, denying that the equal protection clause had any application at all to apportionment and districting and contending that the decisions were actually the result of a “reformist” nonjudicial attitude on the part of the Court. 377 U.S. at 589. Justices Stewart and Clark dissented in two and concurred in four cases on the basis of their view that the equal protection clause was satisfied by a plan that was rational and that did not systematically frustrate the majority will. 377 U.S. at 741, 744.}

“We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State.”\footnote{Reynolds v. Sims, 377 U.S. 533, 568 (1964).} What was required was that each State “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.”\footnote{377 U.S. at 577.}

Among the principal issues raised by these decisions were which units were covered by the principle, to what degree of exactness population equality had to be achieved, and to what other elements of the apportionment and districting process the equal protection clause extended.

The first issue has largely been resolved, although some few problem areas persist. It has been held that a school board the members of which were appointed by boards elected in units of disparate populations and which exercised only administrative powers
rather than legislative powers was not subject to the principle of
the apportionment ruling.\textsuperscript{1813} \textit{Avery v. Midland County}\textsuperscript{1814} held that when a State delegates lawmaking power to local government
and provides for the election by district of the officials to whom the
power is delegated, the districts must be established of substan-
tially equal populations. But in \textit{Hadley v. Junior College Dis-
trict},\textsuperscript{1815} the Court abandoned much of the limitation which was
explicit in these two decisions and held that whenever a State
chooses to vest “governmental functions” in a body and to elect the
members of that body from districts, the districts must have sub-
stantially equal populations. The “governmental functions” should
not be characterized as “legislative” or “administrative” or nec-
ecessarily important or unimportant; it is the fact that members of
the body are elected from districts which triggers the applica-
\textbf{The second issue has been largely but not precisely resolved.}
In \textit{Swann v. Adams},\textsuperscript{1817} the Court set aside a lower court ruling
“for the failure of the State to present or the District Court to ar-
ticulate acceptable reasons for the variations among the popu-
lations of the various legislative districts. . . . \textit{De minimis} devia-
tions are unavoidable, but variations of 30\% among senate dis-
tricts and 40\% among house districts can hardly be deemed \textit{de minimis} and none of our cases suggests that differences of this
magnitude will be approved without a satisfactory explanation
grounded on acceptable state policy.” Two congressional district
cases were disposed of on the basis of \textit{Swann},\textsuperscript{1818} but when the
Court ruled that no congressional districting could be approved
without a “good-faith effort to achieve precise mathematical equal-

\textsuperscript{1814}390 U.S. 474 (1968). Justice Harlan continued his dissent from the Reynolds
line of cases, id. at 486, while Justices Fortas and Stewart called for a more dis-
cerning application and would not have applied the principle to the county council
here. Id. at 495, 509.
\textsuperscript{1815}397 U.S. 50 (1970). The governmental body here was the board of trustees
of a junior college district. Justices Harlan and Stewart and Chief Justice Burger
dissented. Id. at 59, 70.
\textsuperscript{1816}The Court observed that there might be instances “in which a State elects
certain functionaries whose duties are so far removed from normal governmental ac-
tivities and so disproportionately affect different groups that a popular election in
compliance with Reynolds supra, might not be required. . . .” Id. at 56. For cases
involving such units, see \textit{Salyer Land Co. v. Tulare Water Storage Dist.}, 410 U.S.
719 (1973); \textit{Associated Enterprises v. Toltec Watershed Imp. Dist.}, 410 U.S. 743
aff’d per curiam, 409 U.S. 1095 (1973).
\textsuperscript{1818}Kirkpatrick v. Preisler, 385 U.S. 450 (1967); \textit{Duddleston v. Grills}, 385 U.S.
455 (1967).
ity” or the justification of “each variance, no matter how small,”\footnote{Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). The Court has continued to adhere to this strict standard for congressional districting, voiding a plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons. Karcher v. Daggett, 462 U.S. 725 (1983) (rejecting assertion that deviations less than estimated census error are necessarily permissible).} it did not then purport to utilize this standard in judging legislative apportionment and districting.\footnote{And in Abate v. Mundt\footnote{The Court relied on Swann in disapproving of only slightly smaller deviations (roughly 28% and 25%) in Whitcomb v. Chavis, 403 U.S. 124, 161–63 (1971). In Connor v. Williams, 404 U.S. 549, 550 (1972), the Court said of plaintiffs’ reliance on Preisler and Wells that “these decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court’s plan as a design for permanent apportionment.”} the Court approved a plan for apportioning a county governing body which permitted a substantial population disparity, explaining that in the absence of a built-in bias tending to favor any particular area or interest, a plan could take account of localized factors in justifying deviations from equality which might in other circumstances cause the invalidation of a plan.\footnote{403 U.S. 182 (1971).} The total population deviation allowed in Abate was 11.9%; the Court refused, however, to extend Abate to approve a total deviation of 78% resulting from an apportionment plan providing for representation of each of New York City’s five boroughs on the New York City Board of Estimate.\footnote{New York City Bd. of Estimate v. Morris, 489 U.S. 688 (1989). Under the plan each of the City’s five boroughs was represented on the board by its president and each of these members had one vote; three citywide elected officials (the mayor, the comptroller, and the president of the city council) were also placed on the board and given two votes apiece (except that the mayor had no vote on the acceptance or modification of his budget proposal). The Court also ruled that, when measuring population deviation for a plan that mixes at-large and district representation, the at-large representation must be taken into account. Id. at 699–701.}

Nine years after Reynolds v. Sims, the Court reexamined the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished state legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality,
the Court held that more flexibility is constitutionally permissible with respect to the former than to the latter. But it was in determining how much greater flexibility was permissible that the Court moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court held that a maximum 16.4% deviation from equality of population was justified by the State’s policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions qua subdivisions, because the legislature was responsible for much local legislation. Second, just as the first case “demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justified and legally sustainable. It is now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.” This recognition of a de minimis deviation, below which no justification was necessary, was mandated, the Court felt, by the margin of error in census statistics, by the population change over the ten-year life of an apportionment, and by the relief it afforded federal courts able thus to

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1825 410 U.S. at 325-30. The Court indicated that a 16.4% deviation “may well approach tolerable limits.” Id. at 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the State, an issue not addressed by the Court. In Chapman v. Meier, 420 U.S. 1, 21–26 (1975), holding that a 20% variation in a court-developed plan was not justified, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. See also Summers v. Cenarrusa, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4% deviation). But see Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for further consideration the rejection of a deviation in excess of 10% intended to preserve political subdivision boundaries). In Brown v. Thomson, 462 U.S. 835 (1983), the Court held that a consistent state policy assuring each county at least one representative can justify substantial deviation from population equality when only the marginal impact of representation for the state’s least populous county was challenged (the effect on plaintiffs, voters in larger districts, was that they would elect 28 of 64 members rather than 28 of 63), but there was indication in Justice O’Connor’s concurring opinion that a broader-based challenge to the plan, which contained a 16% average deviation and an 89% maximum deviation, could have succeeded.
1826 Gaffney v. Cummings, 412 U.S. 735, 745 (1973). The maximum deviation was 7.83%. The Court did not precisely indicate at what point a deviation had to be justified, but it applied the de minimis standard in White v. Regester, 412 U.S. 755 (1973), in which the maximum deviation was 9.9%. “Very likely, larger differences between districts would not be tolerable without justifications.” Id. at 764. Justices Brennan, Douglas, and Marshall dissented. See also Brown v. Thomson, 462 U.S. 835, 842 (1983): “Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations [insufficient to make out a prima facie case].”
avoid over-involvement in essentially a political process. The “goal of fair and effective representation” is furthered by eliminating gross population variations among districts, but it is not achieved by mathematical equality solely. Other relevant factors are to be taken into account. But when a judicially-imposed plan is to be formulated upon state default, it “must ordinarily achieve the goal of population equality with little more than de minimis variation” and deviations from approximate population equality must be supported by enunciation of historically significant state policy or unique features.

Gerrymandering and the permissible use of multimember districts present examples of the third major issue. It is clear that racially based gerrymandering is unconstitutional under the Fifteenth Amendment, at least when it is accomplished through the manipulation of district lines. Even if racial gerrymandering is intended to benefit minority voting populations, it is subject to strict scrutiny under the Equal Protection Clause if racial considerations are the dominant and controlling rationale in drawing district lines. Showing that a district’s “bizarre” shape departs from traditional districting principles such as compactness, contiguity, and respect for political subdivision lines may serve to reinforce such a claim, although a plurality of the Justices would not preclude the creation of “reasonably compact” majority-minority districts in order to remedy past discrimination or to comply with the requirements of the Voting Rights Act of 1965. On the other

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1828 Chapman v. Meier, 420 U.S. 1, 21–27 (1975). The Court did say that court-ordered reapportionment of a state legislature need not attain the mathematical preciseness required for congressional redistricting. Id. at 27 n.19. Apparently, therefore, the Court’s reference to both “de minimis” variations and “approximate population equality” must be read as referring to some range approximating the Gaffney principle. See also Connor v. Finch, 431 U.S. 407 (1977).


1830 Miller v. Johnson, 515 U.S. 900 (1995) (drawing congressional district lines in order to comply with § 5 of the Voting Rights Act as interpreted by the Department of Justice not a compelling governmental interest).


hand, the Court appears to have more recently weakened a challenger’s ability to establish Equal Protection claims by showing both a strong deference to a legislature’s articulation of legitimate political explanations for districting decisions, and by allowing for a strong correlation between race and political affiliation.\footnote{1833}

Partisan gerrymandering raises more difficult issues. Several lower courts ruled that the issue was beyond judicial cognizance,\footnote{1834} and the Supreme Court itself, upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties, recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune from judicial scrutiny, “we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States.”\footnote{1835}

More recently, however, in a decision of potentially major import reminiscent of \textit{Baker v. Carr}, the Court in \textit{Davis v. Bandemer}\footnote{1836} ruled that partisan gerrymandering in state legislative redistricting is justiciable under the Equal Protection Clause. But although the vote was 6 to 3 in favor of justiciability, a majority of Justices could not agree on the proper test for determining whether particular gerrymandering is unconstitutional, and the lower court’s holding of unconstitutionality was reversed by vote of 7 to 2.\footnote{1837} Thus, while courthouse doors are now ajar for claims of partisan gerrymandering, it is unclear what it will take to succeed on the merits.

On the justiciability issue, the Court viewed the “political question” criteria as no more applicable than they had been in \textit{Baker v. Carr}...
v. Carr. Because *Reynolds v. Sims* had declared “fair and effective representation for all citizens”\(^{1838}\) to be “the basic aim of legislative apportionment,” and because racial gerrymandering issues had been treated as justiciable, the Court viewed the representational issues raised by partisan gerrymandering as indistinguishable. Agreement as to the existence of “judicially discoverable and manageable standards for resolving” gerrymandering issues, however, did not result in a consensus as to what those standards are.\(^{1839}\) While a majority of Justices agreed that discriminatory effect as well as discriminatory intent must be shown, there was significant disagreement as to what constitutes discriminatory effect. Justice White’s plurality opinion suggested that there need be “evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”\(^{1840}\) Moreover, continued frustration of the chance to influence the political process can not be demonstrated by the results of only one election; there must be a history of disproportionate results or a finding that such results will continue. Justice Powell, joined by Justice Stevens, did not formulate a strict test, but suggested that “a heavy burden of proof” should be required, and that courts should look to a variety of factors as they relate to “the fairness of a redistricting plan” in determining whether it contains invalid gerrymandering. Among these factors are the shapes of the districts, adherence to established subdivision lines, statistics relating to vote dilution, the nature of the legislative process by which the plan was formulated, and evidence of intent revealed in legislative history.\(^{1841}\)

It had been thought that the use of multimember districts to submerge racial, ethnic, and political minorities might be treated differently,\(^{1842}\) but in *Whitcomb v. Chavis*\(^{1843}\) the Court, while dealing with the issue on the merits, so enveloped it in strict stand-

\(^{1838}\) 377 U.S. 533, 565–66 (1964). This phrase has had a life of its own in the commentary. See D. Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, and sources cited therein. It is not clear from its original context, however, that the phrase was coined with such broad application in mind.

\(^{1839}\) The quotation is from the Baker v. Carr measure for existence of a political question, 369 U.S. 186, 217 (1962).

\(^{1840}\) 478 U.S. at 133. Joining in this part of the opinion were Justices Brennan, Marshall, and Blackmun.

\(^{1841}\) 478 U.S. at 173. A similar approach had been proposed in Justice Stevens’ concurring opinion in *Karcher v. Daggett*, 462 U.S. 725, 744 (1983).


ards of proof and definitional analysis as to raise the possibility that it might be beyond judicial review. In Chavis the Court held that inasmuch as the multimember districting represented a state policy of more than 100 years observance and could not therefore be said to be motivated by racial or political bias, only an actual showing that the multimember delegation in fact inadequately represented the allegedly submerged minority would suffice to raise a constitutional question. But the Court also rejected as impermissible the argument that any interest group had any sort of right to be represented in a legislative body, in proportion to its members’ numbers or on some other basis, so that the failure of that group to elect anyone merely meant that alone or in combination with other groups it simply lacked the strength to obtain enough votes, whether the election be in single-member or in multimember districts. That fact of life was not of constitutional dimension, whether the group was composed of blacks, or Republicans or Democrats, or some other category of persons. Thus, the submerging argument was rejected, as was the argument of a voter in another county that the Court should require uniform single-member districting in populous counties because voters in counties which elected large delegations in blocs had in effect greater voting power than voters in other districts; this argument the Court found too theoretical and too far removed from the actualities of political life.

Subsequently, and surprisingly in light of Chavis, the Court in White v. Regester affirmed a district court invalidation of the use of multimember districts in two Texas counties on the ground that, when considered in the totality of the circumstances of discrimination in registration and voting and in access to other political opportunities, such use denied African Americans and Mexican Americans the opportunity to participate in the election process in a reliable and meaningful manner. 1845

Doubt was cast on the continuing vitality of White v. Regester, however, by the badly split opinion of the Court in City of Mobile v. Bolden. 1846 A plurality undermined the earlier case in two respects, although it is not at all clear that a majority of the

1845 “To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.” 412 U.S. at 765-66.
Court had been or could be assembled on either point. First, the plurality argued that an intent to discriminate on the part of the redistricting body must be shown before multimember districting can be held to violate the equal protection clause. Second, the plurality read White v. Regester as being consistent with this principle and the various factors developed in that case to demonstrate the existence of unconstitutional discrimination to be in fact indicia of intent; however, the plurality seemingly disregarded the totality of circumstances test utilized in Regester and evaluated instead whether each factor alone was sufficient proof of intent.

Again switching course, the Court in Rogers v. Lodge approved the findings of the lower courts that a multimember electoral system for electing a county board of commissioners was being maintained for a racially discriminatory purpose, although it had not been instituted for that purpose. Applying a totality of the circumstances test, and deferring to lower court factfinding, the Court, in an opinion by one of the Mobile dissenters, canvassed a range of factors which it held could combine to show a discriminatory motive, and largely overturned the limitations which the Mobile plurality had attempted to impose in this area. With the enactment of federal legislation specifically addressed to the issue of multimember districting and dilution of the votes of racial minorities, however, it may be that the Court will have little further opportunity to develop the matter in the context of constitutional litigation. In Thornburg v. Gingles, the Court held that multi-

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1847 446 U.S. at 65-68 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger). On intent versus impact analysis, see discussion supra. Justices Blackmun and Stevens concurred on other grounds, id. at 80, 83, and Justices White, Brennan, and Marshall dissented. Id. at 94, 103. Justice White agreed that purposeful discrimination must be found, id. at 101, while finding it to have been shown, Justice Blackmun assumed that intent was required, and Justices Stevens, Brennan, and Marshall would not so hold.

1848 446 U.S. at 68-74. Four Justices rejected this view of the plurality, while Justice Stevens also appeared to do so but followed a mode of analysis significantly different than that of any other Justice.

1849 458 U.S. 613 (1982). Joining the opinion of the Court were Justices White, Brennan, Marshall, Blackmun, O'Connor, and Chief Justice Burger. Dissenting were Justices Powell and Rehnquist, id. at 628, and Justice Stevens. Id. at 631.

1850 On the legislation, see “Congressional Definition of Fourteenth Amendment Rights,” supra.

1851 478 U.S. 30, 50–51 (1986). Use of multimember districting for purposes of political gerrymandering was at issue in Davis v. Bandemer, 478 U.S. 109 (1986), decided the same day as Gingles, but there was no agreement as to the appropriate constitutional standard. A plurality led by Justice White relied on the Whitcomb v. Chavis reasoning, suggesting that proof that multimember districts were constructed for the advantage of one political party falls short of the necessary showing of deprivation of opportunity to participate in the electoral process. 478 U.S. at 136–37. Two Justices thought the proof sufficient for a holding of invalidity, the minority party having won 46% of the vote but only 3 of 21 seats from the multimember districts, and “the only discernible pattern [being] the appearance of these districts in
member districting violates § 2 of the Voting Rights Act by diluting the voting power of a racial minority when that minority is “sufficiently large and geographically compact to constitute a majority in a single-member district,” when it is politically cohesive, and when block voting by the majority “usually” defeats preferred candidates of the minority.

Finally, it should be said that the Court has approved the discretionary exercise of equity powers by the lower federal courts in drawing district boundaries and granting other relief in districting and apportionment cases, although that power is bounded by the constitutional violations found, so that courts do not have carte blanche, and they should ordinarily respect the structural decisions made by state legislatures and the state constitutions.

Counting and Weighing of Votes.—In Bush v. Gore, a case of dramatic result but of perhaps limited significance for equal protection, the Supreme Court ended a ballot dispute which arose during the year 2000 presidential election. The Florida Supreme Court had ordered a partial manual recount of the Florida vote for Presidential Electors, requiring that all ballots which contained a “clear indication of the intent of the voter” be counted, but allowing the relevant counties to determine what physical characteristics of a ballot would satisfy this test. The Court held that the Equal Protection Clause would be violated by allowing arbitrary and disparate methods of discerning voter intent in the recounting of ballots. The decision was surprising to many as a lack of uniformity in voting standards and procedures is inherent in the American system of decentralized voting administration. The Court, however, limited its holding to “the present circumstances,” where “a state court with the power to assure uniformity” fails to provide “mini-

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mal procedural safeguards.”\textsuperscript{1855} Citing the “many complexities” of application of equal protection “in election processes generally,” the Court distinguished the many situations where disparate treatment of votes results from different standards being applied by different local jurisdictions.

In cases where votes are given more or less weight by operation of law, it is not the weighing of votes itself which may violate the 14th Amendment, but the manner in which it is done. \textit{Gray v. Sanders},\textsuperscript{1856} for instance, struck down the Georgia county unit system under which each county was allocated either two, four, or six votes in statewide elections and the candidate carrying the county received those votes. Since there were a few very populous counties and scores of poorly-populated ones, the rural counties in effect dominated statewide elections and candidates with popular majorities statewide could be and were defeated. But \textit{Gordon v. Lance}\textsuperscript{1857} approved a provision requiring a 60 percent affirmative vote in a referendum election before constitutionally prescribed limits on bonded indebtedness or tax rates could be exceeded. The Court acknowledged that the provision departed from strict majority rule but stated that the Constitution did not prescribe majority rule; it instead proscribed discrimination through dilution of voting power or denial of the franchise because of some class characteristic—race, urban residency, or the like—while the provision in issue was neither directed to nor affected any identifiable class.

\textbf{The Right to Travel}

The doctrine of the “right to travel” actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between states, a right venerable for its longevity, but still lacking a clear doctrinal basis.\textsuperscript{1858} The second, expressly addressed by the first sentence of Article IV, provides a citizen of one State who is temporarily visiting another state the “Privileges and Immunities” of a citizen of the latter state.\textsuperscript{1859} The third is the right

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\item \textsuperscript{1855}531 U.S. at 109.
\item \textsuperscript{1856}372 U.S. 368 (1963).
\item \textsuperscript{1857}403 U.S. 1 (1971).
\item \textsuperscript{1858}Saenz v. Roe, 526 U.S. 489 (1999). “For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The right of free ingress and regress to and from neighboring states which was expressly mentioned in the text of the Article of Confederation, may simply have been conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.” Id. at 501 (citations omitted).
\item \textsuperscript{1859}Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (“without some provision . . . removing from citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with citizens of those States, the Republic
of a new arrival to a state, who establishes citizenship in that state, to enjoy the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a state for a specified period of time before taking advantage of the benefits of that state’s citizenship.

**Durational Residency Requirements.**—Challenges to durational residency requirements have traditionally been made under the Equal Protection Clause of the Fourteenth Amendment. In 1999, however, a majority of the Supreme Court approved a doctrinal shift, so that state laws which distinguished between their own citizens based on how long they had been in the state would be evaluated instead under the Privileges or Immunities Clause of the Fourteenth Amendment. The Court did not, however, question the continuing efficacy of the earlier cases.

A durational residency requirement creates two classes of persons: those who have been within the State for the prescribed period and those who have not been. But persons who have moved recently, at least from State to State, have exercised a right protected by the Constitution of the United States, and the durational residency classification either deters the exercise of the right or penalizes those who have exercised the right. Any such classification is invalid “unless shown to be necessary to promote a compelling governmental interest.” The constitutional right to travel has long been recognized, but it is only relatively re-

would have constituted little more than a league of States; it would not have con-

stituted the Union which now exists.”).

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2. Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Inasmuch as the right to travel is implicated by state distinctions between residents and nonresidents, the relevant constitutional provision is the privileges and immunities clause, Article IV, § 2, cl. 1.


6. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Edwards v. California, 314 U.S. 160 (1941) (both cases in context of direct restrictions on travel). The source of the right to travel and the reasons for reliance on the equal protection clause are
cently that the strict standard of equal protection review has been applied to nullify those durational residency provisions which have been brought before the Court.

Thus, in *Shapiro v. Thompson*,\(^\text{1866}\) durational residency requirements conditioning eligibility for welfare assistance on one year’s residence in the State\(^\text{1867}\) were voided. If the purpose of the requirements was to inhibit migration by needy persons into the State or to bar the entry of those who came from low-paying States to higher-paying ones in order to collect greater benefits, the Court said, the purpose was impermissible.\(^\text{1868}\) If on the other hand the purpose was to serve certain administrative and related governmental objectives—the facilitation of the planning of budgets, the provision of an objective test of residency, minimization of opportunity for fraud, and encouragement of early entry of new residents into the labor force—the requirements were rationally related to the purpose but they were not *compelling* enough to justify a classification which infringed on a fundamental interest.\(^\text{1869}\) Similarly, in *Dunn v. Blumstein*,\(^\text{1870}\) where the durational residency requirements denied the franchise to newcomers, the assertion of such administrative justifications was constitutionally insufficient to justify the classification. The Privileges or Immunities Clause of the Fourteenth Amendment was the basis for striking down a Cali-

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fornia law which limited welfare benefits for California citizens who had resided in the state for less than a year to the level ifof benefits which they would have received in the State of their prior residence.\textsuperscript{1871}

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in \textit{Sosna v. Iowa}.\textsuperscript{1872} While it is not clear what the precise basis of the ruling is, it appears that the Court found that the State’s interest in requiring that those who seek a divorce from its courts be genuinely attached to the State and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement.\textsuperscript{1873} Similarly, durational residency requirements for lower in-state tuituion at public colleges have been held constitutionally justifiable, again, however, without a clear statement of reason.\textsuperscript{1874} More recently, the Court has attempted to clarify these cases by distingui\textsuperscript{1875} ghishing situations where a state citizen is likely to “consume” benefits within a state’s borders (such as the provision of welfare) from those where citizens of other states are likely to establish residency just long enough to acquire some portable benefit, and then return to their original domicile to enjoy them (such as obtaining a divorce decree or paying the in-state tuition rate for a college edu-
cation).\textsuperscript{1875}

A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska’s statehood. The law thus created fixed, permanent distinctions between an ever-increasing number of classes of bona fide residents based on how long they had been in the State. The differences between the durational residency cases previously decided did not alter the bearing of the

\textsuperscript{1871} Saenz v. Roe, 526 U.S. 489, 505 (1999).

\textsuperscript{1872} 419 U.S. 393 (1975). Justices Marshall and Brennan dissented on the mer-
its. Id. at 418.

\textsuperscript{1873} 419 U.S. at 409. But the Court also indicated that the plaintiff was not ab-
solutely barred from the state courts, but merely required to wait for access (which was true in the prior cases as well and there held immaterial), and that possibly the state interests in marriage and divorce were more exclusive and thus more immu-
ne from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or tradi-
tional scrutiny.


\textsuperscript{1875} Saenz v. Roe, 526 U.S. at 505 (1999).
right to travel principle upon the distribution scheme, but the Court’s decision went off on the absence of any permissible purpose underlying the apportionment classification and it thus failed even the rational basis test. ¹⁸⁷⁶

Unresolved still are issues such as durational residency requirements for occupational licenses and other purposes. ¹⁸⁷⁷ Too, it should be noted that this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions, ¹⁸⁷⁸ and the cases do not inhibit the States when, having reasons for doing so, they bar travel by certain persons. ¹⁸⁷⁹

**Marriage and Familial Relations**

In *Zablocki v. Redhail*, ²⁴³⁴ U.S. 374 (1978), importing into equal protection analysis the doctrines developed in substantive due process, the Court identified the right to marry as a “fundamental interest” that necessitates “critical examination” of governmental restrictions which “interfere directly and substantially” with the right. ²⁴⁸¹ Struck down was a statute that prohibited any resident under an obligation to support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. The plaintiff was an indigent wishing to marry but prevented from doing so because he was not complying with a court order to pay support to an illegitimate child he had fathered, and because the child was receiving public assistance. Applying “critical examination,” the Court observed that the statutory prohibition could not

¹⁸⁷⁶Zobel v. Williams, 457 U.S. 55 (1982). Somewhat similar was the Court’s invalidation on equal protection grounds of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices also thought the preference penalized the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986).

¹⁸⁷⁷La Tourette v. McMaster, 248 U.S. 465 (1919), upholding a two-year residence requirement to become an insurance broker, must be considered of questionable validity. Durational periods for admission to the practice of law or medicine or other professions have evoked differing responses by lower courts.


¹⁸⁷⁹Jones v. Helms, 452 U.S. 412 (1981) (statute made it a misdemeanor to abandon a dependent child but a felony to commit the offense and then leave the State).


²⁴⁸¹Although the Court’s due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. 434 U.S. at 396-397 (Justice Powell concurring).
be sustained unless it was justified by sufficiently important state
interests and was closely tailored to effectuate only those inter-
ests.\footnote{434 U.S. at 388. Although the passage is not phrased in the usual
compelling interest terms, the concurrence and the dissent so viewed it without evoking
disagreement from the Court. Id. at 396 (Justice Powell), 403 (Justice Stevens), 407
(Justice Rehnquist). Justices Powell and Stevens would have applied intermediate
scrutiny to void the statute, both for its effect on the ability to marry and for its
impact upon indigents. Id. at 400, 406 n.10.} Two interests were offered that the Court was willing to
accept as legitimate and substantial: requiring permission under
the circumstances furnished an opportunity to counsel applicants
on the necessity of fulfilling support obligations, and the process
protected the welfare of children who needed support, either by
providing an incentive to make support payments or by preventing
applicants from incurring new obligations through marriage. The
first interest was not served, the Court found, there being no provi-
sion for counseling and no authorization of permission to marry
once counseling had taken place. The second interest was found not
to be effectuated by the means. Alternative devices to collect sup-
port existed, the process simply prevented marriage without deliv-
ering any money to the children, and it singled out obligations in-
curred through marriage without reaching any other obligations.

Other restrictions that relate to the incidents of or pre-
requisites for marriage were carefully distinguished by the Court
as neither entitled to rigorous scrutiny nor put in jeopardy by the
decision.\footnote{434 U.S. 47 (1977).} For example, in \textit{Califano v. Jobst}, a unanimous
Court sustained a Social Security provision that revoked disabled
dependents’ benefits of any person who married, except when the
person married someone who was also entitled to receive disabled
dependents’ benefits. Plaintiff, a recipient of such benefits, married
someone who was also disabled but not qualified for the benefits,
and his benefits were terminated. He sued, alleging that distin-
guishing between classes of persons who married eligible persons
and who married ineligible persons infringed upon his right to
marry. The Court rejected the argument, finding that benefit enti-
tlement was not based upon need but rather upon actual depend-
ency upon the insured wage earner; marriage, Congress could have
assumed, generally terminates the dependency upon a parent-wage
earner. Therefore, it was permissible as an administrative conven-
tience to make marriage the terminating point but to make an ex-
cption when both marriage partners were receiving benefits, as a
means of lessening hardship and recognizing that dependency was
likely to continue. The marriage rule was therefore not to be strictly scrutinized or invalidated “simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.”

It seems obvious, therefore, that the determination of marriage and familial relationships as fundamental will be a fruitful beginning of litigation in the equal protection area.

Sexual Orientation

In *Romer v. Evans*, the Supreme Court struck down a state constitutional amendment which both overturned local ordinances prohibiting discrimination against homosexuals, lesbians or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or to grant preferences based on sexual orientation. The Court declined to follow the lead of the Supreme Court of Colorado, which had held that the amendment infringed on gays’ and lesbians’ fundamental right to participate in the political process. The Court also rejected the application of the heightened standard reserved for suspect classes, and sought only to establish whether the legislative classification had a rational relation to a legitimate end.

The Court found that the amendment failed even this restrained review. Animus against a class of persons was not considered by the Court as a legitimate goal of government: “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”

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1885 434 U.S. at 54. See also *Mathews v. De Castro*, 429 U.S. 181 (1976) (provision giving benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying them to a divorced woman under 62 with dependents represents a rational judgment by Congress with respect to likely dependency of married but not divorced women and does not deny equal protection); *Califano v. Boles*, 443 U.S. 282 (1979) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of illegitimate child who was never married to wage earner of equal protection).

1886 See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978) (State’s giving to father of legitimate child who is divorced or separated from mother while denying to father of illegitimate child a veto over the adoption of the child by another does not under the circumstances deny equal protection. The circumstances were that the father never exercised custody over the child or shouldered responsibility for his supervision, education, protection, or care, although he had made some support payments and given him presents). *Accord*, *Lehr v. Robertson*, 463 U.S. 248 (1983).


1889 517 U.S. at 634, quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).
ments that the amendment protected the freedom of association rights of landlords and employers, or that it would conserve resources in fighting discrimination against other groups. The Court found that the scope of the law was unnecessarily broad to achieve these stated purposes, and that no other legitimate rationale existed for such a restriction.

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

Generally.—Whatever may be the status of wealth distinctions per se as a suspect classification, there is no doubt that when the classification affects some area characterized as or considered to be fundamental in nature in the structure of our polity—the ability of criminal defendants to obtain fair treatment throughout the system, the right to vote, to name two examples—then the classifying body bears a substantial burden in justifying what it has done. The cases begin with Griffin v. Illinois, surely one of the most seminal cases in modern constitutional law. There, the State conditioned full direct appellate review, review as to which all convicted defendants were entitled, on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. “In criminal trials,” Justice Black wrote in the plurality opinion, “a State can no more discriminate on account of poverty than on account of religion, race, or color.” While the State was not obligated to provide an appeal at all, when it does so it may not structure its system “in a way that discriminates against some convicted defendants on account of their poverty.” The system’s fault was that it treated defendants with money differently than it treated defendants without money. “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

\footnote{San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).} \footnote{351 U.S. 12 (1956). The opinion of the court was joined by Justices Black, Douglas, and Clark, and Chief Justice Warren. Justice Frankfurter concurred. Id. at 28, 29.} \footnote{Id. at 20. Justices Burton, Minton, Reed, and Harlan dissented. Id. at 26, 29.} \footnote{Id. at 17, 18, 19. Although Justice Black was not explicit, it seems clear that the system was found to violate both the due process and the equal protection clauses. Justice Frankfurter’s concurrence dealt more expressly with the premise of the Black opinion. “It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course, a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted defendants from proceeding.”}
The principle of Griffin was extended in Douglas v. California, in which the court held to be a denial of due process and equal protection a system whereby in the first appeal as of right from a conviction counsel was appointed to represent indigents only if the appellate court first examined the record and determined that counsel would be of advantage to the appellant. “There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel’s examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.”

From the beginning, Justice Harlan opposed reliance on the equal protection clause at all, arguing that a due process analysis was the proper criterion to follow. “It is said that a State cannot discriminate between the ‘rich’ and the ‘poor’ in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action.” A fee system neutral on its face was not a classification forbidden by the equal protection clause. “[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against ‘indigents’ by name would be unconstitutional.” As he protested in Douglas: “The States, of course, are prohibited by the Equal Protection Clause from discriminating between ‘rich’ and ‘poor’ as such in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely.”

indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.” Id. at 23.

1893 372 U.S. 353 (1963). Justice Clark dissented, protesting the Court’s “new fetish for indigency,” id. at 358, 359, and Justices Harlan and Stewart dissented. Id. at 360.

1894 372 U.S. at 357-58.


Due process furnished the standard, Justice Harlan felt, for determining whether fundamental fairness had been denied. Where an appeal was barred altogether by the imposition of a fee, the line might have been crossed to unfairness, but on the whole he did not see that a system which merely recognized differences between and among economic classes, which as in Douglas made an effort to ameliorate the fact of the differences by providing appellate scrutiny of cases of right, was a system which denied due process.\textsuperscript{1897}

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents’ exercise of the right of appeal. “In cases like Griffin and Douglas, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal.”\textsuperscript{1898}

Criminal Procedure.—“[I]t is now fundamental that, once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.”\textsuperscript{1899} “In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. . . .”\textsuperscript{1900} No State may condition the right to appeal\textsuperscript{1901} or the right to file a petition for \textit{habeas corpus}\textsuperscript{1902} or other form of postconviction relief upon the payment of a docketing fee or some other type of fee when the petitioner has no means to pay. Similarly, although the States are not required to furnish full and complete transcripts of their trials to indigents when excerpted versions or some other adequate substitute is available, if a transcript is necessary to adequate review of a conviction, either on appeal or through procedures for postconviction relief, the transcript must be provided to indigent defendants or to others unable to pay.\textsuperscript{1903} This right may not be denied by drawing a felony-
misdemeanor distinction or by limiting it to those cases in which confinement is the penalty.\footnote{1904} A defendant’s right to counsel is to be protected as well as the similar right of the defendant with funds.\footnote{1905} The right to counsel on appeal necessarily means the right to \textit{effective} assistance of counsel.\footnote{1906}

But, deciding a point left unresolved in \textit{Douglas}, the Court held that neither the due process nor the equal protection clause required a State to furnish counsel to a convicted defendant seeking, after he had exhausted his appeals of right, to obtain discretionary review of his case in the State’s higher courts or in the United States Supreme Court. Due process fairness does not require that after an appeal has been provided the State must always provide counsel to indigents at every stage. “Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty.” That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.\footnote{1907} Not even death row inmates

\footnotesize{\textbf{Footnotes:}}

\footnote{1904} U.S. 192 (1966) (indigent prisoner entitled to free transcript of his habeas corpus proceeding for use on appeal of adverse decision therein); Gardner v. California, 393 U.S. 367 (1969) (on filing of new habeas corpus petition in appellate court upon an adverse nonappealable habeas ruling in a lower court where transcript was needed, one must be provided an indigent prisoner). \textit{See also} Rinaldi v. Yeager, 384 U.S. 305 (1966). For instances in which a transcript was held not to be needed, see Britt v. North Carolina, 404 U.S. 266 (1971); United States v. MacCollom, 426 U.S. 317 (1976).


\footnote{1906} Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967). A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client’s appeal is frivolous does not violate the client’s right to assistance of counsel on appeal. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The right is violated if the court allows counsel to withdraw by merely certifying that the appeal is “meritless” without also filing an Anders brief supporting the certification. Penson v. Ohio, 488 U.S. 75 (1988). \textit{But see} Smith v. Robbins, 528 U.S. 259 (2000) (upholding California law providing that appellate counsel may limit his or her role to filing a brief summarizing the case and record and requesting the court to examine record for non-frivolous issues). On the other hand, since there is no constitutional right to counsel for indigent prisoners seeking postconviction collateral relief, there is no requirement that withdrawal be justified in an Anders brief if a state has provided counsel for postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987) (counsel advised the court that there were no arguable bases for collateral relief).

\footnote{1907} Ross v. Moffitt, 417 U.S. 600 (1974). \textit{See also} Fuller v. Oregon, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who...
have a constitutional right to an attorney to prepare a petition for collateral relief in state court.  

This right to legal assistance, especially in the context of the constitutional right to the writ of habeas corpus, means that in the absence of other adequate assistance, as through a functioning public defender system, a State may not deny prisoners legal assistance of another inmate and it must make available certain minimal legal materials.  

**The Criminal Sentence.**—A convicted defendant may not be imprisoned solely because of his indigency. *Williams v. Illinois* held that it was a denial of equal protection for a State to extend the term of imprisonment of a convicted defendant beyond the statutory maximum provided because he was unable to pay the fine which was also levied upon conviction. And *Tate v. Short* held that in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not jail persons who cannot pay the fine, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to pay. Willful refusal to pay may, however, be punished by confinement.  

**Voting.**—Treatment of indigency in a civil type of “fundamental interest” analysis came in *Harper v. Virginia Board of Elections*, in which it was held that “a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.” The Court emphasized both the fundamental interest in the right to vote and the suspect character of wealth classifications. “[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one’s ability to participate
intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored." 1914

The two factors—classification in effect along wealth lines and adverse effect upon the exercise of the franchise—were tied together in Bullock v. Carter 1915 in which the setting of high filing fees for certain offices was struck down upon analysis by a stricter standard than the traditional equal protection standard but apparently a somewhat lesser standard than the compelling state interest test. The Court held that the high filing fees were not rationally related to the State’s interest in allowing only serious candidates on the ballot since some serious candidates could not pay the fees while some frivolous candidates could and that the State could not finance the costs of holding the elections from the fees when the voters were thereby deprived of their opportunity to vote for candidates of their preferences.

Extending Bullock, the Court has held it impermissible for a State to deny indigents, and presumably other persons unable to pay filing fees, a place on the ballot for failure to pay filing fees, however reasonable in the abstract the fees may be. A State must provide such persons a reasonable alternative for getting on the ballot. 1916 Similarly, a sentencing court in revoking probation must consider alternatives to incarceration if the reason for revocation is the inability of the indigent to pay a fine or restitution. 1917

Access to Courts.—In Boddie v. Connecticut, 1918 Justice Harlan carried a majority of the Court with him in utilizing a due process analysis to evaluate the constitutionality of a State’s filing fees in divorce actions which a group of welfare assistance recipients attacked as preventing them from obtaining divorces. The Court found that when the State monopolized the avenues to a pacific settlement of a dispute over a fundamental matter such as marriage—only the State could terminate the marital status—then it denied due process by inflexibly imposing fees which kept some persons from using that avenue. Justice Harlan’s opinion averred that a facially neutral law or policy which did in fact deprive an individual of a protected right would be held invalid even though as a general proposition its enforcement served a legitimate governmental interest. The opinion concluded with a cautioning obser-

1914 383 U.S. at 668. The Court observed that “the right to vote is too precious, too fundamental to be so burdened or conditioned.” Id. at 670.
1917 405 U.S. 134 (1972).
1918 415 U.S. 709 (1974). Note that the Court indicated that Bullock was decided on the basis of restrained review. Id. at 715.
vation that the case was not to be taken as establishing a general right to access to the courts.

The Boddie opinion left unsettled whether a litigant’s interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In United States v. Kras, the Court held that the imposition of filing fees which blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in Boddie was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, did not rise to the same constitutional level as marriage. Moreover, a debtor’s access to relief in bankruptcy had not been monopolized by the government to the same degree as dissolution of a marriage; one may, “in theory, and often in actuality,” manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as Kras, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of filing fees that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance.
The continuing vitality of *Griffin v. Illinois*, however, is seen in the case of *M.L.B. v. S.L.J.*, where the Court considered whether a state seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in *Boddie*, the State, Mississippi, had afforded the plaintiff a trial on the merits, and thus the “monopolization” of the avenues of relief alleged in *Boddie* was not at issue. As in *Boddie*, however, the Court focused on the substantive due process implications of the state limiting “(c)hoices about marriage, family life, and the upbringing of children,” while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the state pay for the transcript needed for an effective appeal, and that the forced dissolution of parental rights was “more substantial than mere loss of money,” the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

**Educational Opportunity.**—Making even clearer its approach in *de facto* wealth classification cases, the Court in *San Antonio School District v. Rodriguez* rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in 49 of the 50 States of financing schools primarily out of property taxes, with the consequent effect that the funds available to local school boards within each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a *de facto* wealth classification that was “suspect” or that education was a “fundamental” right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to

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1925 519 U.S. at 121 (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)).
the State’s interest in protecting and promoting local control of education.\footnote{1927}{411 U.S. at 44-55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id. at 63.}

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the “class of disadvantaged ‘poor’” in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. “The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.”\footnote{1928}{411 U.S. at 20. \textit{But see} id. at 70, 117–24 (Justices Marshall and Douglas dissenting).} No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. But a right to education is not expressly protected by the Constitution, continued the Court, nor should it be implied simply because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in
spending and those differences could not be correlated with differences in educational quality.\textsuperscript{1929}

\textit{Rodriguez} clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a \textit{per se} suspect classification but it must be related to some interest that is fundamental, and \textit{Rodriguez} doctrinally imposed a considerable barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and the family reveal, that barrier has not held entirely firm, but within a range of interests, such as education,\textsuperscript{1930} the case remains strongly viable. Relying on \textit{Rodriguez} and distinguishing \textit{Plyler}, the Court in \textit{Kadrmas v. Dickinson Public Schools}\textsuperscript{1931} rejected an indigent student’s equal protection challenge to a state statute permitting school districts to charge a fee for school bus service, in the process rejecting arguments that either “strict” or “heightened” scrutiny is appropriate. Moreover, the Court concluded, there is no constitutional obligation to provide bus transportation, or to provide it for free if it is provided at all.\textsuperscript{1932}

\textbf{Abortion.}—\textit{Rodriguez} furnished the principal analytical basis for the Court’s subsequent decision in \textit{Maher v. Roe},\textsuperscript{1933} holding that a State’s refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in \textit{Rodriguez}, it was held that the indigent are not a suspect class.\textsuperscript{1934} Again, as in \textit{Rodriguez} and in \textit{Kras}, it was held that when the State has not monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental failure to offer assistance, while funding alternative actions, is not

\begin{itemize}
  \item \textsuperscript{1929}411 U.S. at 29-39. \textit{But see} id. at 62 (Justice Brennan dissenting), 70, 110-17 (Justices Marshall and Douglas dissenting).
  \item \textsuperscript{1930}\textit{Cf.} \textit{Plyler v. Doe}, 457 U.S. 202 (1982). The case is also noted for its proposition that there were only two equal protection standards of review, a proposition even the author of the opinion has now abandoned.
  \item \textsuperscript{1931}487 U.S. 450 (1988). This was a 5–4 decision, with Justice O’Connor’s opinion of the Court being joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy, and with Justices Marshall, Brennan, Stevens, and Blackmun dissenting.
  \item \textsuperscript{1932}487 U.S. at 462. The plaintiff child nonetheless continued to attend school, so the requirement was reviewed as an additional burden but not a complete obstacle to her education.
  \item \textsuperscript{1933}432 U.S. 464 (1977).
  \item \textsuperscript{1934}432 U.S. at 470-71.
\end{itemize}
undue governmental interference with a fundamental right.\footnote{432 U.S. at 471-74. See also Harris v. McRae, 448 U.S. 297, 322–23 (1980). Total deprivation was the theme of Boddie and was the basis of concurrences by Justices Stewart and Powell in Zablocki v. Redhail, 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that Dandridge v. Williams, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. But see Califano v. Goldfarb, 430 U.S. 199 (1977), where the majority rejected the dissent’s argument that this should always be the same.} Expansion of this area of the law of equal protection seems especially limited.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

APPORTIONMENT OF REPRESENTATION

With the abolition of slavery by the Thirteenth Amendment, the African Americans formerly counted as three-fifths of persons would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, there appeared the prospect that politically the readmitted Southern States would gain the advantage in Congress when combined with Democrats from the North. Inasmuch as the South was adamantly opposed to African American suffrage, all the congressmen would be elected by whites. Many wished to provide for the enfranchisement of the African American and proposals to this effect were voted on in both the House and the Senate, but only a few Northern States
permitted African Americans to vote and a series of referenda on the question in Northern States revealed substantial white hostility to the proposal. Therefore, a compromise was worked out, to effect a reduction in the representation of any State which discriminated against males in the franchise.1936

No serious effort was ever made in Congress to effectuate § 2, and the only judicial attempt was rebuffed.1937 With subsequent constitutional amendments adopted and the utilization of federal coercive powers to enfranchise persons, the section is little more than an historical curiosity.1938

However, in Richardson v. Ramirez,1939 the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of § 2 the equal protection clause was simply inapplicable.

**Sections 3 and 4.** No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies

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1936 See generally J. James, The Framing of the Fourteenth Amendment (1956).
1937 Saunders v. Wilkins, 152 F. 2d 235 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946).
1938 The section did furnish a basis to Justice Harlan to argue that inasmuch as § 2 recognized a privilege to discriminate subject only to the penalty provided, the Court was in error in applying § 1 to questions relating to the franchise. Compare Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (Justice Harlan concurring and dissenting), with id. at 229, 250 (Justice Brennan concurring and dissenting). The language of the section recognizing 21 as the usual minimum voting age no doubt played some part in the Court’s decision in Oregon v. Mitchell as well. It should also be noted that the provision relating to “Indians not taxed” is apparently obsolete now in light of an Attorney General ruling that all Indians are subject to taxation. 39 Op. Att’y Gen. 518 (1940).
thereof. But congress may by a vote of two thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**DISQUALIFICATION AND PUBLIC DEBT**

The right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of enumerated individuals. In 1872, the disabilities were removed, by a blanket act, from all persons “except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States.” Twenty-six years later, Congress enacted that “the disability imposed by section 3 . . . incurred heretofore, is hereby removed.”

Although § 4 “was undoubtedly inspired by the desire to put beyond question the obligations of the Government issued during the Civil War, its language indicates a broader connotation. . . . ‘[T]he validity of the public debt . . . [embraces] whatever concerns the integrity of the public obligations,” and applies to government bonds issued after as well as before adoption of the Amendment.
SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ENFORCEMENT

Generally

In the aftermath of the Civil War, Congress, in addition to proposing to the States the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments. Several of these laws were general civil rights statutes which broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the States, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years. In the end, Reconstruction was abandoned and with rare exceptions no cases were brought under the remaining statutes until fairly recently. Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the commerce clause until Supreme Court decisions indicated an expansive concept of congressional power under the Civil War Amendments, which culminated in broad provisions against private in-congressional power." On a Confederate bond problem, see Branch v. Haas, 16 F. 53 (C.C.M.D. Ala. 1883) (citing Hannauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1873), and Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869)). See also The Pietro Campanella, 73 F. Supp. 18 (D. Md. 1947).


1947 The 1957 and 1960 Acts primarily concerned voting; the public accommodations provisions of the 1964 Act and the housing provisions of the 1968 Act were premised on the commerce power.

The story of these years is largely an account of the “state action” doctrine in terms of its limitation on congressional powers; lately, it is the still-unfolding history of the lessening of the doctrine combined with a judicial vesting of discretion in Congress to reinterpret the scope and content of the rights guaranteed in these three constitutional amendments.

The Court, however, ultimately rejected this expansion of the powers of Congress in United States v. Morrison. In Morrison, the Court invalidated a provision of the Violence Against Women Act that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment, dismissing the dicta in Guest, and reaffirming the precedents of the Civil Rights Cases and United States v. Harris. The Court also rejected the assertion that the legislation was “corrective” of bias in the courts, as the suits are not directed at the State or any state actor, but rather at the individuals committing the criminal acts.

194982 Stat. 73, 18 U.S.C. § 245. The statute has yet to receive its constitutional testing.
1950On the “state action” doctrine in the context of the direct application of § 1 of the Fourteenth Amendment, see discussion supra.
1953529 U.S. at 621 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948), for the proposition that the Amendment “erects no shield against merely private conduct, however discriminatory or wrongful”).
1954This holding may have broader significance for federal civil rights law. For instance, 42 U.S.C. § 1985(3) (a civil statute paralleling the criminal statute held unconstitutional in United States v. Harris) lacks a “color of law” requirement. Although the requirement was read into it in Collins v. Hardyman, 341 U.S. 651 (1951), to avoid constitutional problems, it was read out again in Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (while it might be “difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State”). What the unanimous Court held in Griffin was that an “intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” Id. at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress’ powers under § 5 of the 14th Amendment. Id. at 107.
State Action

In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to federal courts, and to provide criminal and civil liability for state officials and agents or persons associated with them who violate protected rights. These statutory measures designed to eliminate discrimination “under color of law” present no problems of constitutional foundation, although there may well be other problems of application. But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875 Congress had prescribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public
amusement. The *Civil Rights Cases*\(^{1963}\) found this enactment to be beyond Congress’ power to enforce the Fourteenth Amendment. It was observed that § 1 was prohibitory only upon the States and did not reach private conduct. Therefore, Congress’ power under § 5 to enforce § 1 by appropriate legislation was held to be similarly limited. “It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.”\(^{1964}\)

The holding in this case had already been preceded by *United States v. Cruikshank*\(^{1965}\) and by *United States v. Harris*\(^{1966}\) in which the Federal Government had prosecuted individuals for killing and injuring African Americans. The Amendment did not increase the power of the Federal Government vis-a-vis individuals, the Court held, only with regard to the States themselves.\(^{1967}\)

*Cruikshank* did, however, recognize a small category of federal rights which Congress could protect against private deprivation, rights which the Court viewed as deriving particularly from one’s status as a citizen of the United States and which Congress had a general police power to protect.\(^{1968}\) These rights included the right to vote in federal elections, general and primary,\(^{1969}\) the right to federal protection while in the custody of federal officers,\(^{1970}\) and

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\(^{1964}\) 109 U.S. at 11. Justice Harlan’s dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action, but also viewed places of public accommodation as serving a quasi-public function which satisfied the state action requirement in any event. Id. at 46–48, 56–57.

\(^{1965}\) 92 U.S. 542 (1876). The action was pursuant to § 6 of the 1870 Enforcement Act, ch. 114, 16 Stat. 140, the predecessor of 18 U.S.C. § 241.


\(^{1968}\) United States v. Cruikshank, 92 U.S. 542, 552–53, 556 (1876). The rights which the Court assumed the United States could protect against private interference were the right to petition Congress for a redress of grievances and the right to vote free of interference on racial grounds in a federal election.

\(^{1969}\) Ex parte Yarbrough, 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941).

\(^{1970}\) Logan v. United States, 144 U.S. 263 (1892).
the right to inform federal officials of violations of federal law. In re Quarles, 158 U.S. 532 (1895). The right of interstate travel is a basic right derived from the Federal Constitution which Congress may protect. In United States v. Williams, in the context of state action, the Court divided four-to-four over whether the predecessor of 18 U.S.C. § 241 in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights "which Congress can beyond doubt constitutionally secure against interference by private individuals." This issue was again reached in United States v. Price and United States v. Guest, again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the due process and equal protection clauses.

Inasmuch as both Price and Guest concerned conduct which the Court found implicated with sufficient state action, it did not then have to reach the question of § 241's constitutionality when applied to private action interfering with rights not the subject of a general police power. But Justice Brennan, responding to what he apparently interpreted as language in the opinion of the Court construing Congress' power under § 5 of the Fourteenth Amendment to be limited by the state action requirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress' power was broader. "Although the Fourteenth Amendment itself . . . 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state offi-

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1971 In re Quarles, 158 U.S. 532 (1895). See also United States v. Waddell, 112 U.S. 76 (1884) (right to homestead).
1976 Justice Brennan's opinion, 383 U.S. at 774, was joined by Chief Justice Warren and Justice Douglas. His statement that "[a] majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy," id. at 782 (emphasis by the Justice), was based upon the language of Justice Clark, joined by Justices Black and Fortas, id. at 761, that inasmuch as Justice Brennan reached the issue the three Justices were also of the view "that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." Id. at 762. In the opinion of the Court, Justice Stewart disclaimed any intention of speaking of Congress' power under § 5. Id. at 755.
cers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection. 1977 The Justice throughout the opinion refers to “Fourteenth Amendment rights,” by which he meant rights which, in the words of 18 U.S.C. § 241, are “secured . . . by the Constitution,” i.e., by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the equal protection clause commands that all “public facilities owned or operated by or on behalf of the State,” be available equally to all persons; that access is a right granted by the Constitution, and § 5 is viewed “as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens.” Within this discretion is the “power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals” who would deny such access. 1978

Congressional Definition of Fourteenth Amendment Rights

In the Civil Rights Cases, 1979 the Court observed that “the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation,” that is, laws to counteract and overrule those state laws which § 1 forbade the States to adopt. And the Court was quite clear that under its responsibilities of judicial review, it was the body which would determine that a state law was impermissible and that a federal law passed pursuant to § 5 was necessary and proper to enforce § 1. 1980 But in United States v. Guest, 1981 Justice Brennan protested that this view “attributes a far too limited objective to the Amendment’s sponsors,” that in fact “the primary purpose of the Amendment was to augment the power of Congress, not the judiciary.”

In Katzenbach v. Morgan, 1982 Justice Brennan, this time speaking for the Court, in effect overrode the limiting view and

1977 383 U.S. at 782.
1982 384 U.S. 641 (1966). Besides the ground of decision discussed here, Morgan also advanced an alternative ground for upholding the statute. That is, Congress might have overridden the state law not because the law itself violated the equal protection clause but because being without the vote meant the class of persons was subject to discriminatory state and local treatment and giving these people the bal-
posed a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to § 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965 1983 barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument “that an exercise of congressional power under § 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce.” 1984 Inasmuch as the Court had previously upheld an English literacy requirement under equal protection challenge, 1985 acceptance of the argument would have doomed the federal law. But, said Justice Brennan, Congress itself might have questioned the justifications put forward by the State in defense of its law and might have concluded that instead of being supported by acceptable reasons the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations which might have led Congress to its conclusion; since Congress “brought a specially informed legislative competence” to an appraisal of voting requirements, “it was Congress’ prerogative to weigh” the considerations and the Court would sustain the conclusion if “we perceive a basis upon which Congress might predicate a judgment” that the requirements constituted invidious discrimination. 1986

In dissent, Justice Harlan protested that “[i]n effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 ‘discretion’ by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court.” 1987 Justice Brennan rejected this reasoning. “We emphasize that Congress’ power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these...
guarantees.” Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on Morgan in expanding federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimination; on the other hand, it enacted provisions of law purporting to overrule the Court’s expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking Morgan.

Congress’ power under Morgan returned to the Court’s consideration when several States challenged congressional legislation lowering the voting age in all elections to 18 and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that Morgan’s vitality was in some considerable doubt, at least with regard to the reach which many observers had previously seen. Four Justices accepted Morgan in full, while one Justice rejected it totally and another would have limited it to racial cases. The other three Justices seemingly restricted Morgan to its alternate rationale in passing on the age reduction provision but the manner in which they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.

1994 400 U.S. at 152, 204–09 (Justice Harlan).
1996 The age reduction provision could be sustained “only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are ‘compelling.’” 400 U.S. at 296 (Justices Stewart and Blackmun and Chief Justice Burger). In their view, Congress did not have that power and Morgan did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that “Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the
More recent decisions read broadly Congress’ power to make determinations that appear to be substantive decisions with respect to constitutional violations. Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that “result” in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments. Moreover, movements have been initiated in Congress by opponents of certain of the Court’s decisions, notably the abortion rulings, to utilize § 5 powers to curtail the rights the Court has derived from the due process clause and other provisions of the Constitution. The case of City of Boerne v. Flores, however, illustrates that the Court will not always defer to Congress’s determination as to what legislation is appropriate to “enforce” the provisions of the Fourteenth Amendment. In Flores, the Court held that the Religious Freedom Restoration Act, which expressly overturned the Court’s narrowing of religious protections under Employment Division v. Smith, exceeded congressional power under section 5 of the Fourteenth Amendment. Although the Court allowed that Congress’s power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be “a congruence and proportionality” between the means adopted and the injury to be remedied. Unlike the pervasive suppression of the African American vote in the South which led to the passage of the Voting Rights Act, there was no similar history of

privilege of taking up residence in another State” without reaching an independent determination of their own that the requirements did in fact have that effect. Id. at 286.


2003 521 U.S. at 533.
religious persecution constituting an "egregious predicate" for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates.\textsuperscript{2004}

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in Boerne, as litigants precluded from arguing that a state's sovereign immunity has been abrogated under Article I congressional powers\textsuperscript{2005} seek alternative legislative authority in section 5. For instance, in \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank},\textsuperscript{2006} a bank which had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the state's sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the states was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the states, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.\textsuperscript{2007}

A similar result was reached regarding the application of the Age Discrimination in Employment Act to state agencies in \textit{Kimel v. Florida Board of Regents}.\textsuperscript{2008} In determining that the Act did not meet the "congruence and proportionality" test, the Court fo-

\textsuperscript{2004} 521 U.S. at 532-33. The Court found that the Religious Freedom Restoration Act was "so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id.
\textsuperscript{2005} 527 U.S. at 627 (1999). See also \textit{College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board}, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act amendment to Lanham Act subjecting states to suits for false advertising is not a valid exercise of Fourteenth Amendment power; neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in one's business interests qualifies as a "property" right protected by the Due Process Clause).
\textsuperscript{2007} 528 U.S. 62 (2000). Again, the issue of the Congress's power under § 5 of the Fourteenth Amendment arose because sovereign immunity prevents private actions against states from being authorized under Article I powers such as the commerce clause.
cused not just on whether state agencies had engaged in age discrimination, but on whether states had engaged in unconstitutional age discrimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination by states, finding that there is a rational basis for states to use age as a proxy for other qualities, abilities and characteristics. Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found that the ADEA, as applied to the states, was “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior.”

Despite what was considered by many to be a better developed legislative record, the Court in *Board of Trustees of the University of Alabama v. Garrett* also rejected the recovery of money damages against states, this time under the Americans with Disabilities Act of 1990 (ADA). The ADA prohibits employers, including states, from “discriminating against a qualified individual with a disability” and requires employers to “make reasonable accommodations [for] . . . physical or mental limitations . . . . unless [to do so] . . . would impose an undue hardship on the . . . business.” Although the Court had previously overturned discriminatory legislative classifications based on disability in *City of Cleburne v. Cleburne Living Center*, the Court had held that determinations of when states had violated the Equal Protection clause in such cases were to be made under the relatively deferential standard of rational basis review. Thus, failure of an employer to provide the kind “reasonable accommodations” required under the ADA would not generally rise to the level of a violation of the 14th Amendment, and instances thereof did not qualify as a “history and pattern of unconstitutional employment discrimination.” Thus, according the Court, not only did the legislative history developed by the Congress not establish a pattern of unconstitutional discrimination against the disabled by states, but the re-

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2010 528 U.S. at 86, quoting City of Boerne, 521 U.S. at 532.


2016 As Justice Breyer pointed out in the dissent, however, the Court seemed determined to accord Congress a degree of deference more commensurate with review of an agency action, discounting portions of the legislative history as based on secondary source materials, unsupported by evidence and not relevant to the inquiry at hand.
requirements of the ADA would be out of proportion to the alleged offenses.
FIFTEENTH AMENDMENT

RIGHT OF CITIZENS TO VOTE

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RIGHT OF CITIZENS TO VOTE

FIFTEENTH AMENDMENT

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ABOLITION OF SUFFRAGE QUALIFICATIONS ON BASIS OF RACE

Adoption and Judicial Enforcement

Adoption.—The final decision of Congress not to include anything relating to the right to vote in the Fourteenth Amendment, aside from the provisions of § 2, left the issue of Negro suffrage solely with the States, and Northern States were generally as loath as Southern to grant the ballot to African Americans, both the newly-freed and those who had never been slaves. But in the second session of the 39th Congress, the right to vote was extended to African Americans by statute in the District of Columbia and the territories, and the seceded States as a condition of readmission had to guarantee Negro suffrage. Following the election of President Grant, the “lame duck” third session of the Fortieth Congress sent the proposed Fifteenth Amendment to the States for ratification. The struggle was intense because Congress was divided into roughly three factions: those who opposed any federal constitutional guarantee of Negro suffrage, those who wanted to go beyond a limited guarantee and enact universal male suffrage, including abolition of all educational and property-holding tests, and those who wanted or who were willing to settle for an amendment merely

1 See discussion under “Apportionment of Representation,” supra. Of course, the equal protection clause has been extensively utilized by the Court to protect the right to vote. See “Fundamental Interests: The Political Process,” supra.


3 Id. at 29–31; ch. 6, 14 Stat. 375 (1866) (District of Columbia); ch. 15, 14 Stat. 379 (1867) (territories); ch. 36, 14 Stat. 391 (1867) (admission of Nebraska to statehood upon condition of guaranteeing against racial qualifications in voting); ch. 153, 14 Stat. 428 (1867) (First Reconstruction Act).
proscribing racial qualifications in determining who could vote under any other standards the States wished to have. The latter group ultimately prevailed.

The Judicial View of the Amendment.—In its initial appraisals of this Amendment, the Supreme Court appeared disposed to emphasize only its purely negative aspects. “The Fifteenth Amendment,” it announced, did “not confer the right . . . [to vote] upon any one,” but merely “invested the citizens of the United States with a new constitutional right which is . . . exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.” But in subsequent cases, the Court, conceding “that this article” has originally been construed as giving “no affirmative right to the colored man to vote” and as having been “designed primarily to prevent discrimination against him,” professed to be able “to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words ‘white man’ as a qualification for voting, this provision did, in effect, confer on him the right to vote, because . . . it annulled the discriminating word white, and this left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which would give the right of voting exclusively to white people.”

Although “the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote,” the Amendment “is cast in fundamental terms” that transcend that immediate objective, and “grants protection to all persons, not just members of a particular race.” Moreover, the Court has construed “race” broadly to comprehend classifications based on ancestry as well as those based on race. “Ancestry can be a proxy for race,” the Court explained recently, finding such a proxy in Hawaii’s limitation of the right to vote in a statewide election for an office responsible for

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6Ex parte Yarbrough, 110 U.S. 651, 665 (1884); Guinn v. United States, 238 U.S. 347, 363 (1915). A state constitutional provision limiting the right of suffrage to whites was automatically nullified by ratification of the Fifteenth Amendment. Neal v. Delaware, 103 U.S. 370 (1881).
8Guinn v. United States, 238 U.S. 347 (1915) (invalidating Oklahoma exception to literacy requirement for any “lineal descendants” of persons entitled to vote in 1866).
administering a trust for the benefit of persons who can trace their ancestry to Hawaiian inhabitants of 1778.  

**Grandfather Clauses.**—Until quite recently, the history of the Fifteenth Amendment has been largely a record of belated judicial condemnation of various state efforts to disenfranchise African Americans either overtly through statutory enactment or covertly through inequitable administration of electoral laws and toleration of discriminatory membership practices of political parties. Of several devices which have been voided, one of the first to be held unconstitutional was the “grandfather clause.” Beginning in 1895, several States enacted temporary laws whereby persons who had been voters, or descendants of those who had been voters, on January 1, 1867, could be registered notwithstanding their inability to meet any literacy requirement. Unable because of the date to avail themselves of the exemption, African Americans were disabled to vote on grounds of illiteracy or through discriminatory administration of literacy tests, while illiterate whites were permitted to register without taking any tests. With the achievement of the intended result, most States permitted their laws to lapse, but Oklahoma’s grandfather clause had been enacted as a permanent amendment to the state constitution. A unanimous Court condemned the device as recreating and perpetuating “the very conditions which the [Fifteenth] Amendment was intended to destroy.”

The Court did not experience any difficulty in voiding a subsequent Oklahoma statute of 1916 which provided that all persons, except those who voted in 1914, who were qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916, with some exceptions for sick and absent persons who were given an additional brief period to register, should be permanently disenfranchised. The Fifteenth Amendment, Justice Frankfurter declared for the Court, nullified “sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.” The impermissible effect of the statute, said the Court, was automatically to continue as permanent voters, without their being obliged to register again, all white persons who were on registration lists in 1914 by virtue of the previously invalidated grandfather clause, whereas African Americans, prevented

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from registering by that clause, had been afforded only a 20-day registration opportunity to avoid permanent disenfranchisement.

**The White Primary.**—Indecision was displayed by the Court, however, when it was called upon to deal with the exclusion of African Americans from participation in primary elections. Prior to its becoming convinced that primary contests were in fact elections to which federal constitutional guarantees applied, the Court had relied upon the equal protection clause to strike down the Texas White Primary Law and a subsequent Texas statute which contributed to a like exclusion by limiting voting in primary elections to members of state political parties as determined by the central committees thereof. When exclusion of African Americans was thereafter perpetuated by political parties not acting in obedience to any statutory command, this discrimination was for a time viewed as not constituting state action and therefore as not prohibited by either the Fourteenth or the Fifteenth Amendments. This holding was reversed nine years later when the Court declared that where the selection of candidates for public office is entrusted by statute to political parties, a political party in making its selection at a primary election is a state agency, and hence it may not under the Fifteenth Amendment exclude African Americans from such elections. An effort by South Carolina to escape the effects of this ruling by repealing all statutory provisions regulating primary elections and political organizations conducting them was nullified by a lower federal court with no doctrinal difficulty, but the Supreme Court, although nearly unanimous on the result, was unable to come to a majority agreement with regard to the exclusion of African Americans by the Jaybird Association, a county-wide organization which, independently of state laws and the use of state election machinery or funds, nearly monopolized access to Democratic nomination for local offices. The exclusionary policy was held unconstitutional but there was no opinion of the Court.

**Literacy Tests.**—At an early date the Court held that literacy tests which are drafted so as to apply alike to all applicants for the voting franchise would be deemed to be fair on their face and in the absence of proof of discriminatory enforcement could not be
said to deny equal protection. 19 But an Alabama constitutional amendment the legislative history of which disclosed that both its object and its intended administration were to disenfranchise African Americans was condemned as violative of the Fifteenth Amendment. 20

**Racial Gerrymandering.**—The Court’s series of decisions interpreting the equal protection clause as requiring the apportionment and districting of state legislatures solely on a population basis 21 had its beginning in *Gomillion v. Lightfoot,* 22 in which the Court found a Fifteenth Amendment violation in the redrawing of a municipal boundary line into a 28-sided figure which excluded from the city all but four or five of 400 African Americans but no whites, and which thereby continued white domination of municipal elections. Subsequent decisions, particularly concerning the validity of multi-member districting and alleged dilution of minority voting power, were decided under the equal protection clause, 23 and in *City of Mobile v. Bolden,* 24 in the course of a considerably divided decision with respect to the requirement of discriminatory motivation in Fifteenth Amendment cases, 25 a plurality of the Court sought to restrict the Fifteenth Amendment to cases in which there is official denial or abridgment of the right to register and vote, and to exclude indirect dilution claims. 26 Congressional amendment of § 2 of the Voting Rights Act may obviate the further development of constitutional jurisprudence in this area, however. 27

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21 See “Apportionment and Districting,” supra.
25 On the issue of motivation versus impact under the equal protection clause, see discussion of “Testing Facialy Neutral Classifications Which Impact on Minorities” in the Fourteenth Amendment, supra. On the plurality’s view, see 446 U.S. at 61-65. Justice White appears clearly to agree that purposeful discrimination is a necessary component of equal protection clause violation, and may have agreed as well that the same requirement applies under the Fifteenth Amendment. Id. at 94–103. Only Justice Marshall unambiguously adhered to the view that discriminatory effect is sufficient. Id. at 125. See also Beer v. United States, 425 U.S. 130, 146–49 & nn.3–5 (1976) (dissenting).
26 446 U.S. at 65. At least three Justices disagreed with this view and would apply the Fifteenth Amendment to vote dilution claims. Id. at 84 n.3 (Justice Stevens concurring), 102 (Justice White dissenting), 125–35 (Justice Marshall dissenting). The issue was reserved in Rogers v. Lodge, 458 U.S. 613, 619 n.6 (1982).
Congressional Enforcement

Although the Fifteenth Amendment is “self-executing,” the Court early emphasized that the right granted to be free from racial discrimination “should be kept free and pure by congressional enactment whenever that is necessary.” Following ratification of the Fifteenth Amendment in 1870, Congress passed the Enforcement Act of 1870, which had started out as a bill to prohibit state officers from restricting suffrage on racial grounds and providing criminal penalties and ended up as a comprehensive measure aimed as well at private action designed to interfere with the rights guaranteed under the Fourteenth and Fifteenth Amendments. Insofar as this legislation reached private action, it was largely nullified by the Supreme Court and the provisions aimed at official action proved ineffectual and much of it was later repealed. More recent legislation has been much more far-reaching in this respect and has been sustained.

State Action.—Like § 1 of the Fourteenth, § 1 of the Fifteenth Amendment prohibits official denial of the rights therein guaranteed, giving rise to the “state action” doctrine. Nevertheless, the Supreme Court in two early cases seemed to be of the opinion that Congress could protect the rights against private deprivation, on the theory that Congress impliedly had power to protect the enjoyment of every right conferred by the Constitution against depriva-

29 Ex parte Yarbrough, 110 U.S. 651, 665 (1884).
32 See “State Action,” under the Fourteenth Amendment, supra. “The State . . . must mean not private citizens but those clothed with the authority and influence which official position affords. The application of the prohibition of the Fifteenth Amendment to ‘any State’ is translated by legal jargon to read ‘State Action.’ This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored.” Terry v. Adams, 345 U.S. 461, 473 (1953) (Justice Frankfurter concurring).
tion from any source. But in *James v. Bowman* the Court held that legislation based on the Fifteenth Amendment which attempted to prohibit private as well as official interference with the right to vote on racial grounds was unconstitutional, and that interpretation was not questioned until 1941. But the Court’s interpretation of the “state action” requirement in cases brought under § 1 of the Fifteenth Amendment narrowed the requirement there and opened the possibility, when these decisions are considered with cases decided under the Fourteenth Amendment, that Congress is not limited to legislation directed to official discrimination.

Thus, in *Smith v. Allwright*, the exclusion of African Americans from political parties without the compulsion or sanction of state law was nonetheless held to violate the Fifteenth Amendment because political parties were so regulated otherwise as to be in effect agents of the State and thus subject to the Fifteenth Amendment; additionally, in one passage the Court suggested that the failure of the State to prevent the racial exclusion might be the act implicating the Amendment. Then, in *Terry v. Adams*, the political organization was not regulated by the State at all and selected its candidates for the Democratic primary election by its own processes; all eligible white voters in the jurisdiction were members of the organization but African Americans were excluded. Nevertheless, the Court held that this exclusion violated the Fifteenth Amendment, although no rationale was agreed upon by a majority of the Justices. Four of them thought the case simply indistinguishable from any source.

33 The idea was fully spelled out in Justice Bradley’s opinion on circuit in United States v. Cruikshank, 25 Fed. Cas. 707, 712, 713 (No. 14,897) (C.C.D. La. 1874). The Supreme Court’s decision in United States v. Cruikshank, 92 U.S. 542, 555–56 (1876), and United States v. Reese, 92 U.S. 214, 217–18 (1876), may be read to support the contention. Ex parte Yarbrough, 110 U.S. 651 (1884), involved a federal election and the assertion of congressional power to reach private interference with the right to vote in federal elections, but the Court went further to broadly state the power of Congress to protect the citizen in the exercise of rights conferred by the Constitution, among which was the right to be free from discrimination in voting protected by the Fifteenth Amendment. Id. at 665–66.

34 190 U.S. 127 (1903), holding unconstitutional Rev. Stat. § 5507, which was § 5 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140.


36 See “Congressional Definition of Fourteenth Amendment Rights,” supra.


38 “The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restrictions by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.” 321 U.S. at 664.

able from *Smith v. Allwright* and thus did not deal with the central issue. Justice Frankfurter thought the participation of local elected officials in the processes of the organization was sufficient to implicate state action. Three Justices thought that when a purportedly private organization is permitted by the State to assume the functions normally performed by an agency of the State, then that association is subject to federal constitutional restrictions, but this opinion also, in citing selected passages of *Yarbrough* and *Reese* and Justice Bradley’s circuit opinion in *Cruikshank*, appeared to be suggesting that the state action requirement is not indispensable. The 1957 Civil Rights Act included a provision prohibiting private action with intent to intimidate or coerce persons in respect of voting in federal elections and authorized the Attorney General to seek injunctive relief against such private actions regardless of the character of the election. The 1965 Voting Rights Act went further and prohibited and penalized private actions to intimidate voters in federal, state, or local elections. The Supreme Court has yet to consider the constitutionality of these sections.

**Federal Remedial Legislation.**—The history of federal remedial legislation is of modern vintage. The 1957 Civil Rights Act authorized the Attorney General of the United States to seek injunctive relief to prevent interference with the voting rights of citizens. The 1960 Civil Rights Act expanded on this authorization by permitting the Attorney General to seek a court finding of “pat-
tern or practice” of discrimination in any particular jurisdiction and authorizing upon the entering of such a finding the registration of all qualified persons in the jurisdiction of the race discriminated against by court-appointed referees. This authorization moved the vindication of voting rights beyond a case-by-case process. Further amendments were added in 1964.\(^{49}\) Finally, in the Voting Rights Act of 1965\(^{50}\) Congress went substantially beyond what it had done before. It provided that if the Attorney General determined that any State or political subdivision maintained on November 1, 1964, any “test or device”\(^{51}\) and that less than 50 per cent of the voting age population in that jurisdiction was registered on November 1, 1964, or voted in the 1964 presidential election, such tests or devices were to be suspended for five years and no person should be denied the right to vote on the basis of such a test or device. A State could reinstitute such a test or device within the prescribed period only by establishing in a three-judge court in the District of Columbia that the test or device did not have a discriminatory intent or effect and the covered jurisdiction could only change its election laws in that period by obtaining the approval of the Attorney General or a three-judge court in the District of Columbia. The Act also provided for the appointment of federal examiners who could register persons meeting nondiscriminatory state qualifications who then must be permitted to vote.

These laws the Supreme Court upheld and expansively applied. In United States v. Mississippi,\(^{52}\) the Court held that the Attorney General was properly authorized to sue for preventive relief to protect the right of citizens to vote, that the State could be sued,
and that various election officers were defendants and the suit could not be defeated by the resignation of various officers. A lower federal court’s judgment voiding an “interpretation test,” which required an applicant to interpret a section of the state or federal constitution to the satisfaction of the voting registrar was approved in *Louisiana v. United States*. The test was bad because it vested vast discretion in the registrars to determine qualifications while imposing no definite and objective standards for administration of the tests, a system which the evidence showed had been administered so as to disqualify African Americans and qualify whites. The Court also affirmed the lower court’s decree invalidating imposition of a new objective test for new voters unless the State required all present voters to reregister so that all voters were tested by the same standards.

But it was in upholding the constitutionality of the 1965 Act that the Court sketched in the outlines of a broad power in Congress to enforce the Fifteenth Amendment. While § 1 authorized the courts to strike down state statutes and procedures which denied the vote on the basis of race, the Court held, § 2 authorized Congress to go beyond proscribing certain discriminatory statutes and practices to “enforcing” the guarantee by any rational means at its disposal. The standard was the same as that employed under the “necessary and proper” clause supporting other congressional legislation. Congress was therefore justified in deciding that certain areas of the Nation were the primary locations of voting discrimination and in directing its remedial legislation to those areas. Congress chose a rational formula based on the existence of voting tests which could be used to discriminate and based on low registration or voting rates demonstrating the likelihood that the tests had been so used; it could properly suspend for a period all literacy tests in the affected areas upon findings that they had been administered discriminatorily and that illiterate whites had been registered while both literate and illiterate African Americans had not been; it could require the States to seek federal permission to reinstitute old tests or to institute new ones; and it could provide for federal examiners to register qualified voters. The nearly unanimous decision affords Congress a vast amount of discretion to enact measures designed to enforce the Amendment through broad affirmative prescriptions rather than through proscriptions of specific

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practices.\(^{55}\) Subsequent decisions confirm the reach of this power. In one case, the Court held that evidence of discrimination in the educational opportunities available to black children in the county as compared to that available to white children during the period in which most of the adults who were now potential voters were in school precluded a North Carolina county from reinstituting a literacy test because of the past educational discrimination.\(^{56}\) And when Congress in 1970\(^{57}\) suspended for a five-year period literacy tests throughout the Nation, the Court unanimously sustained the action as a valid measure to enforce the Fifteenth Amendment.\(^{58}\)

Moreover, in \textit{City of Rome v. United States},\(^{59}\) the Court read even more broadly the scope of Congress' remedial powers under § 2 of the Fifteenth Amendment, paralleling the similar reasoning under § 5 of the Fourteenth. The jurisdiction sought to escape from coverage of the Voting Rights Act by showing that it had not utilized any discriminatory practices within the prescribed period. The lower court had found that the City had engaged in practices without any discriminatory motive, but that its practices had had a discriminatory impact. The City thus argued that, inasmuch as the Fifteenth Amendment reached only purposeful discrimination, the Act's proscription of effect as well as purpose went beyond Congress' power. The Court held, however, that even if discriminatory intent was a prerequisite to finding a violation of § 1 of the Fifteenth Amendment by the courts,\(^{60}\) Congress had the authority to go beyond that and proscribe electoral devices that had the effect of discriminating. The section, like § 5 of the Fourteenth Amendment, was in effect a “necessary and proper clause” enabling Congress to enact enforcement legislation which was rationally related to the end sought and which was not prohibited by it but was consistent with the letter and spirit of the Constitution, even though the actual practice outlawed or restricted would not be judicially found to violate the Fifteenth Amendment. In so acting, Congress could prohibit state action that perpetuated the effect of past discrimination, or that, because of the existence of past purposeful discrimination, raised a risk of purposeful discrimination that might not lend itself to judicial invalidation. “It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices

\(^{55}\) Justice Black dissented from that portion of the decision which upheld the requirement that before a State could change its voting laws it must seek approval of the Attorney General or a federal court. 383 U.S. at 355.


\(^{59}\) 446 U.S. 156 (1980).

that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in McCulloch v. Maryland and Ex parte Virginia . . . . Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.”

City of Rome is highly significant for the validity of congressional additions to the Voting Rights Act. In 1975 and 1982, the Act was extended and revised to increase its effectiveness, and the 1982 Amendments were addressed to revitalizing § 2 of the Act, which, unlike §§ 4 and 5, which remain limited to a number of jurisdictions, applies nationwide. As enacted in 1965, § 2 largely tracked the language of the Fifteenth Amendment itself. In City of Mobile v. Bolden, a majority of the Court agreed that the Fifteenth Amendment and § 2 of the Act were coextensive, but the Justices did not agree on the meaning thus to be ascribed to the

61 City of Rome v. United States, 446 U.S. 156, 177 (1980). Justices Powell, Rehnquist, and Stewart dissented. Id. at 193, 206. In Lopez v. Monterey County, 525 U.S. 266 (1999), the Court reiterated its prior holdings that Congress may exercise its enforcement power based on discriminatory effects, and without any finding of discriminatory intent.

62 The 1975 amendments, Pub. L. 94–73, 89 Stat. 400, extended the Act for seven years, expanded it to include those areas having minorities distinguished by their language, i.e., “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage,” § 207, 42 U.S.C. § 1973 1(c)(3), in which certain statistical tests are met and requiring election materials be provided in the language(s) of the group(s), and enlarged to require bilingual elections if more than five percent of the voting age citizens of a political subdivision are members of a single language minority group whose illiteracy rate is higher than the national rate. The 1982 amendments, Pub. L. 97–205, 96 Stat. 131, in addition to the § 2 revision, alter after August 5, 1984, the provisions by which a covered jurisdiction may take itself from under the Act by proving to the special court in the District of Columbia that it has complied with the Act for the previous ten years and that it has taken positive steps both to encourage minority political participation and to remove structural barriers to minority electoral influence. Moreover, the amendments change the result in Beer v. United States, 425 U.S. 130 (1976), in which the Court had held that a covered jurisdiction was precluded from altering a voting practice only if the change would lead to a retrogression in the position of racial minorities; even if the change was only a little ameliorative of existing discrimination, the jurisdiction could implement it. The 1982 amendments provide that the change may not be approved if it would “perpetuate voting discrimination,” in effect applying the new § 2 results test to preclearance procedures. S. Rep. No. 417, 97th Congress, 2d Sess. 12 (1982); H.R. Rep. No. 227, 97th Congress, 1st Sess. 28 (1981).

63 Private parties may bring suit to challenge electoral practices under § 2. It provided, before the 1982 amendments, that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”

64 446 U.S. 55 (1980). See id. at 60–61 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger), and id. at 105 n.2 (Justice Marshall dissenting).
statute. A plurality did believe that because the constitutional provision reached only purposeful discrimination, § 2 was similarly limited. It was one major purpose of Congress in 1982 to set aside this possible interpretation and provide that any electoral practice “which results in a denial or abridgement” of the right to vote on account of race or color will violate the Act. The subsequent Court adoption, or re-adoption, of the standards by which it can be determined when a practice denies or abridges the right to vote, though couched in terms of proving intent or motivation, may well bring the constitutional and statutory standards into such close agreement that the constitutional question will not arise.

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65 In § 3 of the 1982 amendments, § 2 of the Act was amended by the insertion of the quoted phrase and the addition of a nonexclusive list of factors making up a totality of circumstances test by which a violation of § 2 would be determined. 96 Stat. 134, amending 42 U.S. § 1973. Without any discussion of the Fifteenth Amendment, the Court in Thornburg v. Gingles, 478 U.S. 30 (1986), interpreted and applied the “totality of the circumstances” test in the context of multimember districting.

SIXTEENTH AMENDMENT

INCOME TAX

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

History and Purpose of the Amendment
The ratification of the Sixteenth Amendment was the direct consequence of the Court’s decision in 1895 in Pollock v. Farmers’ Loan & Trust Co.,\(^1\) whereby the attempt of Congress the previous year to tax incomes uniformly throughout the United States\(^2\) was held by a divided Court to be unconstitutional. A tax on incomes derived from property,\(^3\) the Court declared, was a “direct tax” which Congress under the terms of Article I, § 2, and § 9, could impose only by the rule of apportionment according to population. Scarcely fifteen years earlier the Justices had unanimously sustained\(^4\) the collection of a similar tax during the Civil War,\(^5\) the only other occasion preceding the Sixteenth Amendment in which Congress had ventured to utilize this method of raising revenue.\(^6\)

During the interim between the Pollock decision in 1895 and the ratification of the Sixteenth Amendment in 1913, the Court gave evidence of a greater awareness of the dangerous consequences to national solvency which that holding threatened, and partially circumvented the threat, either by taking refuge in redefinitions of “direct tax” or, and more especially, by emphasizing, virtually to the exclusion of the former, the history of excise tax-

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1. 157 U.S. 429 (1895); 158 U.S. 601 (1895).
2. Ch. 349, § 27, 28 Stat. 509, 553.
3. The Court conceded that taxes on incomes from “professions, trades, employments, or vocations” levied by this act were excise taxes and therefore valid. The entire statute, however, was voided on the ground that Congress never intended to permit the entire “burden of the tax to be borne by professions, trades, employments, or vocations” after real estate and personal property had been exempted, 158 U.S. at 635.
6. For an account of the Pollock decision, see “From the Hylton to the Pollock Case,” supra.
ation. Thus, in a series of cases, notably *Nicol v. Ames*, 7 *Knowlton v. Moore*, 8 and *Patton v. Brady*, 9 the Court held the following taxes to have been levied merely upon one of the “incidents of ownership” and hence to be excises: a tax which involved affixing revenue stamps to memoranda evidencing the sale of merchandise on commodity exchanges, an inheritance tax, and a war revenue tax upon tobacco on which the hitherto imposed excise tax had already been paid and which was held by the manufacturer for resale.

Under this approach the Court thus found it possible to sustain a corporate income tax as an excise “measured by income” on the privilege of doing business in corporate form. 10 The adoption of the Sixteenth Amendment, however, put an end to speculation whether the Court, unaided by constitutional amendment, would persist along these lines of construction until it had reversed its holding in the *Pollock* case. Indeed, in its initial appraisal 11 of the Amendment it classified income taxes as being inherently “indirect.” “[T]he command of the amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the *Pollock* case by which alone such taxes were removed from the great class of excises, duties, and imports subject to the rule of uniformity and were placed under the other or direct class.” 12 “[T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged.” 13

**Income Subject to Taxation**

Building upon definitions formulated in cases construing the Corporation Tax Act of 1909, 14 the Court initially described income as the “gain derived from capital, from labor, or from both combined,” inclusive of the “profit gained through a sale or conversion of capital assets”; 15 in the following array of factual situations it

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7 173 U.S. 509 (1899).
8 178 U.S. 41 (1900).
9 184 U.S. 608 (1902).
subsequently applied this definition to achieve results that have been productive of extended controversy.

**Corporate Dividends: When Taxable.**—Rendered in conformity with the belief that all income “in the ordinary sense of the word” became taxable under the Sixteenth Amendment, the earliest decisions of the Court on the taxability of corporate dividends occasioned little comment. Emphasizing that in all such cases the stockholder is to be viewed as “a different entity from the corporation,” the Court in *Lynch v. Hornby*,\(^\text{16}\) held that a cash dividend equal to 24 percent of the par value of the outstanding stock and made possible largely by the conversion into money of assets earned prior to the adoption of the Amendment, was income taxable to the stockholder for the year in which he received it, notwithstanding that such an extraordinary payment might appear “to be a mere realization in possession of an inchoate and contingent interest . . . [of] the stockholder . . . in a surplus of corporate assets previously existing.” In *Peabody v. Eisner*,\(^\text{17}\) decided on the same day and deemed to have been controlled by the preceding case, the Court ruled that a dividend paid in the stock of another corporation, although representing earnings that had accrued before ratification of the Amendment, was also taxable to the shareholder as income. The dividend was likened to a distribution in specie.

Two years later the Court decided *Eisner v. Macomber*,\(^\text{18}\) and the controversy which that decision precipitated still endures. Departing from the interpretation placed upon the Sixteenth Amendment in the earlier cases, i.e., that the purpose of the Amendment was to correct the “error” committed in the *Pollock* case and to restore income taxation to “the category of indirect taxation to which it inherently belonged,” Justice Pitney, who delivered the Court’s opinion in the *Eisner* case, indicated that the sole purpose of the Sixteenth Amendment was merely to “remove the necessity which otherwise might exist for an apportionment among the States of taxes laid on income.” He thereupon undertook to demonstrate how

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\(^{16}\)247 U.S. 339, 344 (1918). On the other hand, in *Lynch v. Turrish*, 247 U.S. 221 (1918), the single and final dividend distributed upon liquidation of the entire assets of a corporation, although equaling twice the par value of the capital stock, was declared to represent only the intrinsic value of the latter earned prior to the effective date of the Amendment, and hence was not taxable as income to the shareholder in the year in which actually received. Similarly, in *Southern Pacific Co. v. Lowe*, 247 U.S. 330 (1918), dividends paid out of surplus accumulated before the effective date of the Amendment by a railway company whose entire capital stock was owned by another railway company and whose physical assets were leased to and used by the latter was declared to be a nontaxable bookkeeping transaction between virtually identical corporations.

\(^{17}\)247 U.S. 347 (1918).

\(^{18}\)252 U.S. 189, 206–08 (1920).
what was not income, but an increment of capital when received, could later be transmitted into income upon sale or conversion and could be taxed as such without the necessity of apportionment. In short, the term “income” acquired to some indefinite extent a restrictive significance.

Specifically, the Court held that a stock dividend was capital when received by a stockholder of the issuing corporation and did not become taxable without apportionment, that is, as “income,” until sold or converted, and then only to the extent that a gain was realized upon the proportion of the original investment which such stock represented. “A stock dividend,” Justice Pitney maintained, “far from being a realization of profits to the stockholder, . . . tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution . . . not only does a stock dividend really take nothing from . . . the corporation and add nothing to that of the shareholder, but . . . the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is richer because of an increase of his capital, at the same time shows [that] he has not realized or received any income in what is no more than a “bookkeeping transaction.” But conceding that a stock dividend represented a gain, the Justice concluded that the only gain taxable as “income” under the Amendment was “a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being ‘derived,’ that is, received or drawn by the recipient [the taxpayer] for his separate use, benefit, and disposal; . . . .” Only the latter in his opinion, answered the description of income “derived” from property, whereas “a gain accruing to a capital, not a growth or an increment of value in the investment” did not. 19

Although steadfastly refusing to depart from the principle 20 which it asserted in Eisner v. Macomber, the Court in subsequent

19252 U.S. at 211-12. This decision has been severely criticized, chiefly on the ground that gains accruing to capital over a period of years are not income and are not transformed into income by being dissevered from capital through sale or conversion. Critics have also experienced difficulty in understanding how a tax on income which has been severed from capital can continue to be labeled a “direct” tax on the capital from which the severance has thus been made. Finally, the contention has been made that in stressing the separate identities of a corporation and its stockholders, the Court overlooked the fact that when a surplus has been accumulated, the stockholders are thereby enriched, and that a stock dividend may therefore be appropriately viewed simply as a device whereby the corporation reinvests money earned in their behalf. See also Merchants’ L. & T. Co. v. Smietanka, 255 U.S. 509 (1921).

20Reconsideration was refused in Helvering v. Griffiths, 318 U.S. 371 (1943).
decisions has, however, slightly narrowed the application thereof. Thus, the distribution, as a dividend, to stockholders of an existing corporation of the stock of a new corporation to which the former corporation, under a reorganization, had transferred all its assets, including a surplus of accumulated profits, was treated as taxable income. The fact that a comparison of the market value of the shares in the older corporation immediately before, with the aggregate market value of those shares plus the dividend shares immediately after, the dividend showed that the stockholders experienced no increase in aggregate wealth was declared not to be a proper test for determining whether taxable income had been received by these stockholders. 21 On the other hand, no taxable income was held to have been produced by the mere receipt by a stockholder of rights to subscribe for shares in a new issue of capital stock, the intrinsic value of which was assumed to be in excess of the issuing price. The right to subscribe was declared to be analogous to a stock divided, and “only so much of the proceeds obtained upon the sale of such rights as represents a realized profit over cost” to the stockholders was deemed to be taxable income. 22 Similarly, on grounds of consistency with Eisner v. Macomber, the Court has ruled that inasmuch as it gave the stockholder an interest different from that represented by his former holdings, a dividend in common stock to holders of preferred stock, 23 or a dividend


In Marr v. United States, 268 U.S. 536, 540–41 (1925), it was held that the increased market value of stock issued by a new corporation in exchange for stock of an older corporation, the assets of which it was organized to absorb, was subject to taxation as income to the holder, notwithstanding that the income represented profits of the older corporation and that the capital remained invested in the same general enterprise. Weiss v. Stearn, 265 U.S. 242 (1924), in which the additional value in new securities was held not taxable, was likened to Eisner v. Macomber, and distinguished from the aforementioned cases on the ground of preservation of corporate identity. Although the “new corporation had . . . been organized to take over the assets and business of the old . . . , the corporate identity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State with presumably the same powers as the old. There was also no change in the character of the securities issued,” with the result that “the proportional interest of the stockholder after the distribution of the new securities was deemed to be exactly the same.”

Under existing law, however, when a taxpayer exchanges all of the outstanding stock for a minor percentage of the total shares of a larger corporation, plus cash, the gain to be recognized in full is not limited to the cash but embraces the excess of the sum of the market value of the stock acquired plus the cash over the cost of the original stock plus the expenses of the sale. Turnbow v. Commissioner, 368 U.S. 337 (1961).


in preferred stock accepted by a holder of common stock was income taxable under the Sixteenth Amendment.

**Corporate Earnings: When Taxable.**—On at least two occasions the Court has rejected as untenable the contention that a tax on undistributed corporate profits is essentially a penalty rather than a tax or that it is a direct tax on capital and hence is not exempt from the requirement of apportionment. Inasmuch as the exaction was permissible as a tax, its validity was held not to be impaired by its penal objective, namely, “to force corporations to distribute earnings in order to create a basis for taxation against the stockholders.” As to the added contention that, because liability was assessed upon a mere purpose to evade imposition of surtaxes against stockholders, the tax was a direct tax on a state of mind, the Court replied that while “the existence of the defined purpose was a condition precedent to the imposition of the tax liability, . . . [did] not prevent it from being a true income tax within the meaning of the Sixteenth Amendment.” Subsequently, in *Helvering v. Northwest Steel Mills*, this appraisal of the constitutionality of the undistributed profits tax was buttressed by the following observation: “It is true that the surtax is imposed upon the annual income only if it is not distributed, but this does not serve to make it anything other than a true tax on income within the meaning of the Sixteenth Amendment. Nor is it true . . . that because there might be an impairment of the capital stock, the tax on the current annual profit would be the equivalent of a tax upon capital. Whether there was an impairment of the capital stock or not, the tax . . . was imposed on profits earned during . . .—a tax year—and therefore on profits constituting income within the meaning of the Sixteenth Amendment.”

Likening a cooperative to a corporation, federal courts have also declared to be taxable income the net earnings of a farmers’ cooperative, a portion of which was used to pay dividends on capital stock without reference to patronage. The argument that such

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25 Helvering v. National Grocery Co., 304 U.S. 282, 288–89 (1938). In Helvering v. Mitchell, 303 U.S. 391 (1938), the defendant contended the collection of fifty per cent of any deficiency in addition to the deficiency alleged to have resulted from a fraudulent intent to evade the income tax amounted to the imposition of a criminal penalty. The Court, however, described the additional sum as a civil and not a criminal sanction, and one which could be constitutionally employed to safeguard the Government against loss of revenue. In contrast, the exaction upheld in *Helvering v. National Grocery Co.*, though conceded to possess the attributes of a civil sanction, was declared to be sustainable as a tax.
26 311 U.S. 46 (1940). *See also* Crane-Johnson Co. v. Helvering, 311 U.S. 54 (1940).
27 311 U.S. at 53.
earnings were in reality accumulated savings of its patrons which the cooperative held as their bailee was rejected as unsound for the reason that “while those who might be entitled to patronage dividends have . . . an interest in such earnings, such interest never ripens into an individual ownership . . . until and if a patronage dividend be declared.” Had such net earnings been apportioned to all of the patrons during the year, “there might be . . . a more serious question as to whether such earnings constituted ‘income’ [of the cooperative] within the Amendment.”

Similarly, the power of Congress to tax the income of an unincorporated joint stock association has been held to be unaffected by the fact that under state law the association is not a legal entity and cannot hold title to property, or by the fact that the shareholders are liable for its debts as partners.

Whether subsidies paid to corporations in money or in the form of grants of land or other physical property constitute taxable income has also concerned the Court. In Edwards v. Cuba Railroad, it ruled that subsidies of lands, equipment, and money paid by Cuba for the construction of a railroad were not taxable income but were to be viewed as having been received by the railroad as a reimbursement for capital expenditures in completing such project. On the other hand, sums paid out by the Federal Government to fulfill its guarantee of minimum operating revenue to railroads during the six months following relinquishment of their control by that government were found to be taxable income. Such payments were distinguished from those excluded from computation of income in the preceding case in that the former were neither bonuses, nor gifts, nor subsidies, “that is, contributions to capital.”

Other corporate receipts deemed to be taxable as income include the following: (1) “insiders profits” realized by a director and stockholder of a corporation from transaction in its stock, which, as required by the Securities and Exchange Act, are paid over to the corporation; (2) money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble damage antitrust recovery; and (3) compensation awarded for the fair rental value of trucking facilities operated by the taxpayer under control and possession of the Government during World War II, for in the last

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28 Farmers Union Co-op v. Commissioner, 90 F.2d 488, 491, 492 (8th Cir. 1937).
30 268 U.S. 628 (1925).
instance the Government never acquired title to the property and had not damaged it beyond ordinary wear. 35

**Gains: When Taxable.**—“Although economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset.” 36 Thus, when through forfeiture of a lease a landlord became possessed of a new building erected on his land by the outgoing tenant, the resulting gain to the former was taxable to him in that same year.

“... The fact that the gain is a portion of the value of the property received by the . . . [landlord] does not negative its realization. . . . [Nor is it necessary] to recognition of taxable gain that . . . [the landlord] should be able to sever the improvement begetting the gain from his original capital.” Hence, the taxpayer was incorrect in contending “that the Amendment does not permit the taxation of such [a] gain without apportionment amongst the states.” 37 Consistent with this holding, the Court has also ruled that when an apartment house was acquired by bequest subject to an unassumed mortgage and several years thereafter was sold for a price slightly in excess of the mortgage, the basis for determining the gain from that sale was the difference between the selling price, undiminished by the amount of the mortgage, and the value of the property at the time of the acquisition, less deductions for depreciation during the years the building was held by the taxpayer. The latter's contention that the Revenue Act, as thus applied, taxed something which was not revenue was declared to be unfounded. 38

As against the argument of a donee that a gift of stock became a capital asset when received and that therefore, when disposed of, no part of that value could be treated as taxable income to said donee, the Court has declared that it was within the power of Congress to require a donee of stock, who sells it at a profit, to pay income tax on the difference between the selling price and the value when the donor acquired it. 39 Moreover, “the receipt in cash or property . . . not [being] the only characteristic of realization of

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37 309 U.S. at 468, 469.
38 Crane v. Commissioner, 331 U.S. 1, 15–16 (1947).
39 The donor could not, “by mere gift, enable another to hold this stock free from . . . [the] right . . . [of] the sovereign to take part of any increase in its value when separated through sale or conversion and reduced to possession.” Taft v. Bowers, 278 U.S. 470, 482, 484 (1929). However, when a husband, as part of a divorce settlement, transfers his own corporate stock to his wife, he is deemed to have exchanged the stock for the release of his wife's inchoate, marital rights, the value of which are presumed to be equal to the current, market value of the stock, and, accordingly, he incurs a taxable gain measured by the difference between the initial purchase price of the stock and said market value upon transfer. United States v. Davis, 370 U.S. 65 (1962).
income to a taxpayer on the cash receipt basis," it follows that one who is normally taxable only on the receipt of interest payments cannot escape taxation thereon by giving away his right to such income in advance of payment. When "the taxpayer does not receive payment of income in money or property, realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him." Hence an owner of bonds, reporting on the cash receipts basis, who clipped interest coupons therefrom before their due date and gave them to his son, was held to have realized taxable income in the amount of said coupons, notwithstanding that his son had collected them upon maturity later in the year.40


The Court was also called upon to resolve questions as to whether gains, realized after 1913, on transactions consummated prior to ratification of the Sixteenth Amendment are taxable, and if so, how such tax is to be determined. The Court's answer generally has been that if the gain to the person whose income is under consideration became such subsequent to the date at which the amendment went into effect, namely, March 1, 1913, and is a real, and not merely an apparent, gain, said gain is taxable. Thus, one who purchased stock in 1912 for $500 could not limit his taxable gain to the difference, $695, the value of the stock on March 1, 1913 and $13,931, the price obtained on the sale thereof, in 1916; but was obliged to pay tax on the entire gain, that is the difference between the original purchase price and the proceeds of the sale, Goodrich v. Edwards, 255 U.S. 527 (1921). Conversely, one who acquired stock in 1912 for $291,600 and who sold the same in 1916 for only $269,346, incurred a loss and could not be taxed at all, notwithstanding the fact that on March 1, 1913, his stock had depreciated to $148,635. Walsh v. Brewster, 255 U.S. 536 (1921). On the other hand, although the difference between the amount of life insurance premiums paid as of 1908, and the amount distributed in 1919, when the insured received the amount of his policy plus cash dividends apportioned thereto since 1908, constituted a gain, that portion of the latter which accrued between 1908 and 1913 was deemed to be an accretion of capital and hence not taxable. Lucas v. Alexander, 279 U.S. 473 (1929).

However, a litigant who, in 1915, reduced to judgment a suit pending on February 26, 1913, for an accounting under a patent infringement, was unable to have treated as capital, and excluded from the taxable income produced by such settlement, that portion of his claim which had accrued prior to March 1, 1913. Income within the meaning of the Amendment was interpreted to be the fruit that is born of capital, not the potency of fruition. All that the taxpayer possessed in 1913 was a contingent chose in action which was inchoate, uncertain, and contested. United States v. Safety Car Heating Co., 297 U.S. 88 (1936).

Similarly, purchasers of coal lands subject to mining leases executed before adoption of the Amendment could not successfully contend that royalties received during 1920–1926 were payments for capital assets sold before March 1, 1913, and hence not taxable. Such an exemption, these purchasers argued, would have been in harmony with applicable local law whereunder title to coal passes immediately to the lessee on execution of such leases. To the Court, on the other hand, such leases were not to be viewed "as a 'sale' of the mineral content of the soil" inasmuch as minerals "may or may not be present in the leased premises, and may or may not be found therein, . . . If found, their abstraction . . . is a time consuming operation and the payments made by the lessee . . . do not normally become payable as the result of a single transaction. . . ." The result for tax purposes would have been the same even had the lease provided that title to the minerals would pass
Income from Illicit Transactions.—In *United States v. Sullivan*, the Court held that gains derived from illicit traffic were taxable income under the act of 1921. Said Justice Holmes for the unanimous Court: “We see no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.” Consistent therewith, although not without dissent, the Court ruled that Congress has the power to tax as income moneys received by an extortioner, and, more recently, that embezzled money is taxable income of an embezzler in the year of embezzlement. “When the taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, ‘he has received income . . . , even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.”

Deductions and Exemptions.—The authorization contained in the Sixteenth Amendment to tax income “from whatever source derived” does not preclude Congress from granting exemptions. Thus, the fact that “under the Revenue Acts of 1913, 1916, 1917, and 1918, stock fire insurance companies were taxed . . . upon gains realized from the sale . . . of property accruing subsequent to March 1, 1913,” but were not so taxed by the Revenue Acts of 1921, 1924, and 1926, did not prevent Congress, under the terms of the Revenue Act of 1928, from taxing all the gain attributable to increase in value after March 1, 1913, which such a company realized from a sale of property in 1928. The constitutional power of Congress to tax a gain being well established, Congress was declared competent to choose “the moment of its realization and the amount realized”; and “its failure to impose a tax upon the increase in value in the earlier years . . . [could not] preclude it from taxing the gain in the year when realized . . . .” Congress is equally well equipped with the “power to condition, limit, or deny deductions from gross incomes in order to arrive at the net that it chooses to only “on severance by the lessee.” Bankers Coal Co. v. Burnet, 287 U.S. 308 (1932); Burnet v. Harmel, 287 U.S. 103, 106–107, 111 (1932).

41 274 U.S. 259 (1927).
42 42 Stat. 227, 250, 268.
Accordingly, even though the rental value of a building used by its owner does not constitute income within the meaning of the Amendment, Congress was competent to provide that an insurance company shall not be entitled to deductions for depreciation, maintenance, and property taxes on real estate owned and occupied by it unless it includes in its computation of gross income the rental value of the space thus used.\footnote{Helvering v. Independent Life Ins. Co., 292 U.S. 371, 381 (1934); Helvering v. Winmill, 305 U.S. 79, 84 (1938).}

Also, a taxpayer who erected a $3,000,000 office building on land, the unimproved worth of which was $660,000, and who subsequently purchased the lease on the latter for $2,100,000 is entitled to compute depreciation over the remaining useful life of the building on that portion of $1,440,000, representing the difference between the price and the unimproved value, as may be allocated to the building; but he cannot deduct the $1,440,000 as a business expense incurred in eliminating the cost of allegedly excessive rentals under the lease, nor can he treat that sum as a prepayment of rent to be amortized over the 21-year period that the lease was to run.\footnote{A tax on the rental value of property so occupied is a direct tax on the land and must be apportioned. Helvering v. Independent L. Ins. Co., 292 U.S. 371, 378–79 (1934).}

\textbf{Diminution of Loss}.—Mere diminution of loss is neither gain, profit, nor income. Accordingly, one who in 1913 borrowed a sum of money to be repaid in German marks and who subsequently lost the money in a business transaction cannot be taxed on the curtailment of debt effected by using depreciated marks in 1921 to settle

\footnote{292 U.S. at 381. Expenditures incurred in the prosecution of work under a contract for the purpose of earning profits are not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income. Accordingly, a dredging contractor, recovering a judgment for breach of warranty of the character of the material to be dredged, must include the amount thereof in the gross income of the year in which it was received, rather than of the years during which the contract was performed, even though it merely represents a return of expenditures made in performing the contract and resulting in a loss. The gain or profit subject to tax under the Sixteenth Amendment is the excess of receipts over allowable deductions during the accounting period, without regard to whether or not such excess represents a profit ascertained on the basis of particular transactions of the taxpayer when they are brought to a conclusion. Burnet v. Sanford & Brooks Co., 282 U.S. 359 (1931).

The grant on denial of deductions is not based on the taxpayers’ engagement in constitutionally protected activities, and, accordingly, no deduction is granted for sums expended in combating legislation, enactment of which would destroy taxpayer’s business. Cammarano v. United States, 358 U.S. 498 (1959).

Likewise, when tank truck owners, either intentionally for business reasons or unintentionally, violate state maximum weight laws, and incur fines, the latter are not deductible, for fines are penalties rather than tolls for the use of highways, and Congress is not to be viewed as having intended to encourage enterprises to violate state policy. Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958); Hoover Express Co. v. United States, 356 U.S. 38 (1958).

\footnote{Millinery Corp. v. Commissioner, 350 U.S. 456 (1956).}
a liability of $798,144 for $113,688, the “saving” having been exceeded by a loss on the entire operation. 52

POPULAR ELECTION OF SENATORS

SEVENTEENTH AMENDMENT

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of each State shall issue writs of election to fill such vacancies: Provided That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

POPULAR ELECTION OF SENATORS

The ratification of the Seventeenth Amendment was the outcome of increasing popular dissatisfaction with the operation of the originally established method of electing Senators. As the franchise became exercisable by greater numbers of people, the belief became widespread that Senators ought to be popularly elected in the same manner as Representatives. Acceptance of this idea was fostered by the mounting accumulation of evidence of the practical disadvantages and malpractices attendant upon legislative selection, such as deadlocks within legislatures resulting in vacancies remaining unfilled for substantial intervals, the influencing of legislative selection by corrupt political organizations and special interest groups through purchase of legislative seats, and the neglect of other duties by legislators as a consequence of protracted electoral contests.

Prior to ratification, however, many States had perfected arrangements calculated to afford the voters more effective control
over the selection of Senators. State laws were amended so as to enable voters participating in primary elections to designate their preference for one of several party candidates for a senatorial seat, and nominations unofficially effected thereby were transmitted to the legislature. Although their action rested upon no stronger foundation than common understanding, the legislatures generally elected the winning candidate of the majority, and, indeed, in two States, candidates for legislative seats were required to promise to support, without regard to party ties, the senatorial candidate polling the most votes. As a result of such developments, at least 29 States by 1912, one year before ratification, were nominating Senators on a popular basis, and, as a consequence, the constitutional discretion of the legislatures had been reduced to little more than that retained by presidential electors.\(^1\)

Very shortly after ratification it was established that if a person possessed the qualifications requisite for voting for a Senator, his right to vote for such an officer was not derived merely from the constitution and laws of the State in which they are chosen but had its foundation in the Constitution of the United States.\(^2\) Consistent with this view, federal courts declared that when local party authorities, acting pursuant to regulations prescribed by a party’s state executive committee, refused to permit an African American, on account of his race, to vote in a primary to select candidates for the office of U.S. Senator, they deprived him of a right secured to him by the Constitution and laws, in violation of this Amendment.\(^3\) An Illinois statute, on the other hand, which required that a petition to form, and to nominate candidates for, a new political party be signed by at least 25,000 voters from at least 50 counties was held not to impair any right under the Seventeenth Amendment, notwithstanding that 52 percent of the State’s voters were residents of one county, 87 percent were residents of 49 counties, and only 13 percent resided in the 53 least populous counties.\(^4\)

\(^1\) G. Haynes, The Senate of the United States 79–117 (1938).

\(^2\) United States v. Aczel, 219 F. 917 (D. Ind. 1915) (citing Ex Parte Yarbrough, 110 U.S. 651 (1884)).

\(^3\) Chapman v. King, 154 F.2d 460 (5th Cir. 1946), cert. denied, 327 U.S. 800 (1946).

PROHIBITION OF INTOXICATING LIQUORS

EIGHTEENTH AMENDMENT

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

PROHIBITION

Validity of Adoption

Cases relating to this question are presented and discussed under Article V.

Enforcement

Cases produced by enforcement and arising under the Fourth and Fifth Amendments are considered in the discussion appearing under the those Amendments.

Repeal

The Eighteenth Amendment was repealed by the Twenty-first Amendment, and titles I and II of the National Prohibition Act\(^1\) were subsequently specifically repealed by the act of August 27, 1935,\(^2\) federal prohibition laws effective in various Districts and Territories were repealed as follows: District of Columbia—April 5,

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\(^1\) Ch. 85, 41 Stat. 305.
\(^2\) Ch. 740, 49 Stat. 872.
1933, and January 24, 1934;\textsuperscript{3} Puerto Rico and Virgin Islands—March 2, 1934;\textsuperscript{4} Hawaii—March 26, 1934;\textsuperscript{5} and Panama Canal Zone—June 19, 1934.\textsuperscript{6}

Taking judicial notice of the fact that ratification of the Twenty-first Amendment was consummated on December 5, 1933, the Supreme Court held that the National Prohibition Act, insofar as it rested upon a grant of authority to Congress by the Eighteenth Amendment, thereupon become inoperative, with the result that prosecutions for violations of the National Prohibition Act, including proceedings on appeal, pending on, or begun after, the date of repeal, had to be dismissed for want of jurisdiction. Only final judgments of conviction rendered while the National Prohibition Act was in force remained unaffected.\textsuperscript{7} Likewise a heavy “special excise tax,” insofar as it could be construed as part of the machinery for enforcing the Eighteenth Amendment, was deemed to have become inapplicable automatically upon the Amendment’s repeal.\textsuperscript{8} However, liability on a bond conditioned upon the return on the day of trial of a vessel seized for illegal transportation of liquor was held not to have been extinguished by repeal when the facts disclosed that the trial took place in 1931 and had resulted in conviction of

\textsuperscript{3} Ch. 19, 48 Stat. 25; ch. 4, 48 Stat. 319.
\textsuperscript{4} Ch. 37, 48 Stat. 361.
\textsuperscript{5} Ch. 88, 48 Stat. 467.
\textsuperscript{6} Ch. 657, 48 Stat. 1116.
\textsuperscript{7} United States v. Chambers, 291 U.S. 217, 222-26 (1934). See also Ellerbee v. Aderhold, 5 F. Supp. 1022 (N.D. Ga. 1934); United States ex rel. Randall v. United States Marshal, 143 F.2d 830 (2d Cir. 1944). The Twenty-first Amendment containing “no saving clause as to prosecutions for offenses therefore committed,” these holdings were rendered unavoidable by virtue of the well-established principle that after “the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force. . . .” The General Pinkey, 9 U.S. (5 Cr.) 281, 283 (1809), quoted in United States v. Chambers, 291 U.S. at 223.
\textsuperscript{8} United States v. Constantine, 296 U.S. 287 (1935). The Court also took the position that even if the statute embodying this “tax” had not been “adopted to penalize violations of the Amendment,” but merely to obtain a penalty for violations of State liquor laws, “it ceased to be enforceable at the date of repeal,” for with the lapse of the unusual enforcement powers contained in the Eighteenth Amendment, Congress could not, without infringing upon powers reserved to the States by the Tenth Amendment, “impose cumulative penalties above and beyond those specified by State law for infractions of . . . [a] State’s criminal code by its own citizens.” Justice Cardozo, with whom Justices Brandeis and Stone were associated, dissented on the ground that, on its face, the statute levying this “tax” was “an appropriate instrument of . . . fiscal policy. . . . Classification by Congress according to the nature of the calling affected by a tax . . . does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state.” Id. at 294, 296, 297-98. In earlier cases it was nevertheless recognized that Congress also may tax what it forbids and that the basic tax on distilled spirits remained valid and enforceable during as well as after the life of the Amendment. See United States v. Yuginovich, 256 U.S. 450, 462 (1921); United States v. Stafoff, 260 U.S. 477 (1923); United States v. Rizzo, 297 U.S. 530 (1936).
the crew. The liability became complete upon occurrence of the breach of the express contractual condition and a civil action for recovery was viewed as unaffected by the loss of penal sanctions.⁹

WOMEN’S SUFFRAGE RIGHTS

NINETEENTH AMENDMENT

SECTION 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

WOMEN’S SUFFRAGE

The Nineteenth Amendment was adopted after a long campaign by its advocates who had largely despaired of attaining their goal through modification of individual state laws. Agitation in behalf of women’s suffrage was recorded as early as the Jackson Administration, but the initial results were meager. Beginning in 1838, Kentucky authorized women to vote in school elections and its action was later copied by a number of other States. Kansas in 1887 granted women unlimited rights to vote in municipal elections. Not until 1869, however, when the Wyoming Territory accorded women suffrage rights on an equal basis with men and continued the practice following admission to statehood, did these advocates register a notable victory. Progress continued to be discouraging, only ten additional States having joined Wyoming by 1914, and judicial efforts having failed.¹ A vigorous campaign brought congressional passage of a proposed Amendment in 1919 and the necessary state ratifications in 1920.²

Following the Supreme Court’s interpretation of the Fifteenth Amendment, the state courts that passed on the effect of the Amendment ruled that it did not confer upon women the right to vote but only the right not to be discriminated against on the basis of their sex in the setting of voting qualifications,³ a formalistic distinction to be sure but one which has restrained the possible applications of the Amendment. In only one case has the Supreme

¹ Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875), a challenge under the privileges of immunities clause of the Fourteenth Amendment.
³ State v. Mittle, 120 S.C. 526 (1922), writ of error dismissed, 260 U.S. 705 (1922); Graves v. Eubank, 205 Ala. 174 (1921); In re Cavelier, 287 N.Y.S. 739 (1936).
Court itself dealt with the Amendment’s effect, holding that a Georgia poll tax statute that exempted from payment women who did not register to vote did not discriminate in any manner against the right of men to vote, although it did note that the Amendment “applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or State.”

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COMMENCEMENT OF THE TERMS OF OFFICE

TWENTIETH AMENDMENT

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose
a Vice President whenever the right of choice shall have de-
volved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th
day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall
have been ratified as an amendment to the Constitution by the
legislatures of three-fourths of the several States within seven
years from the date of its submission.

PURPOSE OF THE AMENDMENT

The Senate Committee on the Judiciary in its report suggested
several reasons for the proposed Twentieth Amendment. It said in
part:

"[W]hen our Constitution was adopted there was some reason
for such a long intervention of time between the election and the
actual commencement of work by the new Congress. . . . Under
present conditions [of communication and transportation] the result
of elections is known all over the country within a few hours after
the polls close, and the Capital City is within a few days' travel of
the remotest portions of the country. . . ."

"Another effect of the amendment would be to abolish the so-
called short session of Congress. . . . Every other year, under our
Constitution, the terms of Members of the House and one-third of
the Members of the Senate expire on the 4th day of March. . . .
Experience has shown that this brings about a very undesirable
legislative condition. It is a physical impossibility during such a
short session for Congress to give attention to much general legis-
lation for the reason that it requires practically all of the time to
dispose of the regular appropriation bills. . . . The result is a con-
gested condition that brings about either no legislation or illy con-
sidered legislation. . . ."

"If it should happen that in the general election in November
in presidential years no candidate for President had received a ma-
Jority of all the electoral votes, the election of a President would
then be thrown into the House of Representatives and the member-
ships of the House of Representatives called upon to elect a Presi-
dent would be the old Congress and not the new one just elected
by the people. It might easily happen that the Members of the
House of Representative, upon whom devolved the solemn duty of
electing a Chief Magistrate for 4 years, had themselves been repu-
diated at the election that had just occurred, and the country would be confronted with the fact that a repudiated House, defeated by the people themselves at the general election, would still have the power to elect a President who would be in control of the country for the next 4 years. It is quite apparent that such a power ought not to exist, and that the people having expressed themselves at the ballot box should through the Representatives then selected, be able to select the President for the ensuing term.

“The question is sometimes asked, Why is an amendment to the Constitution necessary to bring about this desirable change? The Constitution [before this amendment] does not provide the date when the terms of Senators and Representatives shall begin. It does fix the term of Senators at 6 years and of Members of the House of Representatives at 2 years. The commencement of the terms of the first President and Vice President and of Senators and Representatives composing the First Congress was fixed by an act of [the Continental] Congress adopted September 13, 1788, and that act provided 'that the first Wednesday in March next to be the time for commencing proceedings under the Constitution.' It happened that the first Wednesday in March was the 4th day of March, and hence the terms of the President and Vice President and Members of Congress began on the 4th day of March. Since the Constitution provides that the term of Senators shall be 6 years and the term of Members of the House of Representatives 2 years, it follows that this change cannot be made without changing the terms of office of Senators and Representatives, which would in effect be a change of the Constitution. By another act (the act of March 1, 1792) Congress provided that the terms of President and Vice President should commence on the 4th day of March after their election. It seems clear, therefore, that an amendment to the Constitution is necessary to give relief from existing conditions.”

As thus stated, the exact term of the President and Vice President was fixed by the Constitution, Art. II, § 1, cl. 1, at 4 years, and became actually effective, by resolution of the Continental Congress, on the 4th of March 1789. Since this amendment was declared adopted on February 6, 1933, § 1 in effect shortened, by the interval between January 20 and March 4, 1937, the terms of the President and Vice President elected in 1932.

Similarly, it shortened, by the intervals between January 3 and March 4, the terms of Senators elected for terms ending March 4, 1935, 1937, and 1939; and thus temporarily modified the Seventeenth Amendment, fixing the terms of Senators at 6 years. It also

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shortened the terms of Representatives elected to the Seventy-third Congress, by the interval between January 3 and March 4, 1935, and temporarily modified Article I, § 2, clause 1, fixing the terms of Representatives at 2 years.

Section 1 further modifies the Twelfth Amendment in its reference to March 4 as the date by which the House must exercise its choice of a President.

Section 2 supersedes clause 2 of § 4 of Article I. The setting of an exact hour for meeting constitutes a recognition of the long practice of Congress, which in 1867 was for the first time enacted into permanent law, only to be repealed in 1871.

When the 3d of January fell on Sunday (in 1937), Congress did by law appoint a different day for its assemblage.

Pursuant to the authority conferred upon it by § 3 of this amendment, Congress shaped the Presidential Succession Act of 1948 to meet the situation which would arise from the failure of both President elect and Vice President elect to qualify on or before the time fixed for the beginning of the new Presidential term.

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1 Ch. 10, 14 Stat. 378.
3 Ch. 713, 49 Stat. 1826.
4 Ch. 644, 62 Stat. 672, as amended, 3 U.S.C. § 19. See also the discussion of “Presidential Succession” under the Twenty-fifth Amendment, infra.
TWENTY-FIRST AMENDMENT

REPEAL OF THE EIGHTEENTH AMENDMENT

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REPEAL OF THE EIGHTEENTH AMENDMENT

TWENTY-FIRST AMENDMENT

SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

REPEAL OF THE EIGHTEENTH AMENDMENT

Effect of Repeal

The operative effect of section 1, repealing the Eighteenth Amendment, is considered in the commentary dealing with that Amendment.

Scope of Regulatory Power Conferred upon the States

Discrimination Between Domestic and Imported Products.—In a series of interpretive decisions rendered shortly after ratification of the Twenty-first Amendment, the Court established the proposition that States are competent to adopt legislation discriminating against imported intoxicating liquors in favor of those of domestic origin and that such discrimination offends neither the commerce clause of Article I nor the equal protection and due process clauses of the Fourteenth Amendment. Thus, in State Board of Equalization v. Young’s Market Co., a California statute was upheld which exacted a $500 annual license fee for the privilege of importing beer from other States and a $750 fee for the privilege

1 299 U.S. 59 (1936).
of manufacturing beer; and in *Mahoney v. Triner Corp.*, 2 a Minnesota statute was sustained which prohibited a licensed manufacturer or wholesaler from importing any brand of intoxicating liquor containing more than 25 percent alcohol by volume and ready for sale without further processing, unless such brand was registered in the United States Patent Office. Also validated in *Brewing Co. v. Liquor Comm’n* 3 and *Finch & Co. v. McKitrick* 4 were retaliation laws enacted by Michigan and Missouri, respectively, by the terms of which sales in each of these States of beer manufactured in a State already discriminating against beer produced in Michigan or Missouri were rendered unlawful.

Conceding, in *State Board of Equalization v. Young’s Market Co.*, 5 that “prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for ... the privilege of importation ... even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the [seller’s] place of business,” the Court proclaimed that this Amendment “abrogated the right to import free, so far as concerns intoxicating liquors.” Inasmuch as the Amendment was viewed as conferring on states an unconditioned authority to prohibit totally the importation of intoxicating beverages, it logically followed that any discriminatory restriction falling short of total exclusion was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety or morals. As to the contention that the unequal treatment of imported beer would contravene the equal protection clause, the Court succinctly observed that a “classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.” 6

In *Seagram & Sons v. Hostetter* 7 the Court upheld a state statute regulating the price of intoxicating liquors, asserting that the Twenty-first Amendment bestowed upon the States broad regulatory power over the liquor sales within their territories. 8 It was also noted that States are not totally bound by traditional commerce clause limitations when they restrict the importation of toxi-

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2 304 U.S. 401 (1938).
3 305 U.S. 391 (1939).
4 305 U.S. 395 (1939).
5 299 U.S. 59, 62 (1936).
6 299 U.S. at 63-64. In the three decisions rendered subsequently, the Court merely restated these conclusions. The contention that discriminatory regulation of imported liquors violated the due process clause was summarily rejected in *Brewing Co. v. Liquor Comm’n*, 305 U.S. 391, 394 (1939).
cants destined for use, distribution, or consumption within their borders. In such a situation the Twenty-first Amendment demands wide latitude for regulation by the State. The Court added that there was nothing in the Twenty-first Amendment or any other part of the Constitution that required state laws regulating the liquor business to be motivated exclusively by a desire to promote temperance.

Recent cases have undercut the expansive interpretation of state powers in the *Young's Market* and *Triner Corp.* cases. Twenty-first Amendment and Commerce Clause principles are to be harmonized where possible. The Court now phrases the question in terms of “whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.”

“[T]he central power reserved by § 2 of the Twenty-first Amendment [is] that of exercising ‘control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.’” Because “[t]he central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition,” the “central tenet” of the Commerce Clause will control to invalidate “mere economic protectionism,” at least where the state cannot justify its tax or regulation as “designed to promote temperance or to carry out any other purpose of the . . . Amendment.”

**Regulation of Transportation and “Through” Shipments.**—When passing upon the constitutionality of legislation regulating the carriage of liquor interstate, a majority of the Justices seemed disposed to by-pass the Twenty-first Amendment and to resolve the issue exclusively in terms of the commerce clause.

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10 384 U.S. at 35. The Court went on to assert that it was not deciding then whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the commerce clause. Id. at 42–43.
11 384 U.S. at 47.
and state power. This trend toward devaluation of the Twenty-first Amendment was set in motion by Ziffrin, Inc. v. Reeves where a Kentucky statute, forbidding the transportation of intoxicating liquors by carriers other than licensed common carriers, was enforced as to an Indiana corporation, engaged in delivering liquor obtained from Kentucky distillers to consignees in Illinois but licensed only as a contract carrier under the Federal Motor Carriers Act. After acknowledging that “the Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause,” the Court then proceeded to found its ruling largely upon decisions antedating the Amendment which sustained similar state regulations as a legitimate exercise of the police power not unduly burdening interstate commerce. In the light of the contemporaneous cases enumerated in the preceding topic construing the Twenty-first Amendment as according a plenary power to the States, such extended emphasis on the police power and the commerce clause would seem to have been unnecessary. Thereafter, a total eclipse of the Twenty-first Amendment was recorded in Duckworth v. Arkansas and Carter v. Virginia, wherein, without even considering that Amendment, a majority of the Court upheld, as not contravening the commerce clause, statutes regulating the transport through the State of liquor cargoes originating and ending outside the regulating State’s boundaries.

**Regulation of Imports Destined for a Federal Area.**—Importation of alcoholic beverages into a State for ultimate delivery at a National Park located therein but over which the United States retained exclusive jurisdiction has been construed as not constituting “transportation . . . into [a] State for delivery and use therein” within the meaning of § 2 of the Amendment. The importation having had as its objective delivery and use in a federal area over which the State retained no jurisdiction, the increased powers which the State acquired from the Twenty-first Amendment were declared to be inapplicable. California therefore could not extend
the importation license and other regulatory requirements of its Alcoholic Beverage Control Act to a retail liquor dealer doing business in the Park. On the other hand, a state may apply nondiscriminatory liquor regulations to sales at federal enclaves under concurrent federal and state jurisdiction, and may require that liquor sold at such federal enclaves be labelled as being restricted for use only within the enclave.

Foreign Imports, Exports; Taxation, Regulation.—The Twenty-first Amendment did not repeal the export-import clause, Art. I, § 10, cl. 2, nor obliterate the commerce clause, Art. I, § 8, cl. 3. Accordingly, a State cannot tax imported Scotch whiskey while it remains in unbroken packages in the hands of the original importer and prior to [his] resale or use thereof. Likewise, New York is precluded from terminating the business of an airport dealer who, under sanction of federal customs laws, acquired “tax-free liquors for export” from out-of-state sources for resale exclusively to airline passengers, with delivery deferred until the latter arrive at foreign destinations. Similarly, a state “affirmation law” prohibiting wholesalers from charging lower prices on out-of-state sales than those already approved for in-state sales is invalid as a direct regulation of interstate commerce. “The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country . . . or another State.”

Effect of Section 2 upon Other Constitutional Provisions.—Notwithstanding the 1936 assertion that “[a] classification recognized by the Twenty-first Amendment cannot be deemed

20Collins v. Yosemite Park Co., 304 U.S. 518, 537–38 (1938). The principle was reaffirmed in United States v. Mississippi Tax Comm’n, 412 U.S. 363 (1973), holding that Mississippi could not apply its tax regulations to liquor sold to military officers’ clubs and other nonappropriated fund activities located on bases within the State and over which the United States had obtained exclusive jurisdiction. “Absent an appropriate express reservation . . . the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction.” Id. at 375. Nor may states tax importation of liquor for sale at bases over which the United States exercises concurrent jurisdiction only. United States v. Mississippi Tax Comm’n, 421 U.S. 599 (1975).

21North Dakota v. United States, 495 U.S. 423 (1990) (also upholding application to federal enclaves of a uniform requirement that shipments into the state be reported to state officials).


forbidden by the Fourteenth,” the Court has now in a series of cases acknowledged that § 2 of the Twenty-first Amendment did not repeal provisions of the Constitution adopted before ratification of the Twenty-first, save for the severe cabining of commerce clause application to the liquor traffic, but it has formulated no consistent rationale for a determination of the effect of the later provision upon earlier ones. In *Craig v. Boren*, the Court invalidated a state law that prescribed different minimum drinking ages for men and women as violating the equal protection clause. To the State’s Twenty-first Amendment argument, the Court replied that the Amendment “primarily created an exception to the normal operation of the Commerce Clause” and that its “relevance . . . to other constitutional provisions” is doubtful. “Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.”

The square holding on this point is “that the operation of the Twenty-first Amendment does not alter the application of the equal protection standards that would otherwise govern this case.” Other decisions reach the same result but without discussing the application of the Amendment. Similarly, a state “may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment.”

The Court departed from this line of reasoning in *California v. LaRue*. There, the Court sustained the facial constitutionality of regulations barring a lengthy list of actual or simulated sexual activities and motion picture portrayals of these activities in establishments licensed to sell liquor by the drink. In an action attack-

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23 State Bd. of Equalization v. Young’s Market Co., 299 U.S. 59, 64 (1936). In Craig v. Boren, 429 U.S. 190, 206–07 (1976), this case and others like it are distinguished as involving the importation of intoxicants into a State, an area of increased state regulatory power, and as involving purely economic regulation traditionally meriting only restrained review. Neither distinguishing element, of course, addresses the precise language quoted. For consideration of equal protection analysis in an analogous situation, the statutory exemption of state insurance regulations from commerce clause purview, see *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655–74 (1981).


ing the validity of the regulations as applied to ban nude dancing in bars, the Court considered at some length the material adduced at the public hearings which resulted in the rules demonstrating the anti-social consequences of the activities in the bars. It conceded that the regulations reached expression that would not be deemed legally obscene under prevailing standards and reached expressive conduct that would not be prohibitable under prevailing standards, but the Court thought that the constitutional protection of conduct that partakes “more of gross sexuality than of communication” was outweighed by the State’s interest in maintaining order and decency. Moreover, the Court continued, the second section of the Twenty-first Amendment gave an “added presumption in favor of the validity” of the regulations as applied to prohibit questioned activities in places serving liquor by the drink.

A much broader ruling was forthcoming when the Court considered the constitutionality of a state regulation banning topless dancing in bars. “Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State’s power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.” This recurrence to the greater-includes-the-lesser-power argument, relatively rare in recent years, would if it were broadly applied give the States in the area of regulation of alcoholic beverages a review-free discretion of unknown scope.

In 44 Liquormart, Inc. v. Rhode Island, the Court disavowed LaRue and Bellanca, and reaffirmed that, “although the Twenty-


33 409 U.S. at 114-19. In Doran v. Salem Inn, 422 U.S. 922, 922–33 (1975), the Court described its holding in LaRue more broadly, saying that “we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program.”


35 517 U.S. 484 (1996) (statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is not shielded from constitutional scrutiny by the Twenty-first Amendment).
first Amendment limits the effect of the dormant Commerce Clause on a state’s regulatory power over the delivery or use of intoxicating beverages within its borders, ‘the Amendment does not license the States to ignore their obligations under other provisions of the Constitution,’ and therefore does not afford a basis for state legislation infringing freedom of expression protected by the First Amendment. There is no reason, the Court asserted, for distinguishing between freedom of expression and the other constitutional guarantees (e.g., those protected by the Establishment and Equal Protection Clauses) held to be insulated from state impairment pursuant to powers conferred by the Twenty-first Amendment. The Court hastened to add by way of dictum that states retain adequate police powers to regulate "grossly sexual exhibitions in premises licensed to serve alcoholic beverages." "Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." 

Effect on Federal Regulation

The Twenty-first Amendment does not oust all federal regulatory power affecting transportation or sale of alcoholic beverages. Thus, the Court held, the Amendment does not bar a prosecution under the Sherman Antitrust Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado. In a concurring opinion, supported by Justice Roberts, Justice Frankfurter took the position that if the State of Colorado had in fact "authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. . . . [Since] the Sherman Law . . . can have no greater potency than the Commerce Clause itself, it must equally yield to state power drawn from the Twenty-first Amendment."

Following a review of the cases in this area, the Court has observed "that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Al-

37 517 U.S. at 516 (quoting Capital Cities Cable, Inc., v. Crisp, 467 U.S. 691, 712 (1984)).
38 517 U.S. at 515.
though States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a ‘concrete case.’

Invalidating under the Sherman Act a state fair trade scheme imposing a resale price maintenance policy for wine, the Court balanced the federal interest in free enterprise expressed through the antitrust laws against the asserted state interests in promoting temperance and orderly marketing conditions. Since the state courts had found the policy under attack promoted neither interest significantly, the Supreme Court experienced no difficulty in concluding that the federal interest prevailed. Whether more substantial state interests or means more suited to promoting the state interests would survive attack under federal legislation must await further litigation.

Congress may condition receipt of federal highway funds on a state’s agreeing to raise the minimum drinking age to 21, the Twenty-first Amendment not constituting an “independent constitutional bar” to this sort of spending power exercise even though Congress may lack the power to achieve its purpose directly.

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PRESIDENTIAL TENURE

TWENTY-SECOND AMENDMENT

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

LIMITATION OF PRESIDENTIAL TERMS

"By reason of the lack of a positive expression upon the subject of the tenure of the office of President, and by reason of a well-defined custom which has risen in the past that no President should have more than two terms in that office, much discussion has resulted upon this subject. Hence it is the purpose of this . . . [proposal] . . . to submit this question to the people so they, by and through the recognized processes, may express their views upon this question, and if they shall so elect, they may . . . thereby set at rest this problem." ¹ This characterization of the issue, of course, followed soon after the people had expressed their views by electing

Franklin D. Roosevelt to unprecedented third and fourth terms of office, in 1940 and 1944, respectively.

The Twenty-Second Amendment has yet to be tested or applied. Commentary suggests, however, that a number of issues could be raised as to the Amendment’s meaning and application, especially in relation to the Twelfth Amendment. By its terms, the Twenty-Second Amendment bars only the election of two-term Presidents, and this prohibition would not prevent someone who had twice been elected President from succeeding to the office after having been elected or appointed Vice-President. Broader language providing that no such person “shall be chosen or serve as President . . . or be eligible to hold the office” was rejected in favor of the Amendment’s ban merely on election. Whether a two-term President could be elected or appointed Vice President depends upon the meaning of the Twelfth Amendment, which provides that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President.” Is someone prohibited by the Twenty-Second Amendment from being “elected” to the office of President thereby “constitutionally ineligible to the office”? Note also that neither Amendment addresses the eligibility of a former two-term President to serve as Speaker of the House or as one of the other officers who could serve as President through operation of the Succession Act.

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2 H.J. Res. 27, 80th Cong., 1st Sess. (1947) (as introduced). As the House Judiciary Committee reported the measure, it would have made the covered category of former presidents “ineligible to hold the office of President.” H.R. Rep. No. 17, 80th Cong., 1st Sess., at 1 (1947).

3 U.S.C. § 19. For analysis of the Twenty-Second Amendment and its applicability to the various scenarios under which a person can succeed to the office, see Bruce G. Peabody and Scott E. Gant, The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment, 83 Minn. L. Rev. 565 (1999).
PRESIDENTIAL ELECTORS FOR D. C.

TWENTY-THIRD AMENDMENT

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

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

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ENFRANCHISEMENT OF RESIDENTS OF DISTRICT OF COLUMBIA

“The purpose of this . . . constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States. It would permit District citizens to elect Presidential electors who would be in addition to the electors from the States and who would participate in electing the President and Vice President.”

“The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional
anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges will be removed by the proposed constitutional amendment. . .”

“This . . . amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government. . . . It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.”¹

ABOLITION OF THE POLL TAX

TWENTY-FOURTH AMENDMENT

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

EXPANSION OF THE RIGHT TO VOTE

Ratification of the Twenty-fourth Amendment in 1964 marked the culmination of an endeavor begun in Congress in 1939 to effect elimination of the poll tax as a qualification for voting in federal elections. Property qualifications extend back to colonial days, but the poll tax itself as a qualification was instituted in eleven States of the South following the end of Reconstruction, although at the time of the ratification of this Amendment only five States still retained it.\(^1\) Congress viewed the qualification as “an obstacle to the proper exercise of a citizen’s franchise” and expected its removal to “provide a more direct approach to participation by more of the people in their government.” Congress similarly thought a constitutional amendment necessary,\(^2\) inasmuch as the qualifications had previously escaped constitutional challenge on several grounds.\(^3\)

Not long after ratification of the Amendment – applicable only to federal elections – Congress by statute authorized the Attorney General to seek injunctive relief against use of the poll tax as a means of racial discrimination in state elections,\(^4\) and the Supreme


Court held that the poll tax discriminated on the basis of wealth in violation of the equal protection clause.⁵

In *Harman v. Forssenius*,⁶ the Court struck down a Virginia statute which eliminated the poll tax as an absolute qualification for voting in federal elections and gave federal voters the choice either of paying the tax or of filing a certificate of residence six months before the election. Viewing the latter requirement as imposing upon voters in federal elections an onerous procedural requirement which was not imposed on those who continued to pay the tax, the Court unanimously held the law to conflict with the new Amendment by penalizing those who chose to exercise a right guaranteed them by the Amendment.

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⁶380 U.S. 528 (1965).
PRESIDENTIAL VACANCY AND DISABILITY

TWENTY-FIFTH AMENDMENT

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SECTION 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

SECTION 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the
Vice President and a majority of either the principle officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

PRESIDENTIAL SUCCESSION

The Twenty-fifth Amendment was an effort to resolve some of the continuing issues revolving about the office of the President; that is, what happens upon the death, removal, or resignation of the President and what is the course to follow if for some reason the President becomes disabled to such a degree that he cannot fulfill his responsibilities. The practice had been well established that the Vice President became President upon the death of the President, as had happened eight times in our history. Presumably, the Vice President would become President upon the removal of the President from office. Whether the Vice President would become acting President when the President became unable to carry on and whether the President could resume his office upon his recovering his ability were two questions that had divided scholars and experts. Also, seven Vice Presidents had died in office and one had resigned, so that for some twenty per cent of United States history there had been no Vice President to step up. But the seemingly most insoluable problem was that of presidential inability—Garfield lying in a coma for eighty days before succumbing to the ef-
fects of an assassin’s bullet, Wilson an invalid for the last eighteen months of his term, the result of a stroke—with its unanswered questions: who was to determine the existence of an inability, how was the matter to be handled if the President sought to continue, in what manner should the Vice President act, would he be acting President or President, what was to happen if the President recovered. Congress finally proposed this Amendment to the States in the aftermath of President Kennedy’s assassination, with the Vice Presidency vacant and a President who had previously had a heart attack.

This Amendment saw multiple use during the 1970s and resulted for the first time in our history in the accession to the Presidency and Vice-Presidency of two men who had not faced the voters in a national election. First, Vice President Spiro Agnew resigned on October 10, 1973, and President Nixon nominated Gerald R. Ford to succeed him, following the procedures of § 2 of the Amendment for the first time. Hearings were held upon the nomination by the Senate Rules Committee and the House Judiciary Committee, both Houses thereafter confirmed the nomination, and the new Vice President took the oath of office December 6, 1973. Second, President Richard M. Nixon resigned his office August 9, 1974, and Vice President Ford immediately succeeded to the office and took the presidential oath of office at noon of the same day. Third, again following § 2 of the Amendment, President Ford nominated Nelson A. Rockefeller to be Vice President; on August 20, 1974, hearings were held in both Houses, confirmation voted and Mr. Rockefeller took the oath of office December 19, 1974.1

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REDUCTION OF VOTING AGE

TWENTY-SIXTH AMENDMENT

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

THE EIGHTEEN-YEAR-OLD VOTE

In extending the Voting Rights Act of 1965 in 1970, Congress included a provision lowering the age qualification to vote in all elections, federal, state, and local, to 18. In a divided decision, the Supreme Court held that Congress was empowered to lower the age qualification in federal elections, but voided the application of the provision in all other elections as beyond congressional power.

Confronted thus with the possibility that they might have to maintain two sets of registration books and go to the expense of running separate election systems for federal elections and for all other elections, the States were receptive to the proposing of an Amendment by Congress to establish a minimum age qualification at 18 for all elections, and ratified it promptly.
CONGRESSIONAL PAY LIMITATION

TWENTY-SEVENTH AMENDMENT

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

REGULATING CONGRESSIONAL PAY

Referred to the state legislatures at the same time as those proposals that eventually became the Bill of Rights, the congressional pay amendment had long been assumed to be dead. This provision had its genesis, as did several others of the first amendments, in the petitions of the States ratifying the constitution. It, however, was ratified by only six States (out of the eleven needed), and it was rejected by five States. Aside from the idiosyncratic action of the Ohio legislature in 1873, which ratified the proposal in protest of a controversial pay increase adopted by Congress, the pay limitation provision lay dormant until the 1980s. Then, an aide to a Texas legislator discovered the proposal and began a crusade that culminated some ten years later in its proclaimed ratification.

Now that the provision is apparently a part of the Constitution, it will likely play a minor role. What it commands was already statutorily prescribed, and, at most, it may have implications...

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1 Indeed, in Dillon v. Gloss, 256 U.S. 368, 375 (1921), the Court, albeit in dictum, observed that, unless the inference was drawn that ratification must occur within some reasonable time of proposal, “four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable.” (Emphasis supplied).


3 The ratification issues are considered supra in the discussion of Article V.

4 In the only case to date brought under the Amendment, the parties did not raise the question of the validity of its ratification; the court refused to consider the issue raised by an amicus. Boehner v. Anderson, 809 F.Supp. 138, 139 (D.D.C. 1992). It is not at all clear the issue is justiciable.
for automatic cost-of-living increases in pay for Members of Congress.\textsuperscript{5}

\textsuperscript{5} See discussion of “Congressional Pay,” supra.
ACTS OF CONGRESS
HELD UNCONSTITUTIONAL IN WHOLE OR
IN PART BY THE
SUPREME COURT OF THE UNITED STATES
ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES


Provision that “. . . [the Supreme Court] shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any . . . persons holding office, under authority of the United States” as applied to the issue of mandamus to the Secretary of State requiring him to deliver to plaintiff a commission (duly signed by the President) as justice of the peace in the District of Columbia held an attempt to enlarge the original jurisdiction of the Supreme Court, fixed by Article III, § 2.

Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).


Provisions establishing board of revision to annul titles conferred many years previously by governors of the Northwest Territory were held violative of the due process clause of the Fifth Amendment.

Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1868).


The Missouri Compromise, prohibiting slavery within the Louisiana Territory north of 36° 30’ except Missouri, held not warranted as a regulation of Territory belonging to the United States under Article IV, § 3, clause 2 (and see Fifth Amendment).

Concurring: Taney, C.J.
Concurring specially: Wayne, Nelson, Grier, Daniel, Campbell, Catron.
Dissenting: McLean, Curtis.

4. Act of Feb. 25, 1862 (12 Stat. 345, § 1); July 11, 1862 (12 Stat. 532, § 1); March 3, 1863 (12 Stat. 711, § 3), each in part only.

“Legal tender clauses,” making noninterest-bearing United States notes legal tender in payment of “all debts, public and private,” so far as applied to debts contracted before passage of the act, held not within express or implied powers of Congress under Article I, § 8, and inconsistent with Article I, § 10, and Fifth Amendment.

Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); overruled in Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871).
Dissenting: Miller, Swayne, Davis.

Provisions of law requiring, or construed to require, racial separation in the schools of the District of Columbia, held to violate the equal protection component of the due process clause of the Fifth Amendment.


“So much of the fifth section . . . as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void” under the Seventh Amendment.


Provision for an appeal from the Court of Claims to the Supreme Court—there being, at the time, a further provision (§ 14) requiring an estimate by the Secretary of the Treasury before payment of final judgment, held to contravene the judicial finality intended by the Constitution, Article III.

*Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865). (Case was dismissed without opinion; the grounds upon which this decision was made were stated in a posthumous opinion by Chief Justice Taney printed in the appendix to volume 117 U.S. 697.)


Provision that “any prize cause now pending in any circuit court shall, on the application of all parties in interest . . . be transferred by that court to the Supreme Court. . .,” as applied in a case where no action had been taken in the Circuit Court on the appeal from the district court, held to propose an appeal procedure not within Article III, § 2.

*The Alicia*, 74 U.S. (7 Wall.) 571 (1869).


Requirement of a test oath (disavowing actions in hostility to the United States) before admission to appear as attorney in a federal court by virtue of any previous admission, held invalid as applied to an attorney who had been pardoned by the President for all offenses during the Rebellion—as ex post facto (Article I, § 9, clause 3) and an interference with the pardoning power (Article II, § 2, clause 1).

General prohibition on sale of naphtha, etc., for illuminating purposes, if inflammable at less temperature than 110° F., held invalid “except so far as the section named operates within the United States, but without the limits of any State,” as being a mere police regulation.


Provisions penalizing (1) refusal of local election official to permit voting by persons offering to qualify under State laws, applicable to any citizens; and (2) hindering of any person from qualifying or voting, held invalid under Fifteenth Amendment.

_United States v. Reese_, 92 U.S. 214 (1876).
Dissenting: Clifford, Hunt.

Provision making Presidential pardons inadmissible in evidence in Court of Claims, prohibiting their use by that court in deciding claims or appeals, and requiring dismissal of appeals by the Supreme Court in cases where proof of loyalty had been made otherwise than as prescribed by law, held an interference with judicial power under Article III, § 1, and with the pardoning power under Article II, § 2, clause 1.

Dissenting: Miller, Bradley.

Comstock Act provision barring from the mails any unsolicited advertisement for contraceptives, as applied to circulars and flyers promoting prophylactics or containing information discussing the desirability and availability of prophylactics, violates the free speech clause of the First Amendment.

Justices concurring: Marshall, White, Blackmun, Powell, Burger, C.J.
Justices concurring specially: Rehnquist, O'Connor, Stevens.

Provision authorizing federal courts, in suits for forfeitures under revenue and custom laws, to require production of documents, with allegations expected to be proved therein to be taken as proved on
failure to produce such documents, was held violative of the search and seizure provision of the Fourth Amendment and the self-incrimination clause of the Fifth Amendment.

Concurring specially: Miller, Waite, C.J.

Provision that “all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ,” held invalid under the Thirteenth Amendment.

Concurring: Brewer, Brown, Fuller, Peckham, McKenna, Holmes, Moody, White, C.J.
Dissenting: Harlan, Day.

Original trademark law, applying to marks “for exclusive use within the United States,” and a penal act designed solely for the protection of rights defined in the earlier measure, held not supportable by Article I, § 8, clause 8 (copyright clause), nor Article I, § 8, clause 3, by reason of its application to intrastate as well as interstate commerce.

*Trade-Mark Cases*, 100 U.S. 82 (1879).

Provision penalizing “any person respecting whom bankruptcy proceedings are commenced . . . who, within 3 months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud . . . ,” held a police regulation not within the bankruptcy power (Article I, § 4, clause 4).


Provision penalizing “every person who prevents, hinders, controls, or intimidates another from exercising . . . the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery . . . ,” held not authorized by the Fifteenth Amendment.

Concurring: Brewer, Fuller, Peckham, Holmes, Day, White, C.J.
Dissenting: Harlan, Brown.


Section providing punishment in case “two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws . . . or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws . . . ,” held invalid as not being directed at state action proscribed by the Fourteenth Amendment.

United States v. Harris, 106 U.S. 629 (1883).
Concurring: Woods, Miller, Bradley, Gray, Field, Matthews, Blatchford, White, C.J.
Dissenting: Harlan.


Provision that “prosecutions in the police court [of the District of Columbia] shall be by information under oath, without indictment by grand jury or trial by petit jury,” as applied to punishment for conspiracy, held to contravene Article III, § 2, clause 3, requiring jury trial of all crimes.


Provision “That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude”—subject to penalty, held not to be supported by the Thirteenth or Fourteenth Amendments.

Civil Rights Cases, 109 U.S. 3 (1883), as to operation within States.
Concurring: Bradley, Miller, Field, Matthews, Gray, Blatchford, Waite, C.J.
Dissenting: Harlan.


Provision that “if the party [i.e., a person stealing property from the United States] has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against [the] receiver that the property of the United States therein described has been embezzled, stolen, or purloined,” held to contravene the Sixth Amendment.

23. Act of July 12, 1876 (19 Stat. 80, § 6, in part).

Provision that “postmasters of the first, second, and third classes . . . may be removed by the President by and with the advice and consent of the Senate,” held to infringe the executive power under Article II, § 1, clause 1.


Concurring: Taft, C.J., Van Devanter, Sutherland, Butler, Sanford, Stone.

Dissenting: Holmes, McReynolds, Brandeis.


Directive, in a provision for the purchase or condemnation of a certain lock and dam in the Monongahela River, that “. . . in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated . . .,” held to contravene the Fifth Amendment.


Provision of a Chinese exclusion act, that Chinese persons “convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding 1 year and thereafter removed from the United States . . .” (such conviction and judgment being had before a justice, judge, or commissioner upon a summary hearing), held to contravene the Fifth and Sixth Amendments.

_Wong Wing v. United States_, 163 U.S. 228 (1896).

Concurring: Shiras, Harlan, Gray, Brown, White, Peckham, Fuller, C.J.

Concurring in part and dissenting in part: Field.


Provision authorizing the Secretary of the Interior to approve a second lease of certain land by an Indian chief in Minnesota (granted to lessor’s ancestor by art. 9 of a treaty with the Chippewa Indians), held an interference with judicial interpretation of treaties under Article III, § 2, clause 1 (and repugnant to the Fifth Amendment).

_Jones v. Meehan_, 175 U.S. 1 (1899).


Income tax provisions of the tariff act of 1894. “The tax imposed by §§27 and 37, inclusive . . . so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation [Article I, §2, clause 3],
all those sections, constituting one entire scheme of taxation, are necessarily invalid” (158 U.S. 601, 637).

Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1895), and rehearing, 158 U.S. 601 (1895).
Concurring: Fuller, C.J., Gray, Brewer, Brown, Shiras, Jackson.
Concurring specially: Field.
Dissenting: White, Harlan.

Prohibition on sale of liquor “. . . to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government. . . .” held a police regulation infringing state powers, and not warranted by the commerce clause, Article I, § 8, clause 3.

Concurring: Brewer, Brown, White, Peckham, McKenna, Holmes, Day, Fuller, C.J.
Dissenting: Harlan.

Section 10, penalizing “any employer subject to the provisions of this act” who should “threaten any employee with loss of employment . . . because of his membership in . . . a labor corporation, association, or organization” (the act being applicable “to any common carrier . . . engaged in the transportation of passengers or property . . . from one State . . . to another State . . .,” etc.), held an infringement of the Fifth Amendment and not supported by the commerce clause.

Concurring: Harlan, Brewer, White, Peckham, Day, Fuller, C.J.
Dissenting: McKenna, Holmes.

Stamp tax on foreign bills of lading, held a tax on exports in violation of Article I, § 9.

Concurring: Brewer, Brown, Shiras, Peckham, Fuller, C.J.
Dissenting: Harlan, Gray, White, McKenna.

31. Same (30 Stat. 448, 460).
Tax on charter parties, as applied to shipments exclusively from ports in United States to foreign ports, held a tax on exports in violation of Article I, § 9.


32. Same (30 Stat. 448, 461).
Stamp tax on policies of marine insurance on exports, held a tax on exports in violation of Article I, § 9.
2126 ACTS OF CONGRESS HELD UNCONSTITUTIONAL


Section of the Alaska Code providing for a six-person jury in trials for misdemeanors, held repugnant to the Sixth Amendment, requiring “jury” trial of crimes.

Concurring: White, Brewer, Peckham, McKenna, Holmes, Day, Fuller, C.J.
Concurring specially: Harlan, Brown.

Section of the District of Columbia Code granting the same right of appeal, in criminal cases, to the United States or the District of Columbia as to the defendant, but providing that a verdict was not to be set aside for error found in rulings during trial, held an attempt to take an advisory opinion, contrary to Article III, § 2.


Act providing that “every common carrier engaged in trade or commerce in the District of Columbia . . . or between the several States . . . shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers . . . or by reason of any defect . . . due to its negligence in its cars, engines . . . roadbed,” etc., held not supportable under Article I, § 8, clause 3 because it extended to intrastate as well as interstate commercial activities.

Concurring: White, Day.
Concurring specially: Peckham, Brewer, Fuller, C.J.
Dissenting: Moody, Harlan, McKenna, Holmes.

Provision of Oklahoma Enabling Act restricting relocation of the State capital prior to 1913, held not supportable by Article IV, § 3, authorizing admission of new States.

Coyle v. Smith, 221 U.S. 559 (1911).
Concurring: Lurton, White, Harlan, Day, Hughes, Van Devanter, Lamar.
Dissenting: McKenna, Holmes.

Provision in the Immigration Act of 1907 penalizing “whoever . . . shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution . . . any alien woman or girl, within 3 years after she shall have entered the United States,”
held an exercise of police power not within the control of Congress over immigration (whether drawn from the commerce clause or based on inherent sovereignty).

Concurring: Brewer, White, Peckham, McKenna, Day, Fuller, C.J.
Dissenting: Holmes, Harlan, Moody.

Provisions authorizing certain Indians “to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since . . . 1902, insofar as said acts . . . attempt to increase or extend the restrictions upon alienation . . . of allotments of lands of Cherokee citizens . . .”, and giving a right of appeal to the Supreme Court, held an attempt to enlarge the judicial power restricted by Article III, § 2, to cases and controversies.


Provision making locally taxable “all land [of Indians of the Five Civilized Tribes] from which restrictions have been or shall be removed,” held a violation of the Fifth Amendment, in view of the Atoka Agreement, embodied in the Curtis Act of June 28, 1898, providing tax-exemption for allotted lands while title in original allottee, not exceeding 21 years.


Provision of Narcotic Drugs Import and Export Act creating a presumption that possessor of cocaine knew of its illegal importation into the United States held, in light of the fact that more cocaine is produced domestically than is brought into the country and in absence of any showing that defendant could have known his cocaine was imported, if it was, inapplicable to support conviction from mere possession of cocaine.

Concurring specially: Black, Douglas.

A proviso in § 8 of the Federal Corrupt Practices Act fixing a maximum authorized expenditure by a candidate for Senator “in any campaign for his nomination and election,” as applied to a primary election, held not supported by Article I, § 4, giving Congress power to regulate the manner of holding elections for Senators and Representatives.

Concurring: McReynolds, McKenna, Holmes, Day, Van Devanter.
Concurring specially: Pitney, Brandeis, Clarke.
Dissenting: White (concurring in part), C.J.

42. Act of June 18, 1912 (37 Stat. 136, § 8).
Part of § 8 giving Juvenile Court of the District of Columbia (proceeding upon information) concurrent jurisdiction of desertion cases (which were, by law, punishable by fine or imprisonment in the workhouse at hard labor for 1 year), held invalid under the Fifth Amendment, which gives right to presentment by a grand jury in case of infamous crimes.

Concurring: McKenna, Day, Van Devanter, Pitney, McReynolds.
Dissenting: Brandeis, Holmes, Taft, C.J.

43. Act of Mar. 4, 1913 (37 Stat. 988, part of par. 64).
Provision of the District of Columbia Public Utility Commission Act authorizing appeal to the United States Supreme Court from decrees of the District of Columbia Court Appeals modifying valuation decisions of the Utilities Commission, held an attempt to extend the appellate jurisdiction of the Supreme Court to cases not strictly judicial within the meaning of Article III, § 2.


The original Child Labor Law, providing “that no producer . . . shall ship . . . in interstate commerce . . . any article or commodity the product of any mill . . . in which within 30 days prior to the removal of such product therefrom children under the age of 14 years have been employed or permitted to work more than 8 hours in any day or more than 6 days in any week . . . ,” held not within the commerce power of Congress.

Concurring: Day, Van Devanter, Pitney, McReynolds, White, C.J.
Dissenting: Holmes, McKenna, Brandeis, Clarke.

Provision of the income tax law of 1916, that a “stock dividend shall be considered income, to the amount of its cash value,” held invalid (in spite of the Sixteenth Amendment) as an attempt to tax something not actually income, without regard to apportionment under Article I, § 2, clause 3.

Concurring: Pitney, McKenna, Van Devanter, McReynolds, White, C.J.
Dissenting: Holmes, Day, Brandeis, Clarke.
   The amendment of §§ 24 and 256 of the Judicial Code (which pre-
   scribe jurisdiction of district courts) “saving . . . to claimants the
   rights and remedies under the workmen’s compensation law of any
   State,” held an attempt to transfer federal legislative powers to the
   States—the Constitution, by Article III, § 2, and Article I, § 8, having
   adopted rules of general maritime law.

   Concurring: McReynolds, McKenna, Day, Van Devanter, White, C.J.
   Dissenting: Holmes, Pitney, Brandeis, Clarke.

   That part of the Minimum Wage Law of the District of Columbia
   which authorized the Wage Board “to ascertain and declare . . . (a)
   Standards of minimum wages for women in any occupation within the
   District of Columbia, and what wages are inadequate to supply the
   necessary cost of living to any such women workers to maintain them
   in good health and to protect their morals . . .,” held to interfere with
   freedom of contract under the Fifth Amendment.

   *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), overruled in
   *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
   Concurring: Sutherland, McKenna, Van Devanter, McReynolds, Butler.
   Dissenting: Taft, C.J., Sanford, Holmes.

   That part of § 213 of the of Revenue Act of 1919 which provided
   that “. . . for the purposes of the title . . . the term ‘gross income’
   . . . includes gains, profits, and income derived from salaries, wages,
   or compensation for personal service (including in the case of . . .
   judges of the Supreme and inferior courts of the United States . . .
   the compensation received as such) . . .” as applied to a judge in of-
   fice when the act was passed, held a violation of the guaranty of
   judges’ salaries, in Article III, § 1.

   held it invalid as applied to a judge taking office subsequent to the date of
   the act. Both cases were overruled by *O’Malley v. Woodrough*, 307 U.S. 277
   (1939).
   Concurring: Van Devanter, McKenna, Day, Pitney, McReynolds, Clarke,
   White, C.J.
   Dissenting: Holmes, Brandeis.

49. Act of Feb. 24, 1919 (40 Stat. 1097, § 402(c)).
   That part of the estate tax law providing that the “gross estate”
   of a decedent should include value of all property “to the extent of any
   interest therein of which the decedent has at any time made a trans-
   fer or with respect to which he had at any time created a trust, in
   contemplation of or intended to take effect in possession or enjoyment
at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a bona fide sale . . . " as applied to a transfer of property made prior to the act and intended to take effect in possession or enjoyment at death of grantor, but not in fact testamentary or designed to evade taxation, held confiscatory, contrary to Fifth Amendment.

Concurring: McReynolds, Van Devanter, Sutherland, Butler, Taft, C.J.
Concurring specially (only in the result): Holmes, Brandeis, Sanford, Stone.

The Child Labor Tax Act, providing that "every person . . . operating . . . any . . . factory . . . in which children under the age of 14 years have been employed or permitted to work . . . shall pay . . . in addition to all other taxes imposed by law, an excise tax equivalent to 10 percent of the entire net profits received . . . for such year from the sale . . . of the product of such . . . factory . . .," held beyond the taxing power under Article I, § 8, clause 1, and an infringement of state authority.

Dissenting: Clarke.

(a) § 4 of the Lever Act, providing in part "that it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries . . ." and fixing a penalty, held invalid to support an indictment for charging an unreasonable price on sale--as not setting up an ascertainable standard of guilt within the requirement of the Sixth Amendment.

Concurring: White, C.J., McKenna, Holmes, Van Devanter, McReynolds, Clarke.
Concurring specially: Pitney, Brandeis.

(b) That provision of § 4 making it unlawful "to conspire, combine, agree, or arrange with any other person to . . . exact excessive prices for any necessaries" and fixing a penalty, held invalid to support an indictment, on the reasoning of the *Cohen Grocery* case.

Concurring: White, C.J., McKenna, Holmes, Van Devanter, McReynolds, Clarke.
Concurring specially: Pitney, Brandeis.
   (a) § 4 (and interwoven regulations) providing a “tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery, except . . . where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a ‘contract market’ . . .,” held not within the taxing power under Article I, § 8.
   

   (b) § 3, providing “That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each . . . option for a contract either of purchase or sale of grain . . .,” held invalid on the same reasoning.
   

   Provision of Revenue Act of 1921 abating the deduction (4 percent of mean reserves) allowed from taxable income of life insurance companies in general by the amount of interest on their tax-exempts, and so according no relative advantage to the owners of the tax-exempt securities, held to destroy a guaranteed exemption.
   
   Concurring: McReynolds, Van Devanter, Sutherland, Butler, Sanford, Taft, C.J.
   Dissenting: Brandeis, Holmes, Stone.

   A second attempt to amend §§ 24 and 256 of the Judicial Code, relating to jurisdiction of district courts, by saving “to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State . . .” held invalid on authority of *Knickerbocker Ice Co. v. Stewart*.
   
   Concurring: McReynolds, McKenna, Holmes, Van Devanter, Sutherland, Butler, Sanford, Taft, C.J.
   Dissenting: Brandeis.

   The gift tax provisions of the Revenue Act of 1924, applicable to gifts made during the calendar year, were held invalid under the Fifth Amendment insofar as they applied to gifts made before passage of the act.
   
Concurring: McReynolds, Sanford, Van Devanter, Sutherland, Butler, Taft, C.J.
Dissenting: Holmes, Brandeis, Stone.

Stipulation creating a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death of donor and requiring the value thereof to be included in computing the death transfer tax on decedent’s estate was held to effect an invalid deprivation of property without due process.

Concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts, Hughes, C.J.
Dissenting: Stone, Brandeis.

Provision imposing a special excise tax of $1,000 on liquor dealers operating in States where such business is illegal, was held a penalty, without constitutional support following repeal of the Eighteenth Amendment.

Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler, Hughes, C.J.
Dissenting: Cardozo, Brandeis, Stone.

Clause in the Economy Act of 1933 providing “... all laws granting or pertaining to yearly renewable term war risk insurance are hereby repealed,” held invalid to abrogate an outstanding contract of insurance, which is a vested right protected by the Fifth Amendment.


Agricultural Adjustment Act providing for processing taxes on agricultural commodities and benefit payments therefore to farmers, held not within the taxing power under Article I, § 8, clause 1.

Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler, Hughes, C.J.
Dissenting: Stone, Brandeis, Cardozo.

60. Joint Resolution of June 5, 1933 (48 Stat. 113, § 1).
Abrogation of gold clause in Government obligations, held a repudiation of the pledge implicit in the power to borrow money (Article I, § 8, clause 2), and within the prohibition of the Fourteenth Amendment, against questioning the validity of the public debt. (The majority of the Court, however, held plaintiff not entitled to recover under the circumstances.)

(a) Title I, except § 9. Provisions relating to codes of fair competition, authorized to be approved by the President in his discretion “to effectuate the policy” of the act, held invalid as a delegation of legislative power (Article I, § 1) and not within the commerce power (Article I, § 8, clause 3).

Concurring: Hughes, C.J., Van Devanter, McReynolds, Brandeis, Sutherland, Butler.
Concurring specially: Cardozo, Stone.

(b) § 9(c). Clause of the oil regulation section authorizing the President “to prohibit the transportation in interstate . . . commerce of petroleum . . . produced or withdrawn from storage in excess of the amount permitted . . . by any State law . . .” and prescribing a penalty for violation of orders issued thereunder, held invalid as a delegation of legislative power.

Concurring: Hughes, C.J., Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts.
Concurring specially: Cardozo, Stone.


Temporary reduction of 15 percent in retired pay of judges, retired from service but subject to performance of judicial duties under the Act of Mar. 1, 1929 (45 Stat. 1422), was held a violation of the guaranty of judges’ salaries in Article III, § 1.


Provision for conversion of state building and loan associations into federal associations, upon vote of 51 percent of the votes cast at a meeting of stockholders called to consider such action, held an encroachment on reserved powers of State.

_Hopkins Savings Ass’n v. Cleary_, 296 U.S. 315 (1935).

64. Act of May 24, 1934 (48 Stat. 798).

Provision for readjustment of municipal indebtedness, though “adequately related” to the bankruptcy power, was held invalid as an interference with state sovereignty.
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Concurring: McReynolds, Van Devanter, Sutherland, Butler, Roberts.
Dissenting: Cardozo, Brandeis, Stone, Hughes, C.J.

Section 316 of the Communications Act of 1934, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station’s or casino’s location, violates the First Amendment’s protections for commercial speech as applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is illegal.

Justices concurring: Stevens, O’Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J.
Justices concurring especially: Thomas.

The Railroad Retirement Act, establishing a detailed compulsory retirement system for employees of carriers subject to the Interstate Commerce Act, held, not a regulation of commerce within the meaning of Article I, § 8, clause 3, and violative of the due process clause (Fifth Amendment).

Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler.
Dissenting: Hughes, C.J., Brandeis, Stone, Cardozo.

The Frazier-Lemke Act, adding subsection (s) to § 75 of the Bankruptcy Act, designed to preserve to mortgagors the ownership and enjoyment of their farm property and providing specifically, in paragraph 7, that a bankrupt left in possession has the option at any time within 5 years of buying at the appraised value—subject meanwhile to no monetary obligation other than payment of reasonable rental, held a violation of property rights, under the Fifth Amendment.


Amendments of Agricultural Adjustment Act held not within the taxing power, the amendments not having cured the defects of the original act held unconstitutional in United States v. Butler, 297 U.S. 1 (1936).


The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels
is inconsistent with the protections afforded to commercial speech by the First Amendment. The government’s interest in curbing strength wars among brewers is substantial, but, given the “overall irrationality” of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

Justices concurring: Thomas, O’Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J.
Justice concurring specially: Stevens.

Bituminous Coal Conservation Act of 1935, held to impose, not a tax within Article I, § 8, but a penalty not sustained by the commerce clause (Article I, § 8, clause 3).

Concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts.
Concurring specially: Hughes, C.J.
Concurring in part and dissenting in part: Cardozo, Brandeis, Stone.

District of Columbia Code § 22-1115, prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into “public odium” or “public disrepute,” violates the First Amendment.

Justices concurring: O’Connor, Brennan, Marshall, Stevens, Scalia.

Federal Food, Drug, and Cosmetic Act of 1938, § 301(f), prohibiting the refusal to permit entry or inspection of premises by federal officers held void for vagueness and as violative of the due process clause of the Fifth Amendment.

Concurring: Douglas, Black, Reed, Frankfurter, Jackson, Clark, Minton, Vinson, C.J.
Dissenting: Burton.

Federal Firearms Act, § 2(f), establishing a presumption of guilt based on a prior conviction and present possession of a firearm, held to violate the test of due process under the Fifth Amendment.

Concurring: Roberts, Reed, Frankfurter, Jackson, Rutledge, Stone, C.J.
Concurring specially: Black, Douglas.
74. Act of Aug. 10, 1939 (§ 201(d), 53 Stat. 1362, as amended, 42 U.S.C. § 402(g)).

Provision of Social Security Act that grants survivors’ benefits based on the earnings of a deceased husband and father covered by the Act to his widow and to the couple’s children in her care but that grants benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower held violative of the right to equal protection secured by the Fifth Amendment’s due process clause, since it unjustifiably discriminates against female wage earners required to pay social security taxes by affording them less protection for their survivors than is provided for male wage earners.


Provision of Aliens and Nationality Code (8 U.S.C. § 1481(a)(8)), derived from the Nationality Act of 1940, as amended, that citizenship shall be lost upon conviction by court martial and dishonorable discharge for deserting the armed services in time of war, held invalid as imposing a cruel and unusual punishment barred by the Eighth Amendment and not authorized by the war powers conferred by Article I, § 8, clauses 11 to 14.


Dissenting: Frankfurter, Burton, Clark, Harlan.


Urgent Deficiency Appropriation Act of 1943, § 304, providing that no salary should be paid to certain named federal employees out of moneys appropriated, held to violate Article I, § 9, clause 3, forbidding enactment of bill of attainder or ex post facto law.


Concurring: Black, Douglas, Murphy, Rutledge, Burton, Stone, C.J.

Concurring specially: Frankfurter, Reed.


§ 401(J) of Immigration and Nationality Act of 1940, added in 1944, and § 49(a)(10) of the Immigration and Nationality Act of 1952 depriving one of citizenship, without the procedural safeguards guaranteed by the Fifth and Sixth Amendments, for the offense of leaving or remaining outside the country, in time of war or national emergency, to evade military service held invalid.

Concurring: Goldberg, Black, Douglas, Warren, C.J.
Concurring specially: Brennan.
Dissenting: Harlan, Clark, Stewart, White.

District court decision holding invalid under First and Fifth Amendments statute prohibiting parades or assemblages on United States Capitol grounds is summarily affirmed.


Provision of Lindberg Kidnapping Act which provided for the imposition of the death penalty only if recommended by the jury held unconstitutional inasmuch as it penalized the assertion of a defendant’s Sixth Amendment right to jury trial.

Dissenting: White, Black.

Provision, insofar as it applies to the public sidewalks surrounding the Supreme Court building, which bars the display of any flag, banner, or device designed to bring into public notice any party, organization, or movement, held violative of the free speech clause of the First Amendment.

Concurring: White, Brennan, Blackmun, Powell, Rehnquist, O’Connor, Burger, C.J.
Concurring in part and dissenting in part: Marshall, Stevens.

Article 3(a) of the Uniform Code of Military Justice, subjecting civilian ex-servicemen to court martial for crime committed while in military service, held to violate Article III, § 2, and the Fifth and Sixth Amendments.

Concurring: Black, Frankfurter, Douglas, Clark, Harlan, Warren, C.J.
Dissenting: Reed, Burton, Minton.

Insofar as Article 2(11) of the Uniform Code of Military Justice subjects civilian dependents accompanying members of the armed forces overseas in time of peace to trial, in capital cases, by court martial, it is violative of Article III, § 2, and the Fifth and Sixth Amendments.

Reid v. Covert, 354 U.S. 1 (1957).
Concurring: Black, Douglas, Warren, C.J.
Insofar as the aforementioned provision is invoked in time of peace for the trial of noncapital offenses committed on land bases overseas by employees of the armed forces who have not been inducted or who have not voluntarily enlisted therein, it is violative of the Sixth Amendment. *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter.
Concurring in Part and dissenting in Part: Whittaker, Stewart.

Insofar as the aforementioned provision is invoked in time of peace for the trial of noncapital offenses committed by civilian dependents accompanying members of the armed forces overseas, it is violative of Article III, §2, and the Fifth and Sixth Amendments. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter.
Concurring in part and dissenting in part: Whittaker, Stewart.

Insofar as the aforementioned provision is invoked in time of peace for the trial of a capital offense committed by a civilian employee of the armed forces overseas, it is violative of Article III, §2, and the Fifth and Sixth Amendments. *Grisham v. Hagan*, 361 U.S. 278 (1960).

Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter.
Concurring in part and dissenting in part: Whittaker, Stewart.

Statutory scheme authorizing the Postmaster General to close the mails to distributors of obscene materials held unconstitutional in the absence of procedural provisions to assure prompt judicial determination that protected materials were not being restrained.


District court decision holding invalid as a violation of the equal protection component of the Fifth Amendment's due process clause a Social Security provision entitling a husband to insurance benefits through his wife's benefits, provided he received at least one-half of his support from her at the time she became entitled, but requiring no such showing of support for the wife to qualify for benefits through her husband, is summarily affirmed.


Social Security Act provision awarding survivor’s benefits based on earnings of a deceased wife to widower only if he was receiving at least half of his support from her at the time of her death, whereas widow receives benefits regardless of dependency, held violative of equal protection element of Fifth Amendment’s due process clause because of its impermissible sex classification.

Concurring specially: Stevens.
Dissenting: Rehnquist, Stewart, Blackmun, Burger, C.J.


Provision of Subversive Activities Control Act making it unlawful for member of Communist front organization to work in a defense plant held to be an overbroad infringement of the right of association protected by the First Amendment.

Concurring specially: Brennan.
Dissenting: White, Harlan.


Subversive Activities Control Act of 1950, § 6, providing that any member of a Communist organization, which has registered or has been ordered to register, commits a crime if he attempts to obtain or use a passport, held violative of due process under the Fifth Amendment.

Concurring: Goldberg, Brennan, Stewart, Warren, C.J.
Concurring specially: Black, Douglas.
Dissenting: Clark, Harlan, White.


Provisions of Subversive Activities Control Act of 1950 requiring in lieu of registration by the Communist Party registration by Party members may not be applied to compel registration by or to prosecute for refusal to register, alleged members who have asserted their privilege against self-incrimination, inasmuch as registration would expose such persons to criminal prosecution under other laws.

_Albertson v. Subversive Activities Control Board_, 382 U.S. 70 (1965).


Provision of Railroad Retirement Act similar to section voided in _Goldfarb_ (no. 85, supra).


Provision of Immigration and Nationality Act of 1952 providing for revocation of United States citizenship of one who votes in a foreign election held unconstitutional under §1 of the Fourteenth Amendment.

Dissenting: Harlan, Clark, Stewart, White.

91. Act of June 27, 1952 (66 Stat. 163, 269, § 352(a)(1)).

§ 352(a)(1) of the Immigration and Nationality Act of 1952, depriving a naturalized person of citizenship for “having a continuous residence for three years” in state of his birth or prior nationality, held violative of the due process clause of the Fifth Amendment.

Concurring: Douglas, Black, Stewart, Goldberg, Warren, C.J.
Dissenting: Clark, Harlan, White.


Provision of the immigration law that permits either House of Congress to veto the decision of the Attorney General to suspend the deportation of certain aliens violates the bicameralism and presentation requirements of lawmaking imposed upon Congress by Article I, §§ 1 and 7.

Justice concurring specially: Powell.
Justices dissenting: Rehnquist, White.


Provisions of tax laws requiring gamblers to pay occupational and excise taxes may not be used over an assertion of one's privilege against self-incrimination either to compel extensive reporting of activities, leaving the registrant subject to prosecution under the laws of all the States with the possible exception of Nevada, or to prosecute for failure to register and report, because the scheme abridged the Fifth Amendment privilege.

Concurring: Harlan, Black, Douglas, White, Fortas.
Concurring specially: Brennan, Stewart.
Dissenting: Warren, C.J.

Provisions of tax laws requiring possessors of marijuana to register and to pay a transfer tax may not be used over an assertion of the privilege against self-incrimination to compel registration or to prosecute for failure to register.


Provisions of tax laws requiring the possessor of certain firearms, which it is made illegal to receive or to possess, to register with the Treasury Department may not be used over an assertion of the privilege against self-incrimination to prosecute one for failure to register or for possession of an unregistered firearm since the statutory scheme abridges the Fifth Amendment privilege.

Dissenting: Warren, C.J.


Provision of tax laws providing for forfeiture of property used in violating internal revenue laws may not be constitutionally used in face of invocation of privilege against self-incrimination to condemn money in possession of gambler who had failed to comply with the registration and reporting scheme held void in _Marchetti v. United States_, 390 U.S. 39 (1968).

Dissenting: White, Stewart, Blackmun, Burger, C.J.


A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, § 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

Justices concurring: Thomas, O'Connor, Scalia, Souter, Breyer, and Rehnquist, C.J.
Justices dissenting: Kennedy, Ginsburg.


Provision of Narcotic Drugs Import and Export Act creating a presumption that possessor of marijuana knew of its illegal importation into the United States held, in absence of showing that all mari-
juana in United States was of foreign origin and that domestic users could know that their marijuana was more likely than not of foreign origin, unconstitutional under the due process clause of the Fifth Amendment.

Concurring specially: Black.


Servicemen may not be charged under the Act and tried in military courts because of the commission of non-service connected crimes committed off-post and off-duty which are subject to civilian court jurisdiction where the guarantees of the Bill of Rights are applicable.

Dissenting: Harlan, Stewart, White.

100. Act of Aug. 10, 1956 (70A Stat. 35, § 772(f)).

Proviso of statute permitting the wearing of United States military apparel in theatrical productions only if the portrayal does not tend to discredit the armed forces imposes an unconstitutional restraint upon First Amendment freedoms and precludes a prosecution under 18 U.S.C. § 702 for unauthorized wearing of uniform in a street skit disrespectful of the military.


Provision of Internal Revenue Code creating a presumption that one’s presence at the site of an unregistered still shall be sufficient for conviction under a statute punishing possession, custody, or control of an unregistered still unless defendant otherwise explained his presence at the site to the jury held unconstitutional because the presumption is not a legitimate, rational, or reasonable inference that defendant was engaged in one of the specialized functions proscribed by the statute.


Exemptions from ban on photographic reproduction of currency “for philatelic, numismatic, educational, historical, or newsworthy purposes” violates the First Amendment because it discriminates on the basis of the content of a publication.

Justice dissenting: Stevens.


Federal statutes providing that spouses of female members of the Armed Forces must be dependent in fact in order to qualify for certain dependent’s benefits, whereas spouses of male members are statutorily deemed dependent and automatically qualified for allowances, whatever their actual status, held an invalid sex classification under the equal protection principles of the Fifth Amendment’s due process clause.

Dissenting: Rehnquist.


Provision of Labor-Management Reporting and Disclosure Act of 1959 making it a crime for a member of the Communist Party to serve as an officer or, with the exception of clerical or custodial positions, as an employee of a labor union held to be a bill of attainder and unconstitutional.

Dissenting: White, Clark, Harlan, Stewart.


Provision of Postal Services and Federal Employees Salary Act of 1962 authorizing Post Office Department to detain material determined to be “communist political propaganda” and to forward it to the addressee only if he requested it after notification by the Department, the material to be destroyed otherwise, held to impose on the addressee an affirmative obligation which amounted to an abridgment of First Amendment rights.


Provision of District of Columbia laws requiring that a person to be eligible to receive welfare assistance must have resided in the District for at least one year impermissibly classified persons on the basis of an assertion of the right to travel interstate and therefore held to violate the due process clause of the Fifth Amendment.

Dissenting: Warren, C.J., Black, Harlan.
Provision of Higher Education Facilities Act of 1963 which in effect removed restriction against religious use of facilities constructed with federal funds after 20 years held to violate the establishment clause of the First Amendment inasmuch as the property will still be of considerable value at the end of the period and removal of the restriction would constitute a substantial governmental contribution to religion.


Section of Social Security Act qualifying certain illegitimate children for disability insurance benefits by presuming dependence but disqualifying other illegitimate children, regardless of dependency, if the disabled wage earner parent did not contribute to the child’s support before the onset of the disability or if the child did not live with the parent before the onset of disability, held to deny latter class of children equal protection as guaranteed by the due process clause of the Fifth Amendment.

Dissenting: Rehnquist.

109. Act of Sept. 3, 1966 (§ 102(b), 80 Stat. 831), and Act of Apr. 8, 1974 (§§ 6(a)(1) amending § 3(d) of Act, 6(a)(2) amending 3 (e)(2)(C), 6(a)(5) amending § 3(s)(5), and 6(a)(6) amending § 3(x)).
Those sections of the Fair Labor Standards Act extending wage and hour coverage to the employees of state and local governments held invalid because Congress lacks the authority under the commerce clause to regulate employee activities in areas of traditional governmental functions of the States.

Concurring: Rehnquist, Stewart, Blackmun, Powell, Burger, C.J.
Dissenting: Brennan, White, Marshall; Stevens.

Communications Act provision banning noncommercial educational stations receiving grants from the Corporation for Public Broadcasting from engaging in editorializing violates the First Amendment.

Justices concurring: Brennan, Marshall, Blackmun, Powell, O’Connor.
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   District court decisions holding unconstitutional under Fifth Amendment’s due process clause section of Social Security Act that reduced, perhaps to zero, benefits coming to illegitimate children upon death of parent in order to satisfy the maximum payment due the wife and legitimate children are summarily affirmed.
   

   Provision of Social Security Act extending benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but not giving benefits when the mother becomes unemployed held to impermissibly classify on the basis of sex and violate the Fifth Amendment’s due process clause.
   

   A section of the Omnibus Crime Control and Safe Streets Act of 1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations prior to the Court’s decision in Miranda v. Arizona, 384 U.S. 486 (1966), is an invalid attempt by Congress to redefine a constitutional protection defined by the Court. The warnings to suspects required by Miranda are constitution-based rules. While the Miranda Court invited a legislative rule that would be “at least as effective” in protecting a suspect’s right to remain silent, section 3501 is not an adequate substitute.
   
   Justices dissenting: Scalia, Thomas.

   A federal prohibition on disclosure of the contents of an illegally intercepted electronic communication violates the First Amendment as applied to a talk show host and a community activist who had played no part in the illegal interception, and who had lawfully obtained tapes of the illegally intercepted cellular phone conversation. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was “a matter of public concern.” Although the disclosure prohibition well serves the government’s “im-
“important” interest in protecting private communication, in this case “privacy concerns give way when balanced against the interest in publishing matters of public importance.”

Justices concurring: Stevens, O’Connor, Kennedy, Souter, Ginsburg, Breyer.

Provision of Voting Rights Act Amendments of 1970 which set a minimum voting age qualification of 18 in state and local elections held to be unconstitutional because beyond the powers of Congress to legislate.

Concurring: Harlan, Stewart, Blackmun, Burger, C.J.
Concurring specially: Black.

Provision of Occupational Safety and Health Act authorizing inspections of covered work places in industry without warrants held to violate Fourth Amendment.

Concurring: White, Stewart, Marshall, Powell, Burger, C.J.
Dissenting: Stevens, Blackmun, Rehnquist.

Provision of Food Stamp Act disqualifying from participation in program any household containing an individual unrelated by birth, marriage, or adoption to any other member of the household violates the due process clause of the Fifth Amendment.

*Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).
Dissenting: Rehnquist, Burger, C.J.

Provision of Food Stamp Act disqualifying from participation in program any household containing a person 18 years or older who had been claimed as a dependent child for income tax purposes in the present or preceding tax year by a taxpayer not a member of the household violates the due process clause of the Fifth Amendment.

Dissenting: Blackmun, Rehnquist, Powell, Burger, C.J.

Provision of Presidential Election Campaign Fund Act limiting to $1,000 the amount that independent committees may expend to fur-
ther the election of a presidential candidate financing his campaign with public funds is an impermissible limitation of freedom of speech and association protected by the First Amendment.

Justices concurring: Rehnquist, Brennan, Blackmun, Powell, O'Connor, Stevens, Burger, C.J.

Provisions of election law that forbid a candidate or the members of his immediate family from expending personal funds in excess of specified amounts, that limit to $1,000 the independent expenditures of any person relative to an identified candidate, and that forbid expenditures by candidates for federal office in excess of specified amounts violate the First Amendment speech guarantees; provisions of the law creating a commission to oversee enforcement of the Act are an invalid infringement of constitutional separation of powers in that they devolve responsibilities upon a commission four of whose six members are appointed by Congress and all six of whom are confirmed by the House of Representatives as well as by the Senate, not in compliance with the appointments clause.

Concurring: Brennan, Stewart, Blackmun, Powell, Rehnquist, Burger, C.J.
Dissenting (expenditure provisions only): White.
Dissenting (candidate's personal funds only): Marshall.

Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts violates the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject non-consenting states to suits for damages in state courts.

Justices concurring: Kennedy, O'Connor, Scalia, Thomas, Rehnquist, C.J.
Justices dissenting: Souter, Stevens, Ginsburg, Breyer.

The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeds congressional power under section 5 of the Fourteenth Amendment. Age is not a suspect classification under the Equal Protection Clause, and the ADEA is “so out of
proportion to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."


Justices concurring: O'Connor, Scalia, Kennedy, Thomas, Rehnquist, C.J.

Justices dissenting: Stevens, Souter, Ginsburg, Breyer.


The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures by a political party “in connection with the general election campaign of a [congressional] candidate,” violates the First Amendment when applied to expenditures that a political party makes independently, without coordination with the candidate.


Justices concurring: Breyer, O’Connor, Souter.

Justices concurring in part and dissenting in part: Kennedy, Scalia, Thomas, and Rehnquist, C.J.

Justices dissenting: Stevens, Ginsburg.


Provision of Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions to a separate segregated fund violates the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union.


Justice concurring specially: O’Connor.

Justices dissenting: Rehnquist, C.J., White, Blackmun, Stevens.


Provisions of appropriations laws rolling back automatic pay increases for federal officers and employees is unconstitutional as to Article III judges because, the increases having gone into effect, they violate the security of compensation clause of Article III, § 1.


Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, “in a sum of not less than $500 or more than $20,000 as the court considers just,” does not grant the right to a jury trial on the amount of statu-
tory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.


Assignment to judges who do not have tenure and guarantee of compensation protections afforded Article III judges of jurisdiction over all proceedings arising under or in the bankruptcy act and over all cases relating to proceedings under the bankruptcy act is invalid, inasmuch as judges without Article III protection may not receive at least some of this jurisdiction.

Concurring: Brennan, Marshall, Blackmun, Stevens.
Concurring specially: Rehnquist, O'Connor.
Dissenting: White, Powell, Burger, C.J.

Decision of Court of Appeals holding unconstitutional provision giving either House of Congress power to veto rules of Federal Energy Regulatory Commission on certain natural gas pricing matters is summarily affirmed on the authority of INS v. Chadha.


Decision of Court of Appeals holding unconstitutional provision of FTC Improvements Act giving Congress power by concurrent resolution to veto final rules of the FTC is summarily affirmed on the basis of INS v. Chadha.


Acts of Congress applying to bankruptcy reorganization of one railroad and guaranteeing employee benefits is repugnant to the requirement of Article I, § 8, cl. 4, that bankruptcy legislation be “uniform.”


Section of Indian Land Consolidation Act providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract’s total acreage violates the Fifth Amendment’s takings clause by completely abrogating rights of intestacy and devise.
Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell, Scalia, Rehnquist, C.J.


The 1983 extension of the Social Security tax to then-sitting judges violates the Compensation Clause of Article III, §1. The Clause “does not prevent Congress from imposing a non-discriminatory tax laid generally upon judges and other citizens . . . , but it does prohibit taxation that singles out judges for specially unfavorable treatment.” The 1983 Social Security law gave 96% of federal employees “total freedom” of choice about whether to participate in the system, and structured the system in such a way that “virtually all” of the remaining 4% of employees – except the judges – could opt to retain existing coverage. By requiring then-sitting judges to join the Social Security System and pay Social Security taxes, the 1983 law discriminated against judges in violation of the Compensation Clause.

Justices concurring: Breyer, Kennedy, Souter, Ginsburg, Scalia, Thomas, Rehnquist, C.J.


Section 207 of the Indian Land Consolidation Act, as amended in 1984, effects an unconstitutional taking of property without compensation by restricting a property owner’s right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in Hodel v. Irving (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cures the constitutional defect.

Justices concurring: Ginsburg, O’Connor, Scalia, Kennedy, Souter, Thomas, Breyer and Rehnquist, C.J.
Justices dissenting: Stevens.


“Take-title” incentives contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to encourage states to cooperate in the federal regulatory scheme, offend principles of federalism embodied in the Tenth Amendment. These incentives, which require that non-participating states take title to waste or become liable for generators’ damages, cross the line distinguishing encouragement from coercion. Congress may not simply commandeer the legis-
lative and regulatory processes of the states, nor may it force a transfer from generators to state governments. A required choice between two unconstitutionally coercive regulatory techniques is also impermissible.

Justices concurring: O'Connor, Scalia, Kennedy, Souter.
Thomas, Rehnquist, C.J.
Justices dissenting: White, Blackmun, Stevens.

That portion of the Balanced Budget and Emergency Deficit Control Act which authorizes the Comptroller General to determine the amount of spending reductions which must be accomplished each year to reach congressional targets and which authorizes him to report a figure to the President which the President must implement violates the constitutional separation of powers inasmuch as the Comptroller General is subject to congressional control (removal) and cannot be given a role in the execution of the laws.

Justices dissenting: White, Blackmun.

The Metropolitan Washington Airports Act of 1986, which transferred operating control of two Washington, D.C., area airports from the Federal Government to a regional airports authority, violates separation of powers principles by conditioning that transfer on the establishment of a Board of Review, composed of Members of Congress and having veto authority over actions of the airports authority's board of directors.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter.
Justices dissenting: White, Marshall, Rehnquist, C.J.

The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5 to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125% of cargo value on commercial cargo shipped through the Nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used
by exporters, and the tax does not, therefore, represent compensation for services rendered.


Amendment to Communications Act of 1934 imposing an outright ban on “indecent” but not obscene messages violates the First Amendment, since it has not been shown to be narrowly tailored to further the governmental interest in protecting minors from hearing such messages.


A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate States’ Eleventh Amendment immunity from suit in federal court. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), is overruled.


Justices concurring: Rehnquist, C.J., O’Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.


The Flag Protection Act of 1989, criminalizing burning and certain other forms of destruction of the United States flag, violates the First Amendment. Most of the prohibited acts involve disrespectful treatment of the flag, and evidence a purpose to suppress expression out of concern for its likely communicative impact.


Justices concurring: Brennan, Marshall, Blackmun, Scalia, Kennedy.
Justices dissenting: Stevens, White, O’Connor, Rehnquist, C.J.


Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit Members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS-16. The ban is limited to expressive activity and does not include other outside income, and the “speculative benefits” of the ban do not justify its “crudely crafted burden” on expression.

ACTS OF CONGRESS HELD UNCONSTITUTIONAL

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Justice concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.
Justice concurring in part and dissenting in part: O'Connor.


Title I of the Americans with Disabilities Act of 1990 (ADA), exceeds congressional power to enforce the Fourteenth Amendment, and violates the Eleventh Amendment, by subjecting states to suits brought by state employees in federal courts to collect money damages for the state's failure to make reasonable accommodations for qualified individuals with disabilities. Rational basis review applies, and consequently states "are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." The legislative record of the ADA fails to show that Congress identified a pattern of irrational state employment discrimination against the disabled. Moreover, even if a pattern of discrimination by states had been found, the ADA's remedies would run afield of the "congruence and proportionality" limitation on Congress's exercise of enforcement power.

Justice dissenting: Breyer, Stevens, Souter, Ginsburg.


The Mushroom Promotion, Research, and Consumer Information Act violates the First Amendment by imposing mandatory assessments on mushroom handlers for the purpose of funding generic advertising to promote mushroom sales. The mushroom program differs "in a most fundamental respect" from the compelled assessment on fruit growers upheld in Glickman v. Wileman Brothers & Elliott (1997). There the mandated assessments were "ancillary to a more comprehensive program restricting marketing autonomy," while here there is "no broader regulatory system in place." The mushroom program contains no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing else that forces mushroom producers to associate as a group to make cooperative decisions. But for the assessment for advertising, the mushroom growing business is unregulated.

Justice concurring: Kennedy, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J..
Justice dissenting: Breyer, Ginsburg, O'Connor..
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The Gun Free School Zones Act of 1990, which makes it a criminal
offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is "a criminal
statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." Possession of a gun at or near a school "is in no sense an economic activity that might, through repetition
elsewhere, substantially affect any sort of interstate commerce."

Justices dissenting: Stevens, Souter, Breyer, Ginsburg.

§ 78aa-1.

Section 27A(b) of the Securities Exchange Act of 1934, as added
in 1991, requiring reinstatement of any section 10(b) actions that
were dismissed as time barred subsequent to a 1991 Supreme Court
decision, violates the Constitution's separation of powers to the extent
that it requires federal courts to reopen final judgments in private
civil actions. The provision violates a fundamental principle of Article
III that the federal judicial power comprehends the power to render
dispositive judgments.

Justices concurring: Scalia, O'Connor, Kennedy, Souter,
Thomas, Rehnquist, C.J.
Justice concurring specially: Breyer..
Justices dissenting: Stevens, Ginsburg.

146. Act of Oct. 5, 1992 (Pub. L. 102-385, §§ 10(b) and 10(c)), 106 Stat. 1487,
1503; 47 U.S.C. § 532(j) and § 531 note, respectively.

Section 10(b) of the Cable Television Consumer Protection and
Competition Act of 1992, which requires cable operators to segregate
and block indecent programming on leased access channels if they do
not prohibit it, violates the First Amendment. Section 10(c) of the Act,
which permits a cable operator to prevent transmission of "sexually
explicit" programming on public access channels, also violates the
First Amendment.

Justices concurring: Breyer, Stevens, O'Connor (§ 10(b) only), Kennedy,
Souter, Ginsburg.
Justices dissenting: Thomas, Scalia, O'Connor (§ 10(c) only), Rehnquist, C.J.


The Coal Industry Retiree Health Benefit Act of 1992 is unconsti-
tutional as applied to the petitioner Eastern Enterprises. Pursuant to
the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

Justices concurring: O'Connor, Scalia, Thomas, Rehnquist, C.J.
Justices concurring specially: Kennedy.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.


The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) “under the eleventh amendment. . . or under any other doctrine of sovereign immunity,” did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Article I powers, and the TRCA cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. The right to be free from a business competitor’s false advertising is not a “property right” protected by the Due Process Clause.

Justices concurring: Scalia, O'Connor, Kennedy, Thomas, Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer.


The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states’ sovereign immunity from patent infringement suits is invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act’s provisions are “out of proportion to a supposed remedial or preventive object.”

Justices dissenting: Stevens, Souter, Ginsburg, Breyer.


The Religious Freedom Restoration Act, which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion,
exceeds congressional power under section 5 of the Fourteenth Amendment. Congress' power under Section 5 to "enforce" the Fourteenth Amendment by "appropriate legislation" does not extend to defining the substance of the Amendment's restrictions. This RFRA appears to do. RFRA "is so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

Justices concurring: Kennedy, Stevens, Thomas, Ginsburg, Rehnquist, C.J..
Justices dissenting: O'Connor, Breyer, Souter.

Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between Federal and State governments. In New York v. United States, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and "Congress cannot circumvent that prohibition by conscripting the State's officers directly."

Justices dissenting: Stevens, Souter, Ginsburg, Breyer.

A provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate "noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, is not aimed at the conduct of state officials, but is aimed at private conduct.

Justices dissenting: Souter, Breyer, Stevens, Ginsburg.

Two provisions of the Communications Decency Act of 1996 -- one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive
messages in a manner that is available to anyone under 18 years of age -- violate the First Amendment.


Justices concurring: Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

Justices concurring in part and dissenting in part: O'Connor, Rehnquist, C.J.


Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to designated hours when children are less likely to be watching, violates the First Amendment. The provision is content-based, and therefore can only be upheld if narrowly tailored to promote a compelling governmental interest. The measure is not narrowly tailored, since the Government did not establish that the less restrictive alternative found in section 504 of the Act -- that of scrambling a channel at a subscriber's request -- would be ineffective.


Justices concurring: Kennedy, Stevens, Souter, Thomas, Ginsburg.

Justices dissenting: Scalia, Breyer, O'Connor, Scalia, Rehnquist, C.J.


The Line Item Veto Act, which gives the President the authority to “cancel in whole” three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President “the unilateral power to change the text of duly enacted statutes.” This Line Item Veto Act authority differs in important respects from the President’s constitutional authority to “return” (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.


Justices concurring: Stevens, Kennedy, Souter, Thomas, Ginsburg, Rehnquist, C.J.

Justices dissenting: Scalia, O'Connor, Breyer.


A restriction in the appropriations act for the Legal Services Corporation that prohibits funding for any organization that participates in litigation that challenges a federal or state welfare law constitutes viewpoint discrimination in violation of the First Amendment. More-
over, the restrictions on LSC advocacy “distort [the] usual functioning” of the judiciary, and are “inconsistent with accepted separation-of-powers principles.” “An informed, independent judiciary presumes an informed, independent bar,” yet the restriction “prohibits speech and expression on which courts must depend for the proper exercise of judicial power.”

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer.
Justices dissenting: Scalia, O’Connor, Thomas, Rehnquist, C.J..


Two sections of the Child Pornography Prevention Act of 1996 that extend the federal prohibition against child pornography to sexually explicit images that appear to depict minors but that were produced without using any real children violate the First Amendment. These provisions cover any visual image that “appears to be” of a minor engaging in sexually explicit conduct, and any image promoted or presented in a way that “conveys the impression” that it depicts a minor engaging in sexually explicit conduct. The rationale for excepting child pornography from First Amendment coverage is to protect children who are abused and exploited in the production process, yet the Act’s prohibitions extend to “virtual” pornography that does not involve children in the production process.

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, and Breyer.
Justice concurring specially: Thomas.
Justices dissenting: Chief Justice Rehnquist, and Scalia.


Section 127 of the Food and Drug Administration Modernization Act of 1997, which adds section 503A of the Federal Food, Drug, and Cosmetic Act to exempt “compounded drugs” from the regular FDA approval process if providers comply with several restrictions, including that they refrain from advertising or promoting the compounded drugs, violates the First Amendment. The advertising restriction does not meet the *Central Hudson* test for acceptable governmental regulation of commercial speech. The government failed to demonstrate that the advertising restriction is “not more extensive than is necessary” to serve its interest in preventing the drug compounding exemption from becoming a loophole by which large-scale drug manufacturing can avoid the FDA drug approval process. There are several non-speech means by which the government might achieve its objective.

Justices concurring: O'Connor, Scalia, Kennedy, Souter, Breyer.

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW (1789–2002)
STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW

Three separate lists of Supreme Court decisions appear below: part I lists cases holding state constitutional or statutory provisions unconstitutional, part II lists cases holding local laws unconstitutional, and part III lists cases holding that state or local laws are preempted by federal law. Each case is briefly summarized, and the votes of Justices are indicated unless the Court’s decision was unanimous. Previous editions contained only two lists, one for cases holding state laws unconstitutional or preempted by federal law, and one for unconstitutional or preempted local laws. The 2002 edition adds the third category because of the different nature of preemption cases. State or local laws held to be preempted by federal law are void not due to repugnancy with any provision of the Constitution, but rather due to conflict with a federal statute or treaty, and through operation of the Supremacy Clause. Preemption cases formerly listed in one of the first two categories have been moved to the third. A few cases with multiple holdings are listed in more than one category.

I. STATE LAWS HELD UNCONSTITUTIONAL

1. United States v. Peters, 9 U.S. (5 Cr.) 115 (1809)
   A Pennsylvania statute prohibiting the execution of any process issued to enforce a certain sentence of a federal court, on the ground that the federal court lacked jurisdiction in the cause, could not oust the federal court of jurisdiction. A state statute purporting to annul the judgment of a court of the United States and to destroy rights acquired thereunder is without legal foundation.

2. Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810)
   A Georgia statute annulling conveyance of public lands authorized by a prior enactment was violative of the obligation of contracts clause (Art. I, § 10) of the Constitution.
   Justice dissenting: Johnson (in part).

   A New Jersey law purporting to repeal an exemption from taxation contained in a prior enactment conveying certain lands was violative of the obligation of contracts clause (Art. I, § 10).

   Although subsequently cited as a contract clause case (Piqua Branch Bank v. Knoop, 57 U.S. (16 How.) 369, 389 (1853)), the Court
in the instant decision, without referring to the obligation of contracts clause (Art. I, § 10), voided, as contrary to the principles of natural justice, two Virginia acts which purported to divest the Episcopal Church of title to property “acquired under the faith of previous laws.”

   Retroactive operation of a New York insolvency law to discharge the obligation of a debtor on a promissory note negotiated prior to its adoption violated the obligation of contracts clause (Art. I, § 10).

   A Louisiana insolvency law had no extraterritorial operation, and although adopted in 1808, its invocation to relieve a debtor of an obligation contracted by him in 1811, while a resident of South Carolina, offended the obligation of contracts clause (Art. I, § 10).

   Under the principle of national supremacy (Art. VI) whereunder instrumentalities of the Federal Government are immune from state taxation, a Maryland law imposing a tax on notes issued by a branch of the Bank of United States was held unconstitutional.

   A New Hampshire law which altered a charter granted to a private eleemosynary corporation by the British Crown prior to the Revolution was deemed violative of the obligation of contracts clause (Art. I, § 10).
   Justice dissenting: Duvall.

   A Pennsylvania insolvency law, insofar as it purported to discharge a debtor from obligations contracted prior to its passage, was violative of the obligation of contracts clause (Art. I, § 10).

    Inasmuch as the compact between Virginia and Kentucky negotiated on the occasion of the separation of the latter from the former stipulated that rights in lands within the ceded area should remain valid and secure under the laws of Kentucky, and should be determined by Virginia law as of the time of separation, a subsequent Kentucky law which diminished the rights of a lawful owner by reducing the scope of his remedies against an adverse possessor violated the obligation of contracts clause (Art. I, § 10).
    Justice concurring: Johnson (separately).

An Ohio statute levying a tax on the Bank of the United States, a federal instrumentality, was unenforceable (Art VI).


Justice dissenting: Johnson.


Although a New York insolvency law may be applied to discharge a debt contracted subsequently to the passage of such law, the statute could not be accorded extraterritorial enforcement to the extent of discharging a claim sought to be collected by a citizen of another State either in a federal court or in the courts of other States.


Justices dissenting: Washington, Thompson, Trimble.


A Maryland statute which required an importer to obtain a license before reselling in the original package articles imported from abroad was in conflict with the federal power to regulate foreign commerce (Art. I, § 8, cl. 3) and with the constitutional provision (Art. I, § 10, cl. 2) prohibiting States from levying import duties.


Justice dissenting: Thompson.


A Missouri act, under the authority of which certificates in denominations of 50 to $10 were issued, payable in discharge of taxes or debts owned to the State and of salaries due public officers violated the constitutional prohibition (Art. I, § 10, cl. 10) against emission of “bills of credit” by States.


Justices dissenting: Johnson, Thompson, McLean.


Consistently with the principle of *Ogden v. Saunders*, a Maryland insolvency law could not be invoked to effect discharge of an obligation contracted in Louisiana subsequently to its passage.


A Pennsylvania law which diminished the compensation of a federal officer by subjecting him to county taxes imposed an invalid burden on a federal instrumentality (Art. VI).

A Pennsylvania statute (1826) which penalized an owner's recovery of a runaway slave was violative of Art. IV, § 2, cl. 3, as well as federal implementing legislation.

Justices concurring: Story, Catron, McKinley, Taney, C.J. (separately), Thompson (separately), Baldwin (separately), Wayne (separately), Daniel (separately), McLean (separately).


Illinois mortgage moratorium law which, when applied to a mortgage negotiated prior to its passage, reduced the remedies of the mortgage lender by conferring a new right of redemption upon a defaulting borrower, impaired an obligation of contract contrary to Art. I, § 10, of the Constitution.

Justices concurring: Taney, C.J., Baldwin, Wayne, Catron, Daniel.
Justice dissenting: McLean.


Illinois mortgage moratorium law, which, when applied to a mortgage executed prior to its passage, diminished remedies of the mortgage lender by prohibiting consummation of a foreclosure unless the foreclosure price equaled two-thirds of the value of the mortgaged property, impaired the lender's obligation of contract contrary to Art. I, § 10, of the Constitution.


As to stockholders of Maryland state banks afforded an exemption under prior act of 1821, Maryland statute of 1841 taxing these stockholders impaired the obligation of contract.


Mississippi law which nullified the power of a bank under a previously issued charter to discount bills of exchange and promissory notes and to institute actions for collection of the same was void by reason of impairing an obligation of contract (Art. I, § 10).

Justice dissenting: Taney, C.J., Daniel.


Collection by New York and Massachusetts of per capita taxes on alien and domestic passengers arriving in the ports of these States was violative of the federal power to regulate foreign and interstate commerce (Art. I, § 8, cl. 3).

Justices concurring: McLean (separately), Wayne (separately), Catron (separately), McKinley (separately), Grier (separately).
Justice dissenting: Taney, C.J. (separately), Daniel (separately), Woodbury (separately), Nelson.

   A judgment debtor of the State of Arkansas tendered, in satisfaction of the judgment, banknotes in circulation at the time of the repeal by the State of that section of the said bank's charter providing that such notes should be received in discharge of public debts. By reason of the inhibition of the contract clause of the Constitution, the legislative repeal could neither affect such notes nor abrogate the pledge of the State to receive them in payment of debts.

   Justices dissenting: Catron, Daniel, Nelson, Grier.


   Inasmuch as by the terms of a Maryland statute, assented to by Congress, no toll was to be levied by that State on passenger coaches carrying mails over the Cumberland Road, later Maryland law imposing tolls on passengers in such coaches was void by reason of conflict with an earlier compact between Maryland and the Federal Government and also by virtue of imposing a burden on federal carriage of the mails (Art. VI).


   Inasmuch as the incorporation by the territorial legislature of the University in 1806 operated to vest in the latter certain federal lands reserved for educational purposes, subsequent enactment by Indiana ordering the sale of such lands and use of the proceeds for other purposes was invalid because of impairment of the contractual rights of the University.

   Justices dissenting: Taney, C.J., Catron, Daniel.


   Retroactive Arkansas laws which vested all property of the state bank in Arkansas and thereby prevented the bank from honoring its outstanding bills payable on demand to the holders thereof impaired the bank's contractual rights and were void.

   Justices dissenting: Catron, Daniel, Nelson.


   Inasmuch as state banks, on acceptance of a charter under the Ohio banking law of 1845, were directed, in lieu of all taxes, to pay six percent of annual dividends to the States, a later statute which exposed these banks to higher taxes effected an invalid impairment of the obligation of contract.

   California lacked jurisdiction to impose property taxes on vessels owned by a New York company and registered in New York as their home port which engaged in the coastwise trade entailing calls at California ports which were too brief to establish a tax situs.
   Justice dissenting: Daniel.

   Levy under an 1851 Ohio law of a bank tax at a higher rate than that specified in the bank’s charter in 1845 was invalid by reason of impairment of the obligation of contract.
   Justices dissenting: Catron, Daniel, Campbell.

   A California stamp tax imposed on bills of lading for gold or silver transported from California to any place outside the State was void as a tax on exports forbidden by Art. I, § 10, cl. 2 of the Constitution.

   An Alabama statute authorizing redemption of mortgaged property in two years after sale under a foreclosure decree, by bona fide creditors of the mortgagor could not be applied to sales under mortgages executed prior to the enactment without invalid impairment of the obligation of contracts (Art. I, § 10).

   Securities of the United States being exempt from state taxation, inclusion of the value thereof in the capital of a bank subjected to taxation by the terms of a New York law rendered the latter void.

   An 1863 New York law, enacted after the *Bank of Commerce* decision, is similarly invalid as in effect a tax on the securities of the United States.

   A Maine statute terminating the liability of corporate stock for the debts of the corporation impaired the obligation of contracts as respects claims of creditors outstanding at the time of such termination.

   An obligation of contract was impaired when the New York legislature, after having issued a charter to a bridge company containing
assurances that erection of other bridges within two miles of said bridge would not be authorized, subsequently chartered a second company to construct a bridge within a few rods of the first.


Arkansas statute of 1855 repealing an 1851 grant of tax exemption applicable to swamp lands, paid for either before or after repeal with scrip issued before the repeal, impaired a contract of the State with holders of such scrip (Art. I, § 10).


Missouri constitutional provisions which required clergymen, as a prerequisite to the practice of their profession, to take an oath that they had never been guilty of hostility to the United States, or of certain other acts which were lawful when committed, was void as a bill of attainder and as an ex post facto law.


Justice dissenting: Swayne, Davis, Miller.


Illinois law limiting taxing powers granted to a municipality under a prior law authorizing it to issue bonds and amortize the same by levy of taxes impaired the obligation of contract (Art. I, § 10).


A Mississippi statute which prohibited enforcement of a judgment of a sister State against a resident of Mississippi whenever barred by the Mississippi statute of limitations was violative of the full faith and credit clause of Art. IV.


A Louisiana statute which provided that port wardens might collect, in addition to other fees, a tax of five dollars from every ship entering the port of New Orleans, whether any service was performed or not, was in conflict with the commerce clause of the Constitution (Art. I, § 8, cl. 3).


A Nevada tax collected from every person leaving the State by rail or stage coach abridged the privileges of United States citizens to move freely across state lines in fulfillment of their relations with the National Government.


Pennsylvania was without jurisdiction to enforce its law taxing interest on railway bonds secured by a mortgage applicable to railway property part of which was located in another State.

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Justices dissenting: Clifford, Swayne.

   Tennessee statute repealing prior law making notes of the Banks of Tennessee receivable in payment of taxes impaired the obligation of contract as to the notes already in circulation (Art. I, § 10).

   Missouri statute taxing corporations afforded tax exemption by their charter impaired the obligation of contract (Art. I, § 10).
   Justices concurring: Nelson, Clifford, Grier, Swayne, Davis.
   Justices dissenting: Chase, C.J., Miller, Field.

   Alabama taxes levied on vessels owned by its citizens and employed in intrastate commerce “at so much per ton of the registered tonnage” were violative of the constitutional prohibition against the levy of tonnage duties by States.

   Maryland law which exacted a traders’ license from nonresidents at a higher rate than was collected from residents was violative of the privileges and immunities clause of Art. IV, § 2.

   State legislation cannot interfere with the disposition of the public domain by Congress, and therefore a Missouri statute of limitations, which was inapplicable to the United States, could not be applied so as to accord title to an adverse possessor as against a grantee from the United States, notwithstanding that the adverse possession preceded the federal conveyance.
   Justices concurring: Field, Nelson, Swayne, Clifford, Miller, Bradley, Chase, C.J. 
   Justices dissenting: Davis, Strong.

   North Carolina statute which levied a tax on the franchise and property of a railroad which had been accorded tax exemption by the terms of its charter impaired the obligation of contract.

   Obligations of contracts clause (Art. I, § 10) precluded reliance on a Georgia constitutional provision of 1868, prohibiting enforcement of any contract, the consideration for which was a slave, to defeat enforcement of a note based on such consideration and negotiated prior to adoption of said provision.
Justice dissenting: Chase, C.J.


   Justice dissenting **Chase**


   A Louisiana constitutional provision rendering unenforceable contracts, the consideration for which was Confederate money, was inapplicable, by reason of the obligation of contracts clause of the Federal Constitution (Art. I, § 10) to contracts consummated before adoption of the former provision.

52. **Case of the State Freight Tax**, 82 U.S. (15 Wall.) 232 (1873).

   A Pennsylvania law which imposed a tax on freight transported interstate, into and out of Pennsylvania, was an invalid regulation of interstate commerce.


   Justices dissenting: Swayne, Davis.


   Pennsylvania law, so far as it directed domestic corporations to withhold on behalf of the State a portion of interest due on bonds owned by nonresidents, impaired the obligation of contract and denied due process by taxing property beyond its jurisdiction.

   Justices concurring: Field, Chase, C.J., Bradley, Swayne, Strong.

   Justices dissenting: Davis, Clifford, Miller, Hunt.


   Georgia constitutional provision increasing amount of homestead exemption impaired the obligation of contract, insofar as it applied to a judgment obtained under a less liberal exemption provision.


   A West Virginia Act of 1865, depriving defendants of right to rehearing on a judgment obtained under an earlier law unless they made oath that they had not committed certain offenses, constituted an invalid bill of attainder and ex post facto law.


   Justice dissenting: Bradley.


   South Carolina taxing laws, as applied to a railroad whose charter exempted it from taxation, impaired the obligation of contract.
   Georgia law restricting remedies for obtaining a judgment, so far as it affected prior contracts, impaired the obligation of contract.

   South Carolina act appropriating for payment of state debts the assets of an insolvent bank, in which the State owned all the stock, disadvantaged private creditors of the bank and thereby impaired the obligation of contract.

   Texas act of 1870 imposing a tonnage tax on foreign vessels to defray quarantine expenses held violative of Art I, § 10, prohibiting levy without consent of Congress.

   Missouri law which levied a tax on railroad prior to expiration of a grant of exemption impaired obligation of contract.
   Justices dissenting: Clifford, Miller.

   Wisconsin act admitting foreign insurance companies to transact business within the State, upon their agreement not to remove suits to federal courts, exacted an unconstitutional condition.
   Justices concurring: Clifford, Miller, Field, Bradley, Swayne, Strong, Hunt.
   Justices dissenting: Waite, C.J., Davis.

   Kansas act of 1872, authorizing municipalities to issue bonds repayable out of tax revenues in support of private enterprise, amounted to collection of money in aid of a private, rather than public purpose, and was violative of due process.
   Justice dissenting: Clifford.

   North Carolina statute, insofar as it authorized a jury in suits on contracts--negotiated previously during the Civil War--to place their own estimates upon the value of the contract instead of taking the value stipulated by the parties, impaired the obligation of such contracts.
   Justice dissenting: Bradley.
   Missouri act which required payment of a license fee by peddlers of merchandise produced outside the State, but exempted peddlers of State-produced merchandise, imposed an unconstitutional burden on interstate commerce.

   Wisconsin statute void on basis of *Welton v. Missouri*.

   New York act of 1849, which required owner of ocean-going passenger vessel to post bond of $300 for each passenger as surety against their becoming public charges, or, in lieu thereof, to pay a tax of $1.50 for each, contravened exclusive federal power to regulate foreign commerce.

   California law, which required master of vessel to post $500 bond for each alien “lewd and debauched female” passenger landed, contravened the federal power to regulate foreign commerce.

68. *Inman Steamship Co. v. Tinker*, 94 U.S. 238 (1877).
   New York act of 1865, providing for collection from docking vessels of a fee measured by tonnage, imposed tonnage duty in violation of Art. I, § 10.

   Louisiana statute requiring survey of hatches of every sea-going vessel arriving at New Orleans, contravened the federal power to regulate foreign and interstate commerce.

   Statute increasing tax above rate stipulated in State’s contract with railroad corporations impaired the obligation of contract.

   Missouri act prohibiting the bringing of cattle into the State between March and November contravened the power of Congress over interstate commerce.

   Louisiana Reconstruction Act, prohibiting interstate common carriers of passengers from making any discrimination on the basis of race or color, held invalid as a regulation of interstate commerce.

   Tennessee law increasing the tax on a bank above the rate specified in its charter, held to impair the obligation of that contract.

Justices concurring: Swayne, Miller, Hunt, Bradley, Harlan, Waite, C.J.
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Justices dissenting: Strong, Clifford, Field.

   North Carolina constitutional provision increasing amount of
debtor's property exempt from sale under execution of a judgment im-
paired the obligation of contracts negotiated prior to its adoption.
   Justices concurring specially: Field, Hunt.
   Justice dissenting: Harlan.

   Provision of the Tennessee Constitution of 1865, forbidding the
receipt for taxes of the bills of the Bank of Tennessee and declaring
the issues of the bank during the insurrectionary period void, held to
impair the obligation of contract.
   Justices concurring: Miller, Clifford, Strong, Hunt, Swayne, Field.
   Justices dissenting: Waite, C.J., Bradley, Harlan.

   Pennsylvania act taxing auction sales, when applied to sales of
imported goods in the original packages, was void as a duty on im-
ports and a regulation of foreign commerce.

   Revenue law of Illinois, so far as it modified tax exemptions
granted to Northwestern University by an earlier statute, impaired
the obligation of contract.

78. Strauder v. West Virginia, 100 U.S. 303 (1880).
   West Virginia law barring Negroes from jury service violated the
equal protection clause of the Fourteenth Amendment.
   Justices concurring: Strong, Miller, Hunt, Swayne, Bradley, Harlan, Waite,
   C.J.
   Justices dissenting: Field, Clifford.

   Maryland statute and Baltimore ordinance, levying tax solely on
products of other States, held to impose an invalid burden upon for-
ign and interstate commerce.
   Justices concurring: Harlan, Hunt, Clifford, Strong, Miller, Swayne, Field,
   Bradley.

   Texas statute, insofar as it levied occupational tax only upon sale
of out-of-state beer and wine, was violative of the federal power to
regulate foreign and interstate commerce.
Virginia act, adopted subsequently to law providing for issuance of bonds and acceptance of interest coupons thereon in full payment of taxes, which levied a new property tax collectible by way of deduction from such interest coupons, impaired the obligation of contract.
   Justice dissenting: Miller.

82. Hall v. Wisconsin, 103 U.S. 5 (1880).
Wisconsin act which repealed prior statute authorizing payment of fixed sum for performance of a contract to complete a geological survey, impaired the obligation of contract, notwithstanding that the second act was enacted prior to total fulfillment of the contract.

Virginia license acts, requiring a license for sale of goods made outside the State but not within the State, held in conflict with the commerce clause.

Louisiana act withdrawing from New Orleans the power to levy taxes adequate to amortize previously issued bonds impaired the obligation of contract.

The general taxing laws for New Orleans when applied to the property of an asylum, whose charter exempted it from taxation, impaired the obligation of contract.
   Justices dissenting: Miller, Field.

86. Western Union Telegraph Co. v. Texas, 105 U.S. 460 (1882).
Texas tax collected on private telegraph messages sent out of the State imposed an invalid burden on foreign and interstate commerce; and insofar as it was imposed on official messages sent by federal officers amounted to an unconstitutional burden on a federal instrumentality.

87. Ralls County Court v. United States, 105 U.S. 733 (1881).
Missouri law which deprived a county of the taxing power requisite to meet interest payments on previously issued bonds impaired the obligation of contract.

West Virginia law authorizing a city to issue its bonds in aid of manufacturers was void by reason of sanctioning an expenditure of
public funds for a private purpose contrary to the requirements of due process.


New York law imposing a tax on every alien arriving from a foreign country, and holding the vessel liable for payment of the tax was an invalid regulation of foreign commerce.


A Missouri law which abolished a rule existing at the time the crime was committed, whereunder subsequent prosecution for first degree murder was precluded after conviction for second degree murder has been set aside on appeal, was void as an ex post facto law.

Justices concurring: Miller, Harlan, Field, Blatchford, Woods.


Louisiana act repealing taxing authority of a municipality to pay judgments hitherto rendered against it impaired the obligation of contract.


Missouri act authorizing city to issue bonds in aid of manufacturing corporations was void by reason of sanctioning defrayment of public moneys for other than public purpose and depriving taxpayers of property without due process.


Pennsylvania taxing laws, when applied to the capital stock of a New Jersey ferry corporation carrying on no business in the State except the landing and receiving of passengers and freight, was void as a tax on interstate commerce.


Virginia act which terminated privilege accorded bondholders under prior law of tendering coupons from said bonds in payment of taxes impaired the obligation of contract (Art. I, § 10).

Justices dissenting: Bradley, Miller, Gray, Waite, C.J..


Virginia Act of 1867, which provided that in suits to enforce contracts for the sale of property negotiated during the Civil War and payable in Confederate notes, the measure of recovery was to be the value of the land at the time of sale rather than the value of such notes at that time, impaired the obligation of contracts (Art. I, § 10).

Kentucky act of 1872 chartering and authorizing a corporation to supply gas in Louisville, Kentucky, impaired the obligation of contract resulting from the grant of an exclusive privilege to an older company in 1869.


When a public officer has completed services (1871-1874), for which the compensation was fixed by law, an implied obligation to pay him at such rate arises, and such contract was impaired by a Louisiana constitutional provision of 1880 which reduced the taxing power of a parish to such extent as to deprive the officer of any effective means of collecting the sum due him.


Alabama law which deprived Mobile and its successor of the power to levy taxes sufficient to amortize previously issued bonds impaired the obligation of contracts.


Michigan law taxing nonresidents soliciting sale of foreign liquors to be shipped into the State imposed an invalid restraint on interstate commerce.


When a Virginia law provided that coupons on state bonds were acceptable in payment of state fees, subsequent law requiring legal tender in payment of a professional license fee impaired the obligation of contract between the coupon holder and the State and also voided invocation of another law imposing penalty for practice without a license (refused for want of payment in legal tender).


Tennessee privilege tax on railway sleeping cars was void insofar as it applied to cars moving in interstate commerce.


A State cannot validly sell for taxes lands which the United States owned at the time the taxes were levied, but in which it ceased to have an interest at the time of sale (Art. VI).


Illinois law, prohibiting long-short haul rate discrimination, when applied to interstate transportation, encroached upon the federal commerce power.

Justices concurring: Miller, Field, Harlan, Woods, Matthews, Blatchford.

Justices dissenting: Bradley, Gray, Waite, C.J.

Tennessee law taxing drummers not operating from a domestic licensed place of business, insofar as it applied to drummers soliciting sales of goods on behalf of out-of-state business firms, was an invalid regulation of interstate commerce.

Justices dissenting: Waite, C.J., Gray, Field.


Maryland law licensing salesmen, insofar as it was applied to a New York resident soliciting orders on behalf of a New York firm, was an invalid regulation of interstate commerce.


Iowa law, conditioning admission of a foreign corporation to do local business on surrender of right to invoke the diversity of citizenship jurisdiction of federal courts, exacted an invalid forfeiture of a constitutional right.


Michigan act, insofar as it taxed the gross receipts of companies and corporations engaged in interstate commerce, was held to be in conflict with the commerce powers of Congress.


Missouri law requiring certain petitions, not exacted when county bonds were issued, before taxes could be levied to amortize said bonds, impaired the obligation of contracts.


Pennsylvania gross receipts tax on public utilities, insofar as it was applied to the gross receipts of a domestic corporation derived from transportation of persons and property on the high seas, was in conflict with the exclusive federal power to regulate foreign and interstate commerce.


Indiana statute concerning the delivery of telegrams, so far as applied to deliveries sent from Indiana to other States, was an invalid regulation of commerce.


Iowa liquor statute requiring interstate carriers to procure a certificate from the auditor of the county of destination before bringing liquor into the State, was violative of the commerce clause.

Justices concurring: Matthews, Field (separately), Miller, Bradley, Blatchford.
Justices dissenting: Harlan, Gray, Waite, C.J.
   A California tax levied on the franchise of interstate railway corporations chartered by Congress pursuant to its commerce power is void, Congress not having consented.

   An Ohio law which levied a tax on the receipts of a telegraph company was invalid to the extent that part of such receipts levied on were derived from interstate commerce.

   A Texas law which imposed a license tax on drummers violates the commerce clause as enforced against one who solicited orders for the purchase of merchandise from out-of-state sellers.

   Clause of the District act requiring commercial agents selling by sample to pay a license tax, held a regulation of interstate commerce when applied to agents soliciting purchases on behalf of principals outside of the District of Columbia.
   
   Justice dissenting: Miller.

   Alabama tax law, as applied to revenue of telegraph company made by sending messages outside the State, was held to be an invalid regulation of commerce.

   Colorado law, when applied to a person convicted of a murder committed prior to the enactment and which increased the penalty to be imposed, was void as an ex post facto law.
   
   Justices concurring: Miller, Field, Harlan, Gray, Blatchford, Lamar, Fuller, C.J.
   Justice dissenting: Brewer, Bradley.

   State rate regulatory law which empowered a commission to establish rate schedules that were final and not subject to judicial review as to their reasonableness was violative of the due process and equal protection clauses of the Fourteenth Amendment.
   
   Justices concurring: Blatchford, Miller, Field, Harlan, Brewer, Fuller, C.J.
   Justices dissenting: Bradley, Gray, Lamar.

   Iowa prohibition law, enforced as to an interstate shipment of liquor in the original packages or kegs, was violative of the federal power to regulate interstate commerce.

Michigan statute taxing sale of imported liquor in original package, held invalid regulation of interstate commerce.

Justices dissenting: Gray, Harlan, Brewer.


Virginia acts which stipulated that if the genuineness of coupons tendered in payment of taxes was in issue, the bond from which the coupon was cut must be produced, which precluded use of expert testimony to establish the genuineness of the coupons, and which, in suits for payment of taxes, imposed on the defendant tendering coupons as payment the burden of establishing the validity of said coupons, were deemed to abridge the remedies available to the bondholders so materially as to impair the obligation of contract.


Pennsylvania act, imposing a license tax on foreign corporation common carriers doing business in the State, was held to be invalid as a tax on interstate commerce.

Justices concurring: Lamar, Miller, Field, Bradley, Harlan, Blatchford.
Justices dissenting: Fuller, C.J., Gray, Brewer.


Minnesota statute, which made it illegal to offer for sale any meat other than that taken from animals passed by state inspectors, held to discriminate against meat producers from other States and to place an undue burden upon interstate commerce.


Virginia statute prohibiting sale of meat killed 100 miles or more from place of sale, unless it was first inspected in Virginia, held void as interference with interstate commerce and imposing a discriminatory tax.


Oregon act of 1887 which voided all certificates for the sale of public land unless 20% of the purchase price had been paid prior to 1879 altered the terms of purchase provided under preexisting law and therefore impaired the obligations of the contract.


Kentucky law, which required license from foreign express corporation agents before doing business in the State, was held invalid under the commerce clause.
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Justices dissenting: Fuller, C.J., Gray.

Virginia statute which required state inspection of all but domestic flour held invalid under commerce clause.

Tennessee statutes which levied taxes on a railroad company enjoying tax exemption under an earlier charter impaired the obligation of contract.

Justices concurring: Jackson, Field, Harlan, Brown, White.
Justices dissenting: Fuller, C.J., Gray, Brewer, Shiras.

Pennsylvania act of 1885 which required a New York corporation, when paying interest in New York City on its outstanding securities, to withhold a Pennsylvania tax levied on resident owners of such securities was violative of due process by reason of its application to property beyond the jurisdiction of Pennsylvania. The act also impaired the obligation of contracts by increasing the conditions originally exacted of the railroad in return for permission to construct and operate over trackage in Pennsylvania.

Kentucky act regulating toll rates on bridge across the Ohio River held unconstitutional regulation of interstate commerce.

Justices concurring: Brown, Harlan, Brewer, Shiras, Jackson.
Justices dissenting: Fuller, C.J., Gray, Brewer, Shiras.

Tennessee revenue laws which imposed a tax on stock beyond that stipulated under the provision of a state charter held to impair the obligation of contracts.

Kansas law granting to mortgagor a right, not existent when the mortgage was negotiated, namely, a right to redeem foreclosed property, impaired the obligation of contracts.

Illinois statute that required a railroad to run its New Orleans train into Cairo and back to mail line, although there was already adequate service to Cairo, was held to be an unconstitutional obstruction of interstate commerce and of passage of United States mails.
   A Nebraska statute that compelled a railroad to permit a third party to erect a grain elevator on its right of way deprived of property violated due process.

   South Carolina act regulating sale of alcoholic beverages exclusively at state dispensaries, when enforced against a resident importing out-of-state liquor, constituted an invalid discriminatory regulation of interstate commerce.
   Justices concurring: Shiras, Field, Harlan, Gray, White, Peckham, Fuller.
   Justice dissenting: Brown.

   Texas law which required railroads to pay court costs and attorneys' fees to litigants successfully prosecuting claims against them deprived the railroads of due process and equal protection of the law.
   Justices dissenting: Gray, White, Fuller, C.J.

   Louisiana law imposing penalty for soliciting contract of insurance on behalf of insurers which have not complied with Louisiana law effected a denial of liberty of contract contrary to due process when applied to an insurance contract negotiated in New York with a New York company and with premiums and losses to be paid in New York.

   Nebraska statute setting intrastate freight rates held to impose rates so low as to be unreasonable and to amount to a deprivation of property without due process of law.

   Texas constitutional provision, as enforced to recover certain sections of land held by a railroad company under a previous legislative grant, judged an impairment of obligation of contract.

   Provision in Utah constitution, providing for the trial of non-capital criminal cases in courts of general jurisdiction by a jury of eight persons, held an ex post facto law applied to felonies committed before the territory became a State.
   Justices concurring: Harlan, Gray, Brown, Shiras, White, McKenna, Fuller, C.J.
   Justices dissenting: Brewer, Peckham.
Pennsylvania law which prohibited the manufacture and sale of oleomargarine was invalid to the extent that it prohibited interstate importation and resale of oleomargarine in original packages.

Justices concurring: Fuller, C.J., Brewer, Brown, Shiras, White, Peckham, McKenna.
Justices dissenting: Gray, Harlan.

New Hampshire law which prohibited the sale of oleomargarine unless it was pink in color, was invalid as an arbitrary means of rendering the product unmarketable and also could not be enforced to prevent the interstate transportation and resale of oleomargarine produced in another State and not colored pink.

Justices concurring: Fuller, C.J., Brewer, Brown, Shiras, White, Peckham, McKenna.
Justices dissenting: Harlan, Gray.

Tennessee acts which granted Tennessee creditors priority over non-resident creditors having claims against foreign corporations admitted to do local business infringed the privileges and immunities clause of Art. IV, § 2.

Justices concurring: Harlan, Gray, Brown, Shiras, White, McKenna, Peckham.
Justices dissenting: Brewer, Fuller, C.J.

The exaction, as authorized by Ohio law, from the owner of property, via special assessment, of the cost of a public improvement in substantial excess of the benefits accruing to him amounted to a taking of property for public use without compensation and was violative of due process.

Justices concurring: Harlan, Brown, White, Peckham, McKenna, Fuller, C.J.
Justices dissenting: Brewer, Gray, Shiras.

Iowa statute deprived a nonresident owner of property in Iowa of due process by subjecting him to personal liability to pay a special assessment when the State did not acquire personal jurisdiction via service of process.

Michigan act which required railroads to sell 1,000-mile tickets at a fixed price in favor of the purchaser, his wife, and children, with provisions for forfeiture if presented by any other person in payment.
of fare, and for expiration within two years, subject to redemption of unused portion and collection of 3 cents per mile already traveled, effected a taking of property without due process and a denial of equal protection.

Justices dissenting: Fuller, C.J., Gray, McKenna.


Subsequent repeal of a Texas statute which permitted treasury warrants to be given to the State for payment of interest on bonds issued by a railroad and held by the State, with accompanying endeavor to hold the railroad liable for back interest paid on the warrants, was invalid by reason of impairment of the obligation of contract.


Illinois law which required all regular passenger trains to stop at county seats for receipt and discharge of passengers imposed an invalid burden on interstate commerce when applied to an express train serving only through passengers between New York and St. Louis.

149. Stearns v. Minnesota, 179 U.S. 223 (1900).

Minnesota statute repealing all former tax exemption laws and providing for the taxation of lands granted to railroads held to impair the obligation of contracts.


Kansas statute, regulating public stock yards, violates the equal protection clause of the Fourteenth Amendment in that it applied only to one stockyard company in the State.


Section of Kentucky constitution on long and short haul railroad rates held invalid where interstate shipments were involved.

Justices concurring: Peckham, Harlan, Brown, Shiras, White, McKenna, Fuller, C.J..
Justices dissenting: Brewer, Gray.


Act of Illinois, which regulated monopolies but exempted agricultural products and livestock in the hands of the producer from the operation of the law, held to deny the equal protection of the laws.

Justice dissenting: McKenna.

Tennessee license tax on agent soliciting and selling by sample for company in another State held invalid regulation of commerce.


An Indiana franchise granted to a Kentucky corporation for operating a ferry from the Indiana to the Kentucky shore had its tax situs in Indiana; and, accordingly, Kentucky lacked jurisdiction with the result that its law which authorized a levy thereon effected a deprivation of property without due process of law.

Justices concurring: Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes.

Justices dissenting: Shiras, Fuller, C.J.


Washington law which accorded contractor or subcontractor a lien on a foreign vessel for work done and which made no provision for protection of owner in event contractor was fully paid before notice of subcontractor’s lien was received deprived the owner of normal defenses and constituted an invalid interference with admiralty jurisdiction exclusively vested in federal courts by Art. III.


New York statutes giving a lien for repairs upon vessels and providing for the enforcement of such liens by proceedings *in rem*, held void as in conflict with the exclusive admiralty and maritime jurisdiction of the federal courts.

Justices concurring: Brown, White, McKenna, Holmes, Day.

Justices dissenting: Brewer, Peckham, Harlan, Fuller, C.J.


Tennessee tax of $500 per year per pullman car, when applied to cars moving in interstate as well as intrastate commerce, imposed an invalid burden on interstate commerce.


Illinois law, passed after a mortgage was executed, which provided that if a mortgagee did not obtain a deed within five years after the period of redemption had lapsed, he lost the estate (whereas under the law existing when the mortgage was executed, failure by the mortgagee to take out a deed had no effect on the title of the mortgagee against the mortgagor) was held void as impairing the obligation of contract and depriving the mortgagee of property rights without due process.
   Sections of Georgia code, imposing the duty on common carriers of reporting on the shipment of freight to the shipper, held void when applied to interstate shipments.

   New York law establishing 10-hour day in bakeries was violative of due process by reason of interfering with the employees' freedom to contract in relation to their labor.
   Justices concurring: Peckham, Brewer, Brown, McKenna, Fuller.
   Justices dissenting: Harlan, White, Day, Holmes (separately).

   Inasmuch as tangible personal property acquires a tax situs in the State where it is permanently located, attempt by Kentucky, in which the owner was domiciled, to tax railway cars located in Indiana, was void and amounted to a deprivation of property without due process.
   Justices concurring: Brown, Harlan, Brewer, Peckham, McKenna, Day.
   Justices dissenting: Holmes, White, Fuller, C.J..

   Texas statute exacting of an interstate railroad an absolute requirement that it furnish a certain number of cars on a given day to transport merchandise to another State imposed an invalid, unreasonable burden on interstate commerce.
   Justices concurring: Brewer, Brown, Peckham, Holmes, Day.
   Justices dissenting: Harlan, McKenna, Fuller, C.J..

   When a railroad is reorganized under a special act but no new corporation is chartered, tax concession granted by such act amounted to a contract which could not be impaired by subsequent Michigan enactment which purported to alter the rate of the tax.
   Justice dissenting: White.

   A water company owning an exclusive franchise to supply a city with water was entitled to an injunction restraining impairment of such contract by attempted erection by city of its own water system pursuant to Mississippi statutory authorization.
   Justice dissenting: Harlan.

A Colorado statute stipulating that foreign corporations, as a condition for admission to do business, pay a fee based on their capital stock whereupon they would be subjected to all the liabilities and restrictions imposed upon domestic corporations amounted to a contract, the obligation of which was invalidly impaired by a later statute which imposed higher annual license fees on foreign corporations admitted under the preceding terms than were levied on domestic corporations, whose corporate existence had not expired.

Justices concurring: Peckham, Brewer, White, McKenna, Day.
Justices dissenting: Harlan, Holmes, Moody, Fuller, C.J..


Kentucky law proscribing C.O.D. shipments of liquor, providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale, and making the carrier jointly liable with the vendor was, as applied to interstate shipments, an invalid regulation of interstate commerce.

Justices concurring: Brewer, Holmes, Peckham, Moody, White, Day, McKenna, Fuller, C.J..
Justice dissenting: Harlan.


Georgia statutory assessment procedure which afforded taxpayer no opportunity to be heard as to valuation of property not returned by him under honest belief that it was not taxable and which permitted him to challenge the assessment only for fraud and corruption was violative of the due process requirements of the Fourteenth Amendment.


Tennessee tax law which exempted domestic crops and manufactured products while extending the levy to like products of out-of-state origin imposed an invalid burden on interstate commerce.


Minnesota railroad rate statute which imposed such excessive penalties that parties affected were deterred from testing its validity in the courts denied a railroad the equal protection of the laws.


Texas gross receipts tax insofar as it was levied on railroad receipts which included income derived from interstate commerce was invalid by reason of imposing a burden on interstate commerce.

Justices concurring: Holmes, Brewer, Peckham, Day, Moody.
Justices dissenting: Harlan, White, McKenna, Fuller, C.J.

New York law which required a public utility to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained under the rates fixed unconstitutionally deprived the utility of its property without due process.


Kentucky constitutional provision which required a carrier to deliver its cars to connecting carriers without providing adequate protection for their return or compensation for their use effected an invalid taking of property without due process of law.

Justices concurring: Holmes, Brewer, White, Peckham, Day, Fuller, C.J.

Justices dissenting: McKenna, Harlan, Moody.


For want of jurisdiction, Oregon could not validly prosecute as a violator of its law prohibiting the use of purse nets one who, pursuant to a license from Washington, used such a net on the Washington side of the Columbia River.


Kentucky law proscribing the sale of liquor to an inebriate, as applied to a carrier delivering liquor to such person from another State, was void by reason of conflict with the commerce clause.

Justices concurring: Brewer, Holmes, Peckham, Moody, White, Day, McKenna, Fuller, C.J.

Justice dissenting: Harlan.


Louisiana act of 1870 providing for registration and collection of judgments against New Orleans, so far as it delayed payment, or collection of taxes for payment, of contract claims existing before its passage, effected an invalid impairment of the obligation of such contracts.


North Dakota statute which required the recipient of a federal retail liquor license, solely because of payment therefor and without reference to the doing of any act within North Dakota, to publish official notices of the terms of such license and of the place where it is posted, to display on his premises an affidavit confirming such publication, and to file an authenticated copy of such federal license together with a $10 fee, was void for imposing a burden on the federal taxing power.

Justices concurring: White, Harlan, Brewer, Day.

Justices dissenting: Fuller, C.J., McKenna, Holmes.

Kansas statute imposing a charter fee, computed as a percentage of authorized capital stock, on corporations for the privilege of doing business in Kansas could not validly be collected from a foreign corporation engaged in interstate commerce, and also was violative of due process insofar as it was imposed on property, part of which was located beyond the limits of that State.

Justices concurring: Harlan, Brewer, White (separately), Day, Moody.
Justices dissenting: Holmes, McKenna, Peckham, Fuller, C.J.


Arkansas law which required a foreign corporation engaged in interstate commerce to pay, as a license fee for doing an intrastate business, a given amount of its entire capital stock, whether employed in Arkansas or elsewhere, was void by reason of imposing a burden on interstate commerce and embracing property outside the jurisdiction of the State.

Justices dissenting: Fuller, C.J., McKenna, Holmes.


Alabama law which imposed on foreign corporations already admitted to do business an additional franchise or privilege tax not levied on domestic corporations exposed the foreign corporations to denial of equal protection of the laws.

Justices dissenting: Fuller, C.J., McKenna, Holmes.


Kansas, which by law exacted of foreign corporations engaged in interstate commerce the following conditions for admission and retention of the right to do business in that State, namely, procurement of a license, submission of an annual financial statement, and which prohibited them from filing actions in Kansas courts unless such conditions were met, imposed an unconstitutional burden on interstate commerce.

Justices dissenting: Fuller, C.J., McKenna.


Arkansas law, and commission order issued under the authority thereof, which required an interstate carrier, upon application of a local shipper, to deliver promptly the number of freight cars requested for loading purposes and which, without regard to the effect of such demand on its interstate traffic, exposed it to severe penalties for non-compliance, imposed an invalid, unreasonable burden on interstate
commerce. The rules of the American Railway Association as to availability of a member carrier's cars for interstate shipments being a matter of federal regulation, it was beyond the power of a state court to pass on their sufficiency.

Justices concurring: White, Harlan, McKenna, Holmes, Day, Lurton.
Justices dissenting: Fuller, C.J.


Nebraska law compelling railroad, at its own expense, and upon request of grain elevator operators, to install switches connecting such elevators with its right of way deprived the carrier of property without due process of law.

Justices concurring: Holmes, White, Day, Lurton, Fuller, C.J.
Justices dissenting: Harlan, McKenna.


Alabama law which imposed license tax on agents not having a permanent place of business in that State and soliciting orders for the purchase and delivery of pictures and frames manufactured in, and delivered from, another State, with the title remaining in the vendor until the agent collected the purchase price, imposed an invalid burden on interstate commercial transactions.


When a railroad already has provided adequate accommodations at any point, a Missouri regulation which required interstate trains to stop at such point imposed an invalid, unreasonable burden on interstate commerce. Also, a Missouri law which forfeited the right of an admitted foreign carrier to do a local business upon its instituting a right of action in a federal court extracted an unconstitutional condition.


Alabama law which made a refusal to perform labor contracted for, without return of money or property advanced under the contract, prima facie evidence of fraud and which was enforced under local rules of evidence which precluded one accused thereof from testifying as to uncommunicated motives was an invalid peonage law proscribed by the Thirteenth Amendment.

Justices concurring: Hughes, Lamar, Harlan, Day, Van Devanter, McKenna, White, C.J.
Justices dissenting: Holmes, Lurton.


Oklahoma law which withheld from foreign corporations engaged in interstate commerce a privilege afforded domestic corporations engaged in local commerce, namely, of building pipe lines across its
highways and transporting to points outside its boundaries natural gas extracted and reduced to possession therein, was invalid as a restraint on interstate commerce and as a deprivation of property without due process of law.

Justices concurring: McKenna, Harlan, Day, Van Devanter, Lamar, White, C.J.

Justices dissenting: Holmes, Lurton, Hughes.

A Washington statute of 1905, as interpreted to authorize taxation of Whitman College, impaired the obligation of contract by nullifying the College's exemption from taxation conferred by its charter.

Kentucky statute prohibiting common carriers from transporting intoxicating liquors to "dry" points in Kentucky was constitutionally inapplicable to interstate shipments of such liquor to consignees in Kentucky.

Colorado law levying tax of 2 cents on each $1,000 of a corporation's capital stock could not constitutionally be collected from a Kansas corporation engaged in interstate commerce, the greater part of whose property and business were located and conducted outside Colorado.

Oklahoma law which purported to be an *ad valorem* tax on the property of corporations, levied in the form of a three per cent gross receipts tax, and computed, in the case of express companies doing an interstate business, as a percentage of gross receipts from all sources, interstate as well as intrastate, which is equal to the proportion which its business in Oklahoma bears to its total business was void as applied to such express companies. The tax burdened interstate commerce and was levied, contrary to due process, on property in the form of income from investments and bonds located outside the State.

Oklahoma conservation law, insofar as it withheld from foreign corporations the right to lay pipe lines across highways for purposes of transporting natural gas in interstate commerce, imposed an invalid burden on interstate commerce.

Arkansas law compelling railroads to pay claimants within 30 days after notice of injury to livestock caused by their trains, and, upon default thereof, authorizing claimants to recover double the damages awarded by a jury plus an attorney's fee, notwithstanding
that the amount sued for was less than the amount originally claimed, in effect penalized the railroads for their refusal to pay excessive claims, and accordingly effected an arbitrary deprivation of property without due process of law.


Kansas law which exacted certain requirements, such as obtaining permission of the State Charter Board, paying filing and license fees, and submitting annual statements listing all stockholders, as a condition prerequisite to doing business in Kansas and suing in its courts could not constitutionally be applied to foreign corporations engaged in interstate commerce. A State cannot exact a franchise for the privilege of engaging in such commerce.


Arkansas statute, exacting license and fee from peddlers of lightning rods and other articles, as applied to representatives of a Missouri corporation soliciting orders for the sale and subsequent delivery of stoves by said corporation, imposed an invalid burden on interstate commerce.


Washington statute of 1907 repealing a prior act of 1893 with the result that rights to consequential damages for a change of street grade that had already accrued under the earlier act were destroyed amounted to an invalid deprivation of property without due process of law.


Kansas statute which did not permit a carrier to have the sufficiency of rates established thereunder determined by judicial review and which exposed the carrier, when sued for charging rates in excess thereof, to a liability for liquidated damages in the sum of $500, which was unrelated to actual damages, effected an unconstitutional deprivation of property without due process of law.


South Dakota law which made railroads liable for double damages in case of failure to pay a claim, within 60 days after notice, or to offer to pay a sum equal to what a jury found the claimant entitled to was arbitrary and deprived the carriers of property without due process of law.


Oklahoma law which prohibited foreign corporations, upon penalty of forfeiting their license to do business in that State, from invoking the diversity of citizenship jurisdiction of federal courts and instituting actions therein exacted an unconstitutional condition.


Maryland Oyster Inspection tax of 1910, levied on oysters coming from other States, the proceeds from which were used partly for inspection and partly for other purposes, such as the policing of state waters, was void as imposing a burden on interstate commerce in excess of the expenses absolutely necessary for inspection.


Minnesota tax on bonds issued by a municipality of the Territory of Oklahoma and held by Minnesota corporations was void as a tax on a federal instrumentality (Art. VI).


Amendment in 1911 of California constitution of 1879, and municipal ordinances of Los Angeles adopted in pursuance of the amendment were ineffectual by reason of the prohibition against impairment of contracts contained in Art. I, § 10, of the Federal Constitution, to deprive a utility of rights acquired before said amendment, which embraced the privilege of laying gas pipes under the streets of Los Angeles.


Alabama sewing machine license tax could not be collected from those agencies of a foreign corporation engaged wholly in an interstate business, that is, in soliciting orders for machines to be accepted and fulfilled at the Georgia office of the seller.


Since venue is not part of a transitory cause of action, Alabama law which created such cause of action by making the employer liable to the employee for injuries attributable to defective machinery was inoperative insofar as it sought to withhold from such employee the right to sue on such action in courts of any State other than Alabama; the full faith and credit clause of Art. IV does not preclude a court in another State which acquired jurisdiction from enforcing such right of action.


Louisiana act of 1906 repealing prior act of 1858 and sequestering with compensation certain property acquired by a canal company under the repealed enactment impaired an obligation of contact.

Texas act of 1914 stipulating that only those who have previously served two years as freight train conductors or brakemen shall be eligible to serve as railroad train conductors was arbitrary and effected a denial of the equal protection of the laws.


Kentucky criminal and antitrust provisions, both constitutional and statutory, were void for vagueness and hence violative of due process because a prohibition of combinations which establish prices that are greater or lower than the “real market value” of an article as established by “fair competition” and “under normal market conditions” afforded no standard that was possible to know in advance and to obey.

Justices concurring: Holmes, Hughes, Lamar, Day, Lurton, Van Devanter, White, C.J.

Justices dissenting: McKenna, Pitney.


Kansas statute empowering a Kansas court to award against a litigant attorney’s fees attributable to the presentation before the United States Supreme Court of an appeal in a mandamus proceeding was inoperative consistently with the principle of national supremacy, for a state court cannot be empowered by state law to assess fees for services rendered in a federal court when such assessment is sanctioned neither by federal law nor by the rules of the Supreme Court.


South Carolina law making mental anguish resulting from negligent non-delivery of a telegram a cause of action could not be invoked to support an action for negligent non-delivery in the District of Columbia, an area beyond the jurisdiction of South Carolina and, consistent with due process, removed from the scope of its legislative power. The statute, as applied to messages sent from South Carolina to another jurisdiction, also was an invalid regulation of interstate commerce.


Alabama law which permitted person convicted of an offense to contract with another whereby, in consideration of the latter becoming surety for the convicted person’s fine, the convicted person agreed to perform certain services, and which further stipulated that if such contract was breached, the convicted person would become subject to a fine equal to the damages sustained by the other contracting party
and payment of which would be remitted to said contracting party imposed a form of peonage proscribed by the Thirteenth Amendment.

Justices concurring: Holmes (separately).


Oklahoma Separate Coach Law violated the equal protection clause of the Fourteenth Amendment by permitting carriers to provide sleeping, dining, and chair cars for whites but not for Negroes.

Justices concurring: White, C.J. (separately), Holmes (separately), Lamar (separately), McReynolds (separately).


South Dakota law which required a foreign corporation to appoint a local agent to accept service of process as a condition precedent to suing in state courts to collect a claim arising out of interstate commerce imposed an invalid burden on said commerce.


Oklahoma privilege tax, insofar as it was levied on sale of coal extracted from lands owned by Indian tribes and leased on their behalf by the Federal Government was invalid as a tax on federal instrumentality.


Kansas law proscribing “yellow dog” contracts whereby the employer exacted of employees an agreement not to join or remain a member of a union as a condition of acquiring and retaining employment deprived employees of liberty of contract contrary to due process.

Justices concurring: Pitney, McKenna, Van Devanter, Lamar, McReynolds, White, C.J.

Justices dissenting: Day, Hughes, Holmes (separately).


Tennessee county privilege tax law, insofar as it was enforced as to a liquor dealer doing a strictly mail-order business confined to shipments to out-of-state destinations was void as a burden on interstate commerce.


North Dakota law compelling carriers to haul certain commodities at less than compensatory rates deprived them of property without due process.

Justices concurring: Hughes, McKenna, Holmes, Day, Van Devanter, Lamar, McReynolds, White, C.J.
Justice dissenting: Pitney.


West Virginia law which compelled carriers to haul passengers at noncompensatory rates deprived them of property without due process.


Justice dissenting: Pitney.


Since the lessee of two railroads, built under special charters containing irrepealable contracts exempting the railway property from taxation in excess of a given rate was to be viewed as in the same position as the owners, Georgia's levy of an ad valorem tax on the lessee in excess of the charter rate impaired the obligation of contract (Art. I, § 10).

Justices concurring: Holmes, McKenna, Day, Van Devanter, White, C.J..

Justices dissenting: Hughes, Pitney, McReynolds.


Justices concurring: Holmes, McKenna, Day, Van Devanter, White, C.J..

Justices dissenting: Hughes, Pitney, McReynolds.


Solicitation by a peddler in Virginia of orders for portraits made in another State, with an option to the purchaser to select frames upon delivery of the portrait by the peddler, amounted to a single transaction in interstate commerce, and Virginia therefore could not validly impose a peddler's license tax on the solicitor of such orders.


Wisconsin statute requiring interstate trains to stop at villages of a specified number of inhabitants, without regard to the volume of business done there, was void as imposing an unreasonable burden on interstate commerce.


Florida statute denied due process insofar as it provided, after execution against a corporation had been returned "no property," a second execution to issue against a stockholder for the same debt to be enforced against his property to the extent of any unpaid subscription owing on his stock and without notice to such stockholder.


South Carolina law which imposed a penalty on carriers for their failure to adjust claims within 40 days imposed an invalid burden on
interstate commerce and also was in conflict with the federal Carmack Amendment.


Kansas Reciprocal Demurrage Law of 1905 which allowed recovery of an attorney’s fee by the shipper in case of delinquency by the carrier but which accorded the carrier no like privilege in case of delinquency on the part of the shipper denied the carrier equal protection of the law.


Oklahoma grandfather clause, in its 1910 constitution, exempting from a literacy requirement and automatically enfranchising all entitled to vote as of January 1, 1866, or who were descendants of those entitled to vote on the latter date, was violative of the Fifteenth Amendment protecting Negroes from discriminatory denial of the right to vote based on race.


Arkansas statute was held to be unreasonable and violative of due process for the reason that, as enforced, it subjected a telephone company to a $6300 penalty for discriminatory refusal to serve when, pursuant to company regulations known to the State and uniformly enforced for economical collection of its approved rates, it suspended services to a delinquent and refused to resume services, while the delinquency remained unpaid, at the reduced rate afforded to those who paid the monthly service charge in advance.


Wisconsin statute which compelled sleeping car companies, if upper berth was not sold, to accord use of the space thereof to purchaser of a lower berth took salable property from the owner without compensation and therefore effected a deprivation of property without due process of law.

Justices concurring: Lamar, Day, Hughes, Van Devanter, Pitney, McReynolds, White, C.J.

Justices dissenting: McKenna, Holmes.


Arizona statute which compelled establishments hiring five or more workers to reserve 80 per cent of the employment opportunities to U.S. citizens denied aliens the equal protection of the laws.

Justices concurring: Hughes, Holmes, Pitney, Lamar, Day, Van Devanter, McKenna, White, C.J.

Kentucky statute levying tax, in the nature of a license tax for the doing of local business, on premiums collected in New York by a foreign insurance company after it had ceased to do business in that State was violative of due process by reason of affecting activities beyond the jurisdiction of the State.


Oklahoma tax on lessee’s interest in Indian lands, acquired pursuant to federal statutory authorization, was void as a tax on a federal instrumentality.


Texas statute imposing special licenses on express companies maintaining offices for C.O.D. delivery of interstate shipments of alcoholic beverages imposed an invalid burden on interstate commerce under the terms of the Wilson Act of 1890 (26 Stat. 313).


Louisiana law which established a rebuttable presumption that any person systematically purchasing sugar in Louisiana at a price below that which he paid in any other State was a party to a monopoly or conspiracy in restraint of trade was violative of both the due process and equal protection clauses of the Fourteenth Amendment in that it declared an individual presumptively guilty of a crime and exempted countless others paying the same price.


Wisconsin law which revoked the license of any foreign corporation which removed to a federal court a suit instituted against it by a Wisconsin citizen imposed an unconstitutional condition.


Construction of acts of 1905 and 1907 as compelling a Detroit City Railway to extend its lines to suburban areas annexed by Detroit only on the same terms as were contained in its initial franchise as authorized by the Detroit ordinance of 1889, wherein its fare was fixed, operated to impair the obligation of contract.

Justices concurring: Pitney, Holmes, Day, Van Devanter, McReynolds, White, C.J.

Justices dissenting: Clarke, Brandeis.


The two-cent passenger rate fixed by act of the Arkansas legislature was confiscatory and accordingly deprived the railroad of its property without due process.

Georgia “Blow-Post” law imposed an unconstitutional burden on interstate commerce insofar as compliance with it would have required an interstate train to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia and would have added more than six hours to the running time of the train.

Justices concurring: McKenna, Holmes, McReynolds, Day, Clarke, Van Devanter.


Tennessee privilege tax could not validly be imposed on interstate sales consummated at either destination in Tennessee by an Indiana corporation which, for the purpose of filling orders taken by its salesmen in Tennessee, shipped thereto a tank car of oil and a carload of barrels and filled the orders through an agent who drew the oil from the tank car into the barrels, or into barrels furnished by customers, and then made delivery and collected the agreed price, and thereafter moved the two cars to another point in Tennessee for effecting like deliveries.

Justices concurring: Van Devanter, Holmes, Brandeis, Pitney, McReynolds, Day, Clarke, McKenna.

Justice dissenting: White, C.J.


Washington law which proscribed private employment agencies by prohibiting them from collecting fees for their services deprived individuals of the liberty to pursue a lawful calling contrary to due process of law.

Justices concurring: McReynolds, Pitney, Van Devanter, White, C.J.

Justices dissenting: McKenna, Brandeis, Holmes, Clarke.


Kentucky act of 1906, amending act of 1894 and construed in such manner as to enable a county to avoid collection of taxes to repay judgment on unpaid bonds impaired the obligation of contract.


Texas law, which, under the guise of taxing the privilege of doing an intrastate business, imposed on an Illinois corporation a license tax based on its authorized capital stock, was void not only as imposing a burden on interstate commerce, but also as contravening the due process clause by affecting property outside the jurisdiction of Texas.
Pennsylvania gross receipts tax on wholesalers, as applied to a merchant who sold part of his merchandise to customers in foreign countries either as the result of orders received directly from them or as the result of orders solicited by agents abroad was void as a regulation of foreign commerce and as a duty on exports.

License fee or excise of a given per cent of the par value of the entire authorized capital stock of a foreign corporation doing both a local and interstate business and owning property in several States was a tax on the entire business and property of the corporation and was void both as an illegal burden on interstate commerce and as a violation of due process by reason of affecting property beyond the borders of the taxing State.

Accord: Locomobile Co. v. Massachusetts, 246 U.S. 146 (1918).

When a Connecticut corporation maintains and employs a Massachusetts office with a stock of samples and an office force and traveling salesmen merely to obtain local orders subject to confirmation at the Connecticut office and with deliveries to be made directly from the latter, its business was interstate commerce and a Massachusetts annual excise could not be validly applied thereto.

Liberty of contract, as protected by the due process clause of the Fourteenth Amendment, precluded enforcement of the Missouri non-forfeiture statute, prescribing how net value of a life insurance policy is to be applied to avert a forfeiture in the event the annual premium is not paid, so as to prevent a Missouri resident from executing in the New York office of the insurer a different agreement sanctioned by New York law whereby the policy was pledged as security for a loan and later canceled in satisfaction of the indebtedness.

Justices concurring: McReynolds, McKenna, Holmes, Van Devanter, White, C.J.
Justices dissenting: Brandeis, Day, Pitney, Clarke.

Georgia act of 1916 revoking a grant in 1879 of a perpetual right of way to a railroad impaired the obligation of contract (Art. I, § 10).

Missouri act, insofar as it authorized the Missouri Public Service Commission to exact a fee of $10,000 for a certificate of authority for issuance by an interstate railroad, doing no intrastate business in Missouri, of a $30,000,000 mortgage bond issue to meet expenditures
incurred but in small part in that State, imposed an invalid burden on interstate commerce.

   Kentucky law, insofar as it authorized a judgment against non-resident individuals based on service against their Kentucky agent after his appointment had expired, was violative of due process.

   Tax exemptions in charters granted to certain railroads inured to their lessee, and, accordingly, a Georgia tax authorized by a constitutional provision postdating such charters and imposed on the leasehold interest of the lessee impaired the obligation of contract.

   Georgia law under which a New Jersey company’s tank cars operating in and out of that State were assessed upon a track-mileage basis, i.e., in an amount bearing the same ratio to the value of all its cars and other personal property as the ratio of the miles of railroad over which the cars were run in Georgia to the total miles over which they were run in all States, was invalid for the reason that the rule bore no necessary relation to the real value in Georgia and hence conflicted with due process.
   Justices dissenting: Pitney, Brandeis, Clarke.

   Washington law under which, in a ten-year period, inspection fees collected on oil products brought into the State for use or consumption amounted to $335,000, of which only $80,000 was disbursed for expenses, was deemed to impose an excessive charge and accordingly an invalid burden on interstate commerce.

   Tennessee act which made the annual tax for the privilege of doing railway construction work dependent on whether the person taxed had his chief office in Tennessee, i.e. $25 if he had and $100 if he did not, was violative of the privilege and immunities clause of Art. IV, § 2.

   New York income tax law which allowed exemptions to residents, with increases for married persons and dependents but which allowed no equivalent exemptions to nonresidents abridged the privileges and immunities clause of Art. IV, § 2.

Oklahoma constitution and laws, under which an order of the State Corporation Commission declaring a laundry a monopoly and limiting its rates was not judicially reviewable, and which compelled litigant, for purposes of obtaining a judicial test of rates, to disobey the order and invite serious penalty for each day of refusal pending completion of judicial appeal, were violative of due process insofar as rates were enforced by penalties.


Illinois law denying Illinois courts jurisdiction in actions for wrongful death occurring in another State which was construed as barring jurisdiction of actions on a sister State judgment founded upon a like cause was, as so applied, violative of the full faith and credit clause.


New Mexico law levying annual license on distributors of gasoline plus 2 cents per gallon on all gasoline sold was a privilege tax, and, as applied to parties who bring gasoline from without and sell it in New Mexico, imposed an invalid burden on interstate commerce insofar as it related to their business of selling in tank car lots and in barrels or packages as originally imported.


North Dakota act, as administered, imposed invalid burden on interstate commerce and took property without due process by reason of taxing an interstate railroad by assessing the value of its property in the State at that proportion of the total value of its stock and bonds that the main track mileage within the State bore to the main track mileage of the entire line; this formula was indefensible inasmuch as the cost of construction per mile was within than without the taxing State, and the large and valuable terminals of the railroad were located elsewhere.


Action of Ohio legislature ratifying proposed Eighteenth Amendment could not be referred to the voters, and the provisions of the Ohio constitution requiring such referendum were inconsistent with Article V of the Federal Constitution.

*Accord: Hawke v. Smith* (No. 2), 253 U.S. 231 (1920), applicable to proposed Nineteenth Amendment.


Since Pennsylvania Public Service Commission Law failed to provide opportunity by way of appeal to the courts or by injunctive proceedings to test issue as to whether rates fixed by Commission are
confiscatory, order of Commission establishing maximum future rates violated due process of law.

Justices concurring: McReynolds, Day, Van Devanter, Pitney, McKenna, White, C.J.
Justices dissenting: Brandeis, Holmes, Clarke.

Virginia law which taxed all income of local corporation derived from business within and without Virginia, while exempting entirely income derived outside of Virginia by local corporations which did no local business violated the equal protection clause of the Fourteenth Amendment.

Justices concurring: Pitney, McReynolds, McKenna, Day, Van Devanter, Clarke, White, C.J.
Justices dissenting: Brandeis, Holmes.

Maryland law requiring operator's license of drivers of motor trucks could not constitutionally be applied to a Postal Department employee operating a federal mail truck in the performance of official duty.

Justices concurring: Holmes, McKenna, Day, Van Devanter, Brandeis, Clarke, White, C.J.
Justices dissenting: Pitney, McReynolds.

Georgia Tax Equalization Act denied due process insofar as it authorized an increase in the assessed valuation of the taxpayer's property without notice and hearing and accorded him an abortive remedy of arbitration which was nullified by the inability of the arbitrators to agree on a lower assessment before the expiration of the time when the assessment became final and binding.

Louisiana law which exempted proceeds of insurance policy, payable upon death of insured to his executor, from the claims of insured's creditors impaired the obligation of contract as enforced against a debt on a promissory note antedating such laws and also as enforced against policies which antedated the law.

Justices concurring: McReynolds, McKenna, Holmes, Day, Van Devanter, Pitney, Brandeis, White, C.J.
Justice dissenting: Clarke.

North Carolina statute which exacted a $500 license fee of every automobile manufacturer as a condition precedent to selling cars in the State and which imposed a like requirement on any firm selling
cars of a manufacturer who had not paid the tax, but which reduced the fee to $100 in the event that the manufacturer had invested three-fourths of his assets in North Carolina state and municipal securities or properties, was invalid as violative of the commerce clause and of the equal protection clause when enforced against nonresident manufacturers selling cars in North Carolina directly or through local dealers.

Justices concurring: McKenna, Holmes, Day, Van Devanter, McReynolds, Clarke.
Justices dissenting: Pitney, Brandeis.


New Mexico statute which imposed a tax of 2 cents per gallon sold on distributors of gasoline was void insofar as it embraced interstate transactions, but the annual license fee of $50 imposed thereby on each gasoline station was totally void insofar as interstate sales could not be separated from the intrastate sales.


Arkansas statute which authorized local assessments for road improvements denied equal protection of the laws insofar as railroad property was burdened for local improvement on a basis totally different from that used for measuring the contribution demanded of individual owners.


West Virginia statute which forbade engaging in the business of transporting petroleum in pipe lines without the payment of a tax of 2¢ for each barrel of oil transported imposed an invalid burden on interstate commerce as applied to company's volume of oil produced in, but moving out of, West Virginia to extra-state destinations.

Justices dissenting: Clarke, Pitney, Brandeis.


Justices dissenting: Brandeis, Clarke.


Kentucky law prescribing conditions under which foreign corporations could do business in that State and which precluded enforcement in Kentucky courts of contracts made by foreign corporations not complying with said conditions could not be enforced against Tennessee corporation which sued in a Kentucky court for breach of a
contract consummated in that State for the purchase of grain to be delivered to and used in Tennessee; such transaction was in interstate commerce, notwithstanding that the Tennessee purchaser might change its mind after delivery to a carrier in Kentucky and sell the grain in Kentucky or consign it to some other place in Kentucky.

Justices concurring: Van Devanter, Holmes, Pitney, Day, McKenna, McReynolds, Taft, C.J.
Justices dissenting: Brandeis, Clarke.


Arizona statute, regulating injunctions in labor disputes which exempted ex-employees, when committing tortious injury to the business of their former employer in the form of mass picketing, libelous utterances, and inducement of customers to withhold patronage, while leaving subject to injunctive restraint all other tort-feasors engaged in like wrong-doing, deprived the employer of property without due process and denied him equal protection of the law.

Justices concurring: Van Devanter, Day, McKenna, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Pitney, Clarke, Brandeis.


Oklahoma income tax law could not validly be enforced as to net income of lessee derived from the sales of his share of oil and gas received under leases of restricted Indian lands which constituted him in effect an instrumentality used by the United States in fulfilling its duties to the Indians.

Justices concurring: Holmes, Day, Van Devanter, McKenna, McReynolds, Taft, C.J.
Justices dissenting: Pitney, Clarke, Brandeis.


Arkansas law which revoked the license of a foreign corporation to do business in that State whenever it resorted to the federal courts sitting in that State exacted an unconstitutional condition.


North Dakota statute which required purchasers of grain to obtain a license to act under a defined system of grading, inspection, and weighing, and to abide by regulations as to prices and profits imposed an invalid burden on interstate commerce insofar as it was applied to a North Dakota association which bought grain in the State and loaded it promptly on cars for shipment to other States for sale, notwithstanding occasional diversion of the grain for local sales.

Justices concurring: Day, McKenna, McReynolds, Van Devanter, Pitney, Taft, C.J.
Justices dissenting: Brandeis, Holmes, Clarke.
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Justices concurring: Day, McKenna, McReynolds, Pitney, Van Devanter, Taft, C.J.

Justices dissenting: Holmes, Brandeis, Clarke.


Rates fixed for the sale of gas by New York statute were confiscatory and deprived the utility of its property without due process of law.


Florida law retroactively validating collection of fee for passage through a canal, the use of which was then free by law, was ineffective; a legislature could not retroactively approve what it could not lawfully do.


Georgia law levying inspection fees and providing for inspection of oil and gasoline was unconstitutional as applied to gasoline and oil in interstate commerce; for the fees clearly exceeded the cost of inspection and amounted to a tariff levied without the consent of Congress.


Nebraska law, as construed, which authorized imposition against carrier, in favor of claimant, of an additional attorney's fee of $100, upon the basis of the service rendered, time and labor bestowed, and recovery secured by claimant's attorney in resisting appeal by which the carrier obtained a large reduction of an excessive judgment was unreasonable in that it deterred carrier from vindicating its rights by appeal and therefore was violative of due process.


Arkansas law exacting of persons insuring property in Arkansas a five percent tax on amounts paid on premiums to insurers not authorized to do business in Arkansas was violative of due process insofar as it was applied to insurance contracted and paid for outside Arkansas by a foreign corporation doing a local business.


A Vermont levy of a property tax on logs under control of the owner which, in the course of their interstate journey, were being
temporarily detained by a boom to await subsidence of high waters and for the sole purpose of saving them from loss, was void as a burden on interstate commerce.


Pennsylvania law which forbade mining in such a way as to cause subsidence of any human habitation or public street or building and which thereby made commercially impracticable the removal of valuable coal deposits was deemed arbitrary and amounted to a deprivation of property without due process. As applied to an owner of land who, prior to this enactment, had validly deeded the surface with express reservation of right to remove coal underneath and subject to waiver by grantee of damage claims resulting from such mining, said law also impaired the obligation of contract.

Justices concurring: Holmes, McKenna, Day, Van Devanter, Pitney, McReynolds, Sutherland, Taft, C.J..
Justice dissenting: Brandeis.


South Carolina statute, as construed, which sought to convert a covenant in a prior legislative contract into a condition subsequent, and to impose as a penalty for its violation the forfeiture of valuable property, impaired the obligation of contract.


A first mortgage executed to a Federal Land Bank is a federal instrumentality and cannot be subjected to an Alabama recording tax.


Ohio law, which was applicable to interstate and intrastate commerce and which exacted fees for inspection of petroleum products in excess of the legitimate cost of inspection, imposed an invalid import tax to the extent that the excess could not be separated and assigned solely to intrastate commerce.


Insofar as drainage district tax authorized under Arkansas law imposed upon a railroad a levy disproportionate to the value of the benefits derived from said improvement, the tax was violative of the equal protection clause.


Minnesota law which provided that interstate railroads which had an agent in Minnesota to solicit traffic over lines outside Minnesota may be served with summons by delivery of copy thereof to the agent imposed an invalid burden on interstate commerce as applied to a carrier which owned and operated no facilities in Minnesota and
which was sued by a plaintiff who did not reside therein on a cause of action arising outside the State.

    Nebraska law which forbade the teaching of any language other than English in any school, private, denominational, or public, maintaining classes for the first eight grades affected a denial of liberty without due process of law.
    Justices concurring: McReynolds, Brandeis, Butler, Sanford, Van Devanter, McKenna, Taft, C.J.
    Justices dissenting: Holmes, Sutherland.


    Georgia law which extended corporate limits of a town and which, as judicially construed, had the effect of rendering applicable to the added territory street railway rates fixed by an earlier contract between the town and the railway impaired the obligation of that contract by adding to its burden.

    Kansas law which compelled business engaged in manufacturing and in the processing of food to continue operation in the event of a labor dispute, to submit the controversy to an arbitration board, and to abide by the latter’s recommendations pertaining to the payment of minimum wages subjected both employers and employees to a denial of liberty without due process of law.
    *Accord: Dorchy v. Kansas*, 264 U.S. 286 (1924), same Kansas law voided when applied to labor disputes affecting coal mines; *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923), voiding other provisions of this Kansas law which authorized arbitration tribunal in the course of compulsory arbitration, to fix the hours of labor to be observed by an employer involved in a labor dispute.

    Wisconsin law which required a foreign corporation not doing business in Wisconsin, or having property there, other than that sought to be recovered in a suit, to send, as a condition precedent to maintaining such action, its officer with corporate records pertinent to the matter in controversy, and to submit to an adversary examination before answer, but which did not subject nonresident individuals to such examination, except when served with notice and subpoena within Wisconsin, and then only in the court where the service was
had, and which limited such examinations, in the case of residents of Wisconsin, individual or corporate, to the county of their residence violated the equal protection clause.

Justices concurring: Van Devanter, Sanford, Butler, McKenna, McReynolds, Sutherland, Taft, C.J.
Justices dissenting: Brandeis, Holmes.


West Virginia law which required pipe line companies to fill all local needs before endeavoring to export any natural gas extracted in West Virginia was void as a prohibited interference with interstate commerce.

Justices concurring: Van Devanter, Sutherland, Butler, McKenna, Taft, C.J.
Justices dissenting: Holmes, McReynolds, Brandeis, Sanford.


Washington state and county property taxes cannot be levied on the property of a corporation which, though formed under Washington law, was a federal instrumentality created and operated by the United States as an instrument of war.


Louisiana license tax law could not validly be enforced as to the business of companies employed as agents by owners of vessels engaged exclusively in interstate and foreign commerce when the services performed by the agents consisted of the soliciting and engaging of cargo, and the nomination of vessels to carry it, etc. (See *Texas Transp. Co. v. New Orleans*, 264 U.S. 150 (1924), voiding like application of a similar New Orleans ordinance.)


Nebraska law which prescribed the minimum weights of loaves of bread to be made and sold and which, in order to prevent the palming off of smaller for larger sizes, fixed a maximum for each class and allowed a “tolerance” of only two ounces per pound in excess of the minimum was found to be unreasonable, to be unnecessary to protect purchasers against the imposition of fraud by short weights, and therefore to deprive bakers and sellers of bread of their liberty without due process of law.

Justices concurring: Butler, Sanford, McReynolds, Sutherland, McKenna, Van Devanter, Taft, C.J.
Justices dissenting: Brandeis, Holmes.


Texas law which permitted a nonresident to prosecute a case which arose outside of Texas against a railroad corporation of another State which was engaged in interstate commerce and neither owned
nor operated facilities in Texas was inoperative by reason of imposing a burden on interstate commerce.


Ohio law which levied an annual fee on foreign corporations for the privilege of exercising their franchise in the State, which was computed at the rate of 5¢ per share upon the proportion of the number of shares of authorized common stock represented by property owned and used and business transacted in Ohio was void as imposing a burden on interstate commerce when applied to a foreign corporation all of whose business, intrastate and interstate, and all of whose property were represented by the shares outstanding; application of the rate to all shares authorized, or even to a greater number than the total outstanding, amounted to a burden on all property and business including interstate commerce. As imposed, the tax also violated the equal protection clause.


Policy of insurance originally issued to insurer in Tennessee and converted by him in Texas from term insurance to 20 year payment life was deemed to be a mere continuation of the original policy, and upon suit on the policy in Texas, a Texas law imposing a penalty and allowing an attorney’s fee could not constitutionally be applied against the insurer for the reason that Texas could not regulate contracts consummated outside its limits in conformity with the laws of the place where the contract was made without violating full faith and credit clause.


Missouri law which required foreign corporations doing business therein to pay an annual franchise tax of 1/10 of 1% of the par value of capital stock and surplus employed in business in the State could not constitutionally be exacted of a pipe line company for the privilege of doing in Missouri what was exclusively an interstate business.

Justice concurring: Sutherland, Holmes, Van Devanter, McReynolds, Butler, Sanford, McKenna, Taft, C.J.

Justice dissenting: Brandeis.


Michigan law which converted an interstate contract motor carrier into a public utility by legislative fiat in effect took property for public use without compensation in violation of the due process clause, and also imposed unreasonable conditions on the right to carry on interstate commerce.
In a suit for breach of contract, plaintiff's right to maintain suit
could not be barred by his failure to pay a Tennessee license tax for
the reason that the state law levying the same could not be applied
to a contract for the purchase of coal to be delivered to customers in
other States, that is, in interstate commerce.

Washington law which prohibited motor vehicle common carriers
for hire from using its highways without obtaining a certificate of con-
venience could not validly be exacted of an interstate motor carrier;
the law was not a regulation designed to promote public safety but
a prohibition of competition and, accordingly, burdened interstate
commerce.

Justices concurring: Brandeis, Sanford, Sutherland, Van Devanter, Butler,
Holmes, Taft, C.J.
Justice dissenting: McReynolds.

301. Accord: Bush Co. v. Maloy, 267 U.S. 317 (1925), voiding like applica-
tion of a similar Maryland law.

Justices concurring: Brandeis, Sutherland, Van Devanter, Holmes, Sanford,
Butler, Taft, C.J.
Justice dissenting: McReynolds.

ing like application of a Texas law.

North Dakota Grain Grading Act which required locally grown
wheat, 90% of which was for interstate shipment, to be graded by li-
censed inspectors and imposed various requirements, such as the
keeping of records of quantity purchased and price paid and the exac-
tion of bonds from purchasers maintaining grain elevators was not
supportable as an inspection law and was void by reason of imposing
undue burdens on interstate commerce.

Justices concurring: Van Devanter, Holmes, Butler, McReynolds, Suther-
land, Sanford, Stone, Taft, C.J.
Justice dissenting: Brandeis.

Massachusetts law which imposed excise tax on foreign corpora-
tions doing business therein, measured by a combination of the total
value of capital shares attributable to transactions therein and the
proportion of net income attributable to such transactions, could not
validly be applied to a foreign corporation which transacted only as
interstate business therein. The tax as here imposed also violated the
due process clause by affecting property beyond Massachusetts bor-
ders.
Justices concurring: McReynolds, Holmes, Van Devanter, Butler, Sutherland, Stone, Sanford, Taft, C.J.
Justice dissenting: Brandeis.

Pennsylvania estate tax law, insofar as it measured the tax on the transfer of that part of the decedent’s estate located within Pennsylvania by taking the whole of the decedent’s estate which included tangible personal property located outside Pennsylvania, was violative of due process.

Oregon Compulsory Education Law which required every parent to send his child to a public school was an unconstitutional interference with the liberty of parents and guardians to direct the upbringing of children and was violative of due process.

Arkansas statute which imposed special assessment on lands acquired by private owners from the United States on account of benefits resulting from road improvements completed before the United States parted with title effected a taking of property without due process of law.

Iowa law which imposed severe, cumulative punishments upon contractors with the State who paid their workers less than “the current rate of per diem wages in the locality where the work is performed” was void for vagueness and violative of due process.

Justices concurring: Brandeis, Holmes.

Texas statute which permitted property taxpaying voters to originate an election approving creation of a road improvement district with power to float bond issue and to levy taxes to amortize the same, with provision for establishment of the district if approved by two-thirds of those voting in the election, was procedurally defective in that each taxpayer to be assessed for the improvement was not accorded a notice and opportunity to be heard on the question of the benefits and hence denied due process.

North Carolina law purporting to tax inheritance of shares owned by nonresident in a foreign corporation having 50% or more of its property in North Carolina was violative of due process inasmuch as the property of a corporation is not owned by a shareholder and presence of corporate property in the State did not give it jurisdiction over his shares for tax purposes.

Wisconsin law which established a conclusive presumption that all gifts of a material part of a decedent’s estate made by him within six years of his death were made in contemplation of death and therefore subject to the graduated inheritance tax created an arbitrary classification violative of the due process and equal protection clauses.

Justices concurring: McReynolds, Butler, Sutherland, Sanford, Van Devanter, Taft, C.J.

Justices dissenting: Holmes, Brandeis, Stone.


Pennsylvania law which prohibited the use of shoddy, even when sterilized, in the manufacture of bedding materials, was so arbitrary and unreasonable as to be violative of due process.

Justices concurring: Butler, Van Devanter, Sutherland, Sanford, McReynolds, Taft, C.J.

Justices dissenting: Holmes, Brandeis, Stone.


New Mexico law which forbade insurance companies authorized to do business in that State to pay any nonresident any fee for the obtaining or placing of any policies covering risks in New Mexico was violative of due process by reason of attempting to control conduct beyond the jurisdiction of New Mexico.

Justices concurring: Holmes, Van Devanter, Sutherland, Stone, Butler, Taft, C.J.


Oklahoma inheritance tax law, applied to inheritance by Indians of Indian lands as determined by federal law, was void as a tax on a federal instrumentality.


Acts of New York of 1857 and 1871 authorizing New York City to erect piers over submerged lots impaired the obligation of contract as embraced in deeds to such submerged lots conveyed to private owners for valuable consideration through deeds executed by New York City in 1852.


Act of New York of 1871 whereby New York City was authorized to construct certain harbor improvements impaired the obligation of contract embraced in prior deeds to grantees whereunder the latter were accorded the privilege of filling in their underwater lots and constructing piers thereover.

California law whereunder private carriers by automobile for hire could not operate over California highways between fixed points in the State without obtaining a certificate of convenience and submitting to regulation as common carriers exacted an unconstitutional condition and effected a denial of due process.

Justices concurring: Sutherland, McReynolds (separately), Taft, C.J., Sanford, Stone, Butler, Van Devanter.

Justices dissenting: Holmes, Brandeis.


Oklahoma law which levied an *ad valorem* tax on ores mined and in bins on the land was void as a tax on federal instrumentality when applied to a lessee of Indian land leased with the approval of the Secretary of the Interior.

Justices concurring: Butler, Stone, Holmes, Sanford, Sutherland, Van Devanter, Taft, C.J.

Justices dissenting: McReynolds, Brandeis.


Minnesota law levying personal property tax could not be collected on logs cut in Minnesota pursuant to a contract of sale for delivery in Michigan while they were in transit in interstate commerce by a route from Minnesota to Michigan.


When an Illinois tax law originally is construed as a personal property tax whereby the local net receipts of foreign insurance companies were subjected to assessment at only 30% of full value, but at a later date is construed as a privilege tax with the result that all the local net income of such foreign companies was taxed at the rate applicable to personal property while domestic companies continued to pay the tax on their personal property assessed at the reduced valuation, the resulting discrimination denied the foreign companies the equal protection of the laws.


North Carolina inheritance tax law could not validly be applied to property constituting a trust fund in Massachusetts established under the will of a Massachusetts resident and bestowing a power of appointment upon a North Carolina resident who exercised that power through a will made in North Carolina; the levy by a State of the tax on property beyond its jurisdiction was violative of due process.

Justices concurring: Holmes, Brandeis, Stone.
Act of New York prescribing a gas rate of $1 per thousand feet was confiscatory and deprived the utility of its property without due process of law.


Wisconsin law which exempted income of corporation derived from interest received from tax exempt federal bonds owned by said corporation, but which attempted to tax such income indirectly by taxing only so much of the stockholder's dividends as corresponded to the corporate income not assessed, was invalid.

Justices concurring: Brandeis, Stone.

Pennsylvania law exacting a license from persons engaged in the State in the sale of steamship tickets and orders for transportation to or from foreign countries was void as imposing an undue burden on foreign commerce.

Justices concurring: Butler, McReynolds, Van Devanter, Sutherland, Sanford, Taft, C.J..

Justices dissenting: Brandeis, Holmes, Stone.

New York law which prohibited ticket agencies from selling theatre tickets at prices in excess of 50¢ over the price printed on the ticket was void by reason of regulating a business not affected with the public interest and depriving such business of due process.

Justices concurring: Sutherland, Van Devanter, Butler, McReynolds, Taft, C.J..

Justices dissenting: Holmes, Brandeis, Stone, Sanford.

Ohio law which compensated mayors serving as judges in minor prohibition offenses solely out of the fees and costs collected from defendants who were convicted was violative of due process.

Texas White Primary Law which barred Negroes from participation in Democratic party primary elections denied them the equal protection of the laws.

Minnesota law which punished anyone who discriminated between different localities of that State by buying dairy products in one locality at a higher price than was paid for the same commodities in another locality infringed liberty of contract as protected by the due process clause.
Justices concurring: McReynolds, Butler, Van Devanter, Sanford, Sutherland, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Stone.

Ohio law which destroyed assignability of a franchise previously granted to an electric company by a municipal ordinance impaired the obligation of contract.
Justices concurring: McReynolds, Sutherland, Stone, Sanford, Butler, Van Devanter, Taft, C.J.
Justices dissenting: Holmes, Brandeis.

Kentucky law which imposed a franchise tax on railroad corporations was constitutionally defective and violative of due process insofar as it was computed by including mileage outside the State which did not in any plain and intelligible way add to the value of the road and the rights exercised in Kentucky.
Justices concurring: Butler, Holmes, Sutherland, Stone, McReynolds, Van Devanter, Sanford, Taft, C.J.
Justice dissenting: Brandeis.

Special assessments levied against a railroad by a road district pursuant to an Arkansas statute and based on real property and rolling stock and other personalty were unreasonably discriminatory and excessive and deprived the railroad of property without due process by reason of the fact that other assessments for the same improvement were based solely on real property.

As construed and applied to an organization not shown to have advocated any crime, violence, or other unlawful acts, the Kansas criminal syndicalism law was violative of due process.

By reason of the exception contained therein, whereby its prohibitions were not to apply to conduct engaged in by participants whenever necessary to obtain a reasonable profit from products traded in, the Colorado Antitrust Law was void for want of a fixed standard for determining guilt and violative of due process.

As applied to a foreign corporation having a fixed place of business and an agent in one county, but no property, debts or anything also in the county in which it was sued, Arkansas law which authorized actions to be brought against a foreign corporation in any county in the State, while restricting actions against domestic corporations
to the county where it had a place of business or where its chief officer resided, deprived the foreign corporation of equal protection of the laws.

Justices concurring: Van Devanter, McReynolds, Sutherland, Stone, Sanford, Butler, Taft, C.J.
Justices dissenting: Holmes, Brandeis.

Wisconsin law levying a tax on the gross income of domestic insurance companies was void where the income was derived in part as interest on United States bonds.

New Jersey statute which provided that in suits by residents against nonresidents for injuries resulting from operation of motor vehicles by the latter, service might be made on the Secretary of State as their agent, but which failed to provide any assurance that notice of such service would be communicated to the nonresidents, was violative of due process.

Justices concurring: Taft, C.J., Van Devanter, Butler, Sutherland, Sanford, McReynolds.
Justices dissenting: Brandeis, Holmes, Stone.

337. Accord: Consolidated Flour Mills Co. v. Muegge, 278 U.S. 559 (1928), voiding similar service as authorized by an Oklahoma law.

Mississippi statute which terminated right of retired revenue agent to prosecute suits for unpaid taxes in the name of his successor by requiring that the successor approve and join in such suits, and which further stipulated that the successor share equally in the commissions hitherto accruing solely to the retired agent, was held to impair the latter’s rights under the contract clause insofar as it was enforced retroactively to accord a share to the successor in suits instituted by the retired agent before this legislative alteration.

Property taxes assessed under New Jersey law on land acquired from the United States Housing Corporation by private purchasers subject to retention of mortgage by the federal agency could not be collected by sale of the land unless the federal liens were excluded and preserved as prior liens.

Justices concurring: Sanford, Stone, Sutherland, Butler, Brandeis, Holmes, Van Devanter, Taft, C.J.
Justice dissenting: McReynolds.
State and city taxes authorized under laws of Virginia may not be levied on the corpus of a trust located in Maryland, the income from which accrued to a beneficiary resident in Virginia; the corpus was beyond the jurisdiction of Virginia and accordingly the assessments were violative of due process.

Kentucky law which conditioned the recording of mortgages not maturing within five years upon the payment of a tax of 20¢ for each $100 of value secured, but which exempted mortgages maturing within that period was void as denying equal protection of the laws.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Sanford, Stone.

Massachusetts income tax law could not validly be imposed on income received by a citizen as royalties for the use of patents issued by the United States.

Justices concurring: McReynolds, Butler, Van Devanter, Sanford, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Sutherland, Stone.

Arkansas law which purported to validate assessments by the district was ineffective to sustain an arbitrary assessment against the pipe line at the rate of $5,000 per mile in view of the fact that the pipe line originally was constructed in 1909-1915 at a cost under $9,000 per mile, and the benefit, if any, which accrued to the pipe line was small.

Mississippi law imposing tax on the sale of gasoline was void as applied to sales to federal instrumentalities such as the Coast Guard or a Veterans’ Hospital.

Justices concurring: Butler, Sutherland, Van Devanter, Sanford, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Stone, McReynolds.

345. Accord: *Graysburg Oil Co. v. Texas*, 278 U.S. 582 (1929), voiding application of Texas gasoline tax statute to gasoline sold to the United States.

New Jersey law empowering Secretary of Labor to fix the fees charged by employment agencies was violative of due process inasmuch as the regulation was not imposed on a business affected with a public interest.
STATE LAWS HELD UNCONSTITUTIONAL

Justices concurring: Sutherland, Taft, C.J., Sanford, Butler, McReynolds, Van Devanter.
Justices dissenting: Stone, Holmes, Brandeis.

Pennsylvania law which taxed gross receipts of foreign and domestic corporations derived from intrastate operation of taxicabs, but exempted like receipts derived by individuals and partnerships, denied equal protection of the laws.

Justices concurring: Butler, Sutherland, Sanford, Van Devanter, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Stone.

Louisiana Shrimp Act which permitted shipment of shrimp taken in Louisiana tidal waters only if the heads and hulls had previously been removed, and which was designed to favor the canning in Louisiana of shrimp destined for the interstate market, was unconstitutional; those taking the shrimp immediately became entitled to ship them in interstate commerce.

Justices concurring: Butler, Sutherland, Sanford, Stone, Van Devanter, Holmes, Brandeis, Taft, C.J.
Justice dissenting: McReynolds.


Pennsylvania law which prohibited corporate ownership of a drug store unless all of the stockholders were licensed pharmacists had no reasonable relationship to public health and therefore was violative of due process.

Justices concurring: Sutherland, Butler, Van Devanter, Stone, Sanford, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Brandeis.

Tennessee law which fixed the prices at which gasoline may be sold violated the due process clause inasmuch as the business sought to be regulated was not affected with a public interest.

Justices concurring: Sutherland, Stone (separately), Sanford, McReynolds, Butler, Brandeis (separately), Van Devanter, Taft, C.J.
Justice dissenting: Holmes.

Where the local property of a foreign corporation and the part of its business transacted in the State, less than half of which was intrastate, were but small fractions of its entire property and its nation-
wide business, Washington law which imposed a tax on such company in the form of a filing fee and a license tax, both reckoned upon its authorized capital stock, was inoperative by reason of burdening interstate commerce and reaching property beyond the State contrary to due process.

Justices concurring: McReynolds, Sutherland, Stone, Sanford, Butler, Van Devanter, Taft, C.J.
Justices dissenting: Brandeis, Holmes.


Oklahoma law which permitted an individual to engage in the business of ginning cotton only upon a showing of public necessity, but allowed a corporation to engage in said business in the same locality without such showing denied the individual equal protection of the law.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Sanford, Taft, C.J.
Justices dissenting: Brandeis, Holmes, Stone.


Georgia banking law which declared every insolvency of a bank shall be deemed to have been fraudulent, with provision for rebutting said presumption, was arbitrary and unreasonable and violative of due process.


Louisiana tax law could not be enforced against oil purchased at interior points for export in foreign commerce for the oil did not lose its character as goods in foreign commerce merely because, after shipment to the exporter at a Louisiana port, the oil was temporarily stored there preparatory to loading on vessels of foreign consignees.

Justices concurring: Taft, C.J., Holmes, Brandeis, Stone, Sanford, Van Devanter, Butler.
Justices dissenting: McReynolds, Sutherland.


California workmen’s compensation act could not be applied in settlement of a claim for the death of a seaman in a case that was subject to the exclusive maritime jurisdiction of federal courts.

Justices concurring: Taft, C.J., Holmes, Stone, Sanford, Sutherland, McReynolds, Butler, Van Devanter.
Justice dissenting: Brandeis.


Kentucky law imposing a tax on the sale of gasoline could not be applied to gasoline purchased outside Kentucky for use in a ferry en-
gaged as an instrumentality of interstate commerce, that is, in operation on the Ohio River between Kentucky and Illinois.

Justices concurring: Sutherland, Butler, Van Devanter, Sanford, Stone (separately), Brandeis (separately), Holmes (separately), Taft, C.J..
Justice dissenting: McReynolds.

Massachusetts law imposing an excise on domestic business corporations was in reality a statute imposing a tax on income rather than a tax on the corporate privilege and, as an income tax law, could not be imposed on income derived from United States bonds nor, by reason of impairment of the obligation of contract on income from local county and municipal bonds exempt by statutory contract.

Justices concurring: Sutherland, Sanford, Butler, Van Devanter, McReynolds, Taft, C.J..
Justices dissenting: Stone, Holmes, Brandeis.

Georgia law which viewed a fatal collision between railroad and motor car at grade crossing as raising a presumption of negligence on the part of the railroad and as the proximate cause of death and which permitted the jury to weigh the presumption as evidence against the testimony of the railroad's witnesses tending to prove due care was unreasonable and violative of due process.

Virginia law which levied a property tax on corpus of a trust consisting of securities managed by a Maryland trustee which paid over to children of settlor, all of whom resided in Virginia, the income therefrom, was violative of due process in that it taxed intangibles with a taxable situs in Maryland, where the trustee and owner of the legal title was located.

Justices concurring: McReynolds, Van Devanter, Butler, Sutherland, Sanford, Stone (separately), Brandeis (separately), Holmes (separately), Taft, C.J..

Minnesota inheritance tax law, insofar as it was applied to Minnesota securities kept in New York by the decedent who died domiciled in New York was violative of due process.

Justices concurring: McReynolds, Van Devanter, Butler, Sutherland, Sanford, Stone (separately), Taft, C.J..

New Jersey franchise tax law, levied at the rate of 5% of gross receipts of a telephone company engaged in interstate and foreign commerce, was a direct tax on foreign and interstate commerce and void.
Justices concurring: Butler, Sutherland, Sanford, Van Devanter, McReynolds.
Justices dissenting: Holmes, Brandeis.


Indiana was powerless to give any force or effect beyond her borders to its law of 1927 purporting to authorize a county treasurer to institute suits for unpaid taxes owed by a nonresident; such officer derived no authority in New York from this Indiana law and hence had no legal capacity to institute the suit in a federal court in the latter State.


Missouri law which provided that, in taxing assets of insurance companies, the amounts of their legal reserves and unpaid policy claims should first be deducted was invalid as applied to a company owning nontaxable United States bonds insofar as the law was construed to require that the deduction should be reduced by the proportion that the value which such bonds bore to total assets; the company thus was saddled with a heavier tax burden than would have been imposed had it not owned such bonds.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J. (separately).
Justices dissenting: Stone, Holmes, Brandeis.


Texas law, which forbade insurance stipulations limiting the time for suit on a claim for a period less than two years, could not constitutionally be applied, consistently with due process, to permit recovery contrary to the terms of a fire insurance policy executed in Mexico by a Mexican insurer and covered in part by reinsurance effected in Mexico and New York by New York insurers licensed to do business in Texas who defended against a Texas claimant to whom the policy was assigned while he was a resident of Mexico and where he resided when the loss was sustained.


Missouri not having jurisdiction for tax purposes of various intangibles, such as bank accounts and federal securities held in banks therein and owned by a decedent domiciled in Illinois, its transfer tax law could not be applied, consistently with due process, to the transfer thereof, under a will probated in Illinois, to the decedent's son who also was domiciled in Illinois.

Justices concurring: McReynolds, Van Devanter, Sutherland, Butler.
Justices dissenting: Holmes, Brandeis, Stone (separately).

Arkansas personal property tax laws could not be enforced against the purchaser of army blankets situate within an army cantonment in that State, as to which exclusive federal jurisdiction attached under Art. I, § 8, cl. 17.


South Carolina inheritance tax law could not be applied, consistently with due process, to affect the transfer by will of shares in a South Carolina corporation and debts owed by the latter belonging to a decedent who died domiciled in Illinois; such intangibles were not shown to have acquired any taxable business situs in South Carolina.

Justices concurring: Hughes, C.J., Holmes (separately), Brandeis (separately), Van Devanter, McReynolds, Sutherland, Butler, Stone, Roberts.


Nebraska law, as construed, which required a railroad to provide an underground cattle-pass across its right of way partly at its own expense for the purpose, not of advancing safety, but merely for the convenience of a farmer owning land on both sides of the railroad, deprived the latter of property without due process.


Arkansas law which withheld from a foreign corporation the right to sue in state courts unless it had filed a copy of its charter and a financial statement and had designated a local office and an agent to accept service of process could not constitutionally be enforced to prevent suit by a non-complying foreign corporation to collect a debt which arose out of an interstate transaction for the sale of goods.


Massachusetts law which imposed succession taxes on all property within Massachusetts transferred by deed or gift intended to take effect in possession or enjoyment after the death of the grantor, or transferred to any person absolutely or in trust, could not, consistently with due process and the contract clause, be enforced with reference to rights of succession or rights effected by gift which vested under trust agreements created prior to passage of said act, notwithstanding that the settlor died after its passage.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J.


North Carolina income tax law, as applied to income of New York corporation which manufactured leather goods in North Carolina for
sale in New York, was violative of due process by reason of the fact that the formula for allocating income to that State, namely, that part of the corporation's net income which bears the same ratio to entire net income as the value of its tangible property in North Carolina bears to the value of all its tangible property, attributed to North Carolina a portion of total income which was out of all appropriate proportion to the business of the corporation conducted in North Carolina.


Tennessee law which imposed a privilege tax graduated to carrying capacity on motor buses, the proceeds from which were not segregated for application to highway maintenance, was void insofar as the privilege tax was imposed on a bus carrier engaged exclusively in interstate commerce.

Justices concurring: Brandeis, Van Devanter, Butler, Sutherland, Roberts, Stone, Holmes, Hughes, C.J.

Justice dissenting: McReynolds.


California law which prohibited the display of a red flag in a public or meeting place as a symbol of opposition to organized government or as a stimulus to anarchistic action or as an aid to seditious propaganda was so vague and indefinite as to permit punishment of the fair use of opportunity for free political discussion and therefore, as enforced, effected a denial of liberty without due process.

Justices concurring: Hughes, C.J., Holmes, Stone, Brandeis, Roberts, Van Devanter, Sutherland.

Justice dissenting: Butler, McReynolds.


Florida law which required motor carriers to furnish bond or an insurance policy for the protection of the public against injuries but which exempted vehicles used exclusively in delivering dairy products and carriers engaged exclusively in transporting fish, agricultural, and dairy products between production to shipping points en route to primary market denied the equal protection of the laws; and insofar as it subjected carriers for hire to the same requirements as to procurement of a certificate of convenience and necessity and rate regulation as were exacted of common carriers the law was violative of due process.


Minnesota law which authorized the enjoiner of one engaged regularly in the business of publishing a malicious, scandalous, and defamatory newspaper or magazine, as applied to publications charging neglect of duty and corruption on the part of state law enforce-
ment officers, effected an unconstitutional infringement of freedom of the press as safeguarded by the due process clause of the Fourteenth Amendment.

Justices concurring: Hughes, C.J., Brandeis, Holmes, Stone, Roberts.
Justices dissenting: Butler, Van Devanter, McReynolds, Sutherland.

Mississippi privilege tax could not be enforced as to an interstate pipe line company which sold gas wholesale to local, independent distributors from a supply which passed into and through the State in interstate commerce; fact that pipe line company, in order to make delivery, used a thermometer and reduced pressure, did not convert the sale into an intrastate transaction.

Wisconsin income tax law which authorized an assessment against a husband of a tax computed on the combined total of his and his wife’s incomes, augmented by surtaxes resulting from the combination, notwithstanding that under the laws of Wisconsin the husband had no interest in, or control over, the property or income of his wife, was violative of the due process and equal protection clauses of the Fourteenth Amendment.

Justices concurring: Roberts, Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J.
Justices dissenting: Holmes, Brandeis, Stone.

Maine transfer tax law could not be applied, consistently with due process, to the inheritance of shares in a Maine corporation passing under the will of a Massachusetts testator who died a resident of Massachusetts and owning the shares.

Justices concurring: Sutherland, Butler, Van Devanter, Roberts, McReynolds, Hughes, C.J.
Justices dissenting: Stone, Holmes, Brandeis.

Oklahoma law which prohibited anyone from engaging in the manufacture, sale, or distribution of ice without a state license, to be issued only on proof of public necessity and capacity to meet public demand, effected an invalid regulation of a business not affected with a public interest and a denial of liberty to pursue a lawful calling contrary to the due process clause of the Fourteenth Amendment.

Justices concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts, Hughes, C.J.
Justices dissenting: Brandeis, Stone.

Repeal of California constitutional provision making directors of corporations liable to creditors for all moneys misappropriated or embezzled impaired the obligation of contract as to creditors who dealt with corporations during the period when such constitutional provision was in force, and inclusion in the state constitution of another provision whereunder the State reserved the power to alter or repeal all existing or future laws concerning corporations could not be invoked to destroy vested rights contrary to due process.

Justices concurring: Sutherland, Roberts, Butler, McReynolds, Van Devanter, Hughes, C.J.

Justices dissenting: Cardozo, Brandeis, Stone.


Texas White Primary Law which empowered the state executive committee of a political party to prescribe the qualifications of members of the party and thereby to exclude Negroes from voting in primaries conducted by the party amounted to state action violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: Cardozo, Brandeis, Stone, Roberts, Hughes, C.J.

Justices dissenting: McReynolds, Van Devanter, Butler, Sutherland.


Section of Oklahoma law which provided that any person violating the statute shall be subject to have his oil producing property placed in the hands of a receiver by a court at the instance of a suit filed by the state Attorney General but which restricted such receivership to the operation of producing wells and the marketing of the production thereof in conformity with this law was a penal provision and as such was void under the due process clause for the reason that it punished violations of regulatory provisions of the statute that were too vague to afford a standard of conduct.


Alabama law which subjected foreign corporations to an annual franchise tax for doing business, levied at the rate of $2 for each $1,000 of capital employed in the State, violated both Art. I, § 10, cl. 2, prohibiting state import duties and the commerce clause, when enforced against a foreign corporation, whose sole business in Alabama consisted of the landing, storing, and selling in original packages of goods imported from abroad.

Justices concurring: Butler, McReynolds, Van Devanter, Roberts, Sutherland, Hughes, C.J.

Justices dissenting: Cardozo, Brandeis, Stone.

Florida Chain Store Tax Law, which levied a heavier privilege tax per store on the owner whose stores were in different counties than on the owner whose stores were all in the same county, effected an arbitrary discrimination amounting to a denial of equal protection of the laws.

Justices concurring: Roberts, McReynolds, Sutherland, Butler, Van Devanter, Hughes, C.J.

Justices dissenting: Brandeis, Cardozo, Stone.


Wisconsin law, insofar as it authorized service of process on a foreign corporation which sold goods in Wisconsin through a controlled subsidiary and hence was not carrying on any business in the State at the time of the attempted service was violative of due process, notwithstanding that the summons was served on an officer of the corporation temporarily in Wisconsin for the purpose of negotiating a controversy with a local attorney.


Oklahoma property tax law could not be enforced, consistently with due process, against the entire fleet of tank cars of an Illinois corporation that were used in transporting oil from its refinery in Oklahoma to other States; instead, the State may base its tax on the number of cars which on the average were physically present within its boundaries.


Virginia law which authorized an administrative officer to require railroads to eliminate grade crossing whenever, in his opinion, such alterations were necessary to promote public safety and convenience and afforded the railroads no notice or hearing on the existence of such necessity and no means of reviewing the officer's decision was violative of due process.

Justices concurring: McReynolds, Roberts, Butler, Van Devanter, Sutherland, Brandeis.

Justices dissenting: Hughes, C.J., Stone, Cardozo.


Section of California Alien Land Law which stipulated that when the State, in a prosecution for violation thereof, proved use or occupancy by an alien lessee, alleged in the indictment to be an alien ineligible for naturalization, the onus of proving citizenship shall devolve upon the defense, was arbitrary and violative of due process as applied to the lessee for the reason that a lease of land conveys no hint of criminality and there is no practical necessity for relieving the prosecution of the obligation of proving Japanese race.

California law which levied a license upon every distributor for each gallon of motor vehicle fuel sold and delivered by him in the State could not constitutionally be applied to the sale and delivery of gasoline to a military reservation as to which the United States had acquired exclusive jurisdiction.


As judicially applied, Mississippi statutes which deemed all contracts of insurance and surety covering its citizens to have been made therein and which were enforced to facilitate recovery under an indemnity contract, consummated in Tennessee in conformity with the law of the latter where the insured, a Mississippi corporation, also conducted its business, and to nullify as contrary to Mississippi law nonobservance of a contractual stipulation as to the time for filing claims, were violative of due process in that the Mississippi laws were accorded effect beyond the territorial limits of Mississippi.


Alabama law, as judicially construed, which precluded Alabama courts from entertaining actions against foreign corporations arising in other States under federal law, while permitting entertainment of like actions arising in other States under state law, was violative of the Constitution.


Arkansas law which exempted life insurance proceeds from judicial process, when applied to prevent recovery by a creditor of the insured who had garnished the insurer prior to passage of the law, impaired the obligation of contract.

Justices concurring: Hughes, C.J., Cardozo, Brandeis, Roberts, Stone, Sutherland (separately), Van Devanter (separately), McReynolds (separately), Butler (separately).


Illinois tax laws were discriminatory and violative of the equal protection clause for the reason that they (1) subjected foreign insurance companies selling fire, marine, inland marine, and casualty insurance to two property taxes, one on tangible property and a second, on net receipts, including net receipts from their casualty business, while subjecting competing foreign insurance companies selling only casualty insurance to the single tax on tangible property; and (2) insofar as the net receipts were assessed at full value while other personal property in general was assessed at only 60% of value.

Justices concurring: Van Devanter, Sutherland, Butler, McReynolds, Roberts.
Justices dissenting: Cardozo, Brandeis, Stone.


Montana laws which imposed an occupation tax on every telephone company providing service in the State imposed an invalid burden on interstate commerce when applied to a company which used the same facilities to furnish both interstate as well as intrastate services.


New York Milk Control Act, insofar as it prohibited the sale of milk imported from another State unless the price paid to the producer in the other State equalled the minimum prescribed for purchases from local producers, imposed an invalid burden on interstate commerce irrespective of resale of such milk in the original or other containers.


Kentucky law which taxed the sales of retailers at the rate of 1/20 of 1% on the first $400,000 of gross sales, and which imposed increasing rates on each additional $100,000 of gross sales up to $1,000,000, with a maximum rate of 1% on sales over $1,000,000, was arbitrary and violative of the equal protection clause for the reason that there existed no reasonable relation between the amount of the tax and the value of the privilege of merchandising or between gross sales, the measure of the tax, and net profits.

Justices concurring: Roberts, Sutherland, Van Devanter, Butler, McReynolds, Hughes, C.J.

Justices dissenting: Cardozo, Brandeis, Stone.


Justices concurring: Roberts, Sutherland, Butler, McReynolds, Van Devanter, Hughes, C.J.

Justices dissenting: Brandeis, Cardozo.


Kansas law which, as judicially construed, empowered the state highway commission to order a pipe line company, at its own expense, to relocate its pipe and telephone lines, then located on a private right of way, in order to conform to plans adopted for new highways across the right of way, deprived the company of property without due process of law.

Justices concurring: McReynolds, Butler, Van Devanter, Sutherland, Brandeis, Roberts, Stone (separately), Cardozo (separately), Hughes, C.J.

New Jersey law, which prohibited institution of suits in New Jersey courts to enforce a stockholder's statutory personal liability arising under the laws of another State and which was invoked to bar a suit by the New York Superintendent of Banks to recover assessments levied on New Jersey residents holding stock in a New York bank, was ineffective to prevent New Jersey courts from entertaining said action consistently with the full faith and credit clause.

Justices concurring: Brandeis, Sutherland, Butler, Van Devanter, Stone, Roberts, McReynolds, Hughes, C.J..

Justices dissenting: Cardozo.


Arkansas law which reduced the remedies available to mortgagees in the event of a default on mortgage bonds issued by an improvement district, with the result that they were deprived of effective means of recovery for 6½ years, impaired the obligation of contract.


Insofar as a Georgia law, which authorized a municipality to effect certain street improvements and to assess railways having tracks on such streets with the cost of such improvement, supported a presumption that a benefit accrued to the railway from said improvements which could not be rebutted by contrary proof offered in a court of law, the effect of the statute was to deny the railway a hearing essential to due process of law.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Roberts, Hughes, C.J.

Justices dissenting: Stone, Brandeis, Cardozo.


Insofar as trust certificates held by a resident represented interests in various parcels of land located in, and outside of, Ohio, which afforded the holder no voice in the management of such property but only a right to share in the net income therefrom and in the proceeds from the sale thereof, such interests could be taxed only by a uniform rule according to value, and Ohio law which levied an intangible property tax thereon measured by income was violative of the equal protection and due process clauses.

Justices concurring: McReynolds, Butler, Van Devanter, Sutherland, Roberts, Hughes, C.J.

Justices dissenting: Stone, Brandeis, Cardozo.


Vermont law which levied a 4% tax on income derived from loans made outside the State but which exempted entirely like income de-
rived from money loaned within Vermont at interest not exceeding 5% per year embodied an arbitrary discrimination and abridged the privileges and immunities of United States citizens contrary to the Fourteenth Amendment.

Justices concurring: Sutherland, Van Devanter, Butler, McReynolds, Roberts, Hughes, C.J.

Justices dissenting: Stone, Brandeis, Cardozo.


Louisiana law which abolished prior requirement that building and loan associations, when income was insufficient to pay all demands of withdrawing stockholders within 60 days, set apart 50% of receipts to pay such withdrawals and provided, instead, that the directors be vested with sole discretion as to the amount to be allocated for such withdrawals, impaired the obligation of contract as to a stockholder who, prior to such amending statute, gave notice of withdrawal and whose demand had not been paid.


Louisiana law which imposed a tax on the gross receipts derived from the sale of advertisements by newspapers enjoying a circulation of more than 20,000 copies per week unconstitutionally restricted freedom of the press contrary to the due process clause of the Fourteenth Amendment.


New York Milk Control Act, which permitted milk dealers without well advertised trade names who were in business before April 10, 1933, to sell milk in New York City at a price one cent below the minimum binding on competitors with well advertised trade names, subjected dealers without well advertised names who established their business after that date to a denial of equal protection of the law.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Sutherland, Butler, McReynolds.

Justices dissenting: Cardozo, Brandeis, Stone.


New Mexico law which imposed an excise tax on the sale and use of gasoline and motor fuel and collected a license tax of $25 from users who import for use in New Mexico gasoline purchased in another State could not validly be imposed on a motor vehicle carrier engaged exclusively in interstate commerce which imported out-of-state gasoline for use in New Mexico; for the tax was levied, not as compensation for the use of that State's highways, but on the use of an instrumentality of interstate commerce.

Washington law which levied an occupation tax measured by gross receipts of radio broadcasting stations within that State whose programs were received by listeners in other States imposed an unconstitutional burden on interstate commerce.


Tennessee law relative to settlement of public construction contracts which retroactively released the surety on a bond given by a contractor as required by prior law for the security of claims of materialmen and substituted therefor, without the latter’s consent, the obligation of another bond impaired the obligation of contract.


Alabama law which imposed an excise tax on the sale of gasoline could not be enforced as to sales of gasoline to the United States.

Justices concurring: Butler, Sutherland, Van Devanter, Roberts, Hughes, C.J., McReynolds.

Justices dissenting: Cardozo, Brandeis.


New York law which required employers to pay women minimum wages that would be not only equal to the fair and reasonable value of the services rendered but also sufficient to meet the minimum cost of living necessary for health deprived employers and employees of their freedom of contract without due process of law.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Roberts.

Justices dissenting: Hughes, C.J., Brandeis, Stone, Cardozo.


Massachusetts succession tax law whereunder succession to property through failure of an intestate to exercise a power of appointment under a non-testamentary conveyance of the property by deed or trust made after September 1, 1907, was not taxed, whereas if the conveyance was made before that date, the succession was not only taxable but the rate might be substantially increased by aggregating the value of that succession with other interests derived by the transferee by inheritance from the donee of the power, was discriminatory and violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Butler, Sutherland, McReynolds.

Justices dissentering: Cardozo, Brandeis.

Oregon Criminal Syndicalism Law, invoked to punish participation in the conduct of a public meeting devoted to a lawful purpose merely because the meeting had been held under the auspices of an organization which taught or advocated the forcible overthrow of government but which did not engage in such advocacy during the meeting, was violative of freedom of assembly and freedom of speech guaranteed by the due process clause of the Fourteenth Amendment.


New York income tax law could not be extended to salaries of employees of the Panama Railroad Company by reason of the fact that the latter together with its employees was a federal instrumentality (Art. VI).


California Caravan Act, which imposed a $15 fee on each motor vehicle transported from another State into California for the purposes of sale, imposed an unconstitutional burden on interstate commerce; the proceeds from such fees were not used to meet the cost of highway construction or maintenance, but instead to reimburse the State for the added expense of policing caravan traffic, and for that purpose the fee was excessive.


Georgia insurrection statute, which punished as a crime the acts of soliciting members for a political party and conducting meetings of a local unit of that party, where one of the doctrines of the party, established by reference to a document not shown to have been exhibited by any one, may be said to embrace ultimate resort in the indefinite future to violence against government, invaded freedom of speech as guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Roberts, Brandeis, Stone, Hughes, C.J., Cardozo.
Justices dissenting: Van Devanter, McReynolds, Butler, Sutherland.


Washington statute which increased the severity of a penalty for a specific offense by mandating a sentence of 15 years and thereby removing the discretion of the judge to sentence for less than the maximum of 15 years, when applied retroactively to a crime committed before its enactment, was invalid as an *ex post facto* law.


Georgia law which prohibited stock insurance companies writing fire and casualty insurance from acting through agents who were their salaried employees, but which permitted mutual companies
writing such insurance to do so, violated the equal protection clause of the Fourteenth Amendment.

Justices concurring: McReynolds, Sutherland, Van Devanter, Butler, Hughes, C.J.

Justices dissenting: Roberts, Brandeis, Stone, Cardozo.


Washington gross receipts tax law could not validly be enforced as to receipts accruing to a stevedoring corporation acting as an independent contractor in loading and unloading cargoes of vessels engaged in interstate or foreign commerce by longshoremen subject to its own direction and control; such business was a form of interstate and foreign commerce.


West Virginia gross receipts tax law could not validly be enforced to sustain levy on that part of gross receipts of a federal contractor working on a federal installation in West Virginia which was derived from the fabrication of equipment at its Pennsylvania plant for which the contractor received payment prior to installation of such equipment on the West Virginia site owned by the Federal Government; for such compensable activities were completed beyond the jurisdiction of West Virginia.


California law which levied a privilege tax on admitted foreign insurers, measured by gross premiums received, was violative of due process insofar as it affected premiums received in Connecticut on contracts of reinsurance consummated in the latter State and covering policies of life insurance issued by other insurers to residents of California; California was without power to tax activities conducted beyond its borders.

Justices concurring: Stone, Hughes, C.J., McReynolds, Brandeis, Butler, Roberts.

Justice dissenting: Black.


Indiana law of 1933 which repealed tenure rights of certain teachers accorded under a Tenure Act of 1927 impaired the obligation of contract.


Justice dissenting: Black.


Indiana gross receipts tax law could not constitutionally be applied to gross receipts derived by an Indiana corporation from sales
in other States of goods manufactured in Indiana; as thus applied the
law burdened interstate commerce.

   Justices concurring: Roberts, Hughes, C.J., Brandeis, Butler, Stone, Reed.
   Justices dissenting: Black (in part), McReynolds (in part).

   The Indiana gross income tax imposes an unconstitutional burden
on interstate commerce when applied to the receipt by one domiciled
in the State of the proceeds of a sale of securities sent out of the State
to be sold.

   Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Rutledge, Bur-
   ton.
   Justices dissenting: Black, Douglas, Murphy.

   Indiana’s gross receipts tax law also could not be levied on re-
ceipts from the purchase and sale on margin of securities by resident
owners through a nonresident broker engaged in interstate commerce.

   Justices concurring: Warren, C.J., Reed, Frankfurter, Burton, Clark,
   Minton.
   Justices dissenting: Black, Douglas.

   California Alcoholic Beverages Control Act, as to its regulatory
provisions which embraced a fee for a license to import alcoholic bev-
erages and control over importation of such beverages, could not be
enforced, consistently with the Twenty-first Amendment, against a re-
tail dealer doing business in a National Park as to which California
retained no jurisdiction.

   A Missouri statute which accorded Negro residents financial aid
to enable them to obtain instruction at out-of-state universities equi-
valent to that afforded exclusively to white students at the University
of Missouri denies such Negroes the equal protection of the laws. The
obligation of a State to give equal protection of the laws can be per-
formed only where its laws operate, that is, within its own jurisdi-
cction.

   Justices concurring: Hughes, C.J., Brandeis, Stone, Roberts, Black, Reed.
   Justices dissenting: McReynolds, Butler.

   A Washington gross receipts tax levied on the privilege of engaging
in business in the State cannot constitutionally be imposed on the
gross receipts of a marketing agent for a federation of fruit growers
whose business consists of the marketing of fruit shipped from Wash-
ington to places of sale in other States and foreign countries. Such a
tax burdens interstate and foreign commerce contrary to Art. I, § 8, cl. 3.

Justices concurring: Butler, McReynolds, Hughes, C.J., Brandeis, Stone, Roberts, Reed.
Justice dissenting: Black.

Florida statute imposing an inspection fee of 15 cents per cwt. (60 times the cost of the inspection) on cement imported from abroad is invalid under the commerce clause (Art. I, § 8, cl. 3).

A New Jersey statute which stipulated that “any person not engaged in a lawful occupation, known to be a member of a gang of two or more persons, who had been convicted at least three times of being a disorderly person, or who has been convicted of any crime in New Jersey or any other State, is declared to be a gangster” and punishable upon conviction, is repugnant to the due process clause of the Fourteenth Amendment because of vagueness and uncertainty.

An Oklahoma statute which provided that all persons, other than those who voted in 1914, qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916, should be perpetually disenfranchised was found to be repugnant to the Fifteenth Amendment.

Justices concurring: Hughes, C.J., Roberts, Black, Reed, Frankfurter.
Justices dissenting: McReynolds, Butler.

An Alabama statute which forbids the publicizing of facts concerning a labor dispute, whether by printed sign, pamphlet, by word of mouth, or otherwise in the vicinity of the business involved, and without regard to the number of persons engaged in such activity, the peaceful character of their conduct, the nature of the dispute, or the accuracy or restraint of the language used in imparting information, is violative of freedom of speech and press guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Hughes, C.J., Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy.
Justice dissenting: McReynolds.

A Connecticut statute which forbids any person to solicit money or valuables for any alleged religious cause, unless a license has first been procured from an official who is required to determine whether such cause is a religious one and who may deny issuance if he deter-
mines that the cause is not, imposes a previous restraint of the free exercise of religion and effects a deprivation of liberty without due process of law in violation of the Fourteenth Amendment.


Gasoline carried by interstate motor buses through Arkansas for use as fuel in interstate transportation beyond the Arkansas line cannot be subject to an Arkansas tax imposed for maintenance of state highways and collected on every gallon of gasoline above 20 brought into the State in any motor vehicle for use in operating the same. The statute levying this tax imposes an unconstitutional burden on interstate commerce.

Justices concurring: McReynolds, Stone, Hughes, C.J., Roberts, Reed (separately).

Justices dissenting: Black, Frankfurter, Douglas.


A North Carolina statute which levies an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the State, who displays samples in any hotel room or house rented for the purpose of securing retail orders, cannot be applied to a nonresident merchant who took orders in the State and shipped interstate directly to customers. In view of the imposition of a one dollar per year license tax collected from regular retail merchants, the enforcement of the statute as to nonresidents effects an unconstitutional discrimination in favor of intrastate commerce contrary to Art. I, § 8, cl. 3.


When Arkansas, with the help of a statute curing irregularities in a tax proceeding, sold land under a tax title which was valid, subsequent repeal of such curative statute was unconstitutional by reason of effecting an impairment of the obligation of contract (Art. I, § 10, cl. 1).

Justices concurring: Hughes, C.J., Stone, Roberts, Reed, Frankfurter.

Justices dissenting: Black, Douglas, Murphy.


A California statute making it a misdemeanor for any one knowingly to bring, or assist in bringing, into the State a nonresident, indigent person is invalid by reason of imposing an unconstitutional burden on interstate commerce.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Byrnes, Douglas, Black, Murphy, Jackson would have rested the invalidity on § 1 of the Fourteenth Amendment.

A Georgia statute making it a crime for any person to contract with another to perform services of any kind, and thereupon obtain in advance money or other thing of value, with intent not to perform such service, and providing further that failure to perform the service or to return the money, without good and sufficient cause, shall amount to presumptive evidence of intent, at the time of making the contract, not to perform such service, is violative of the Thirteenth Amendment.


As applied to one convicted once of stealing chickens, and twice of robbery, an Oklahoma statute providing for the sterilization of habitual criminals, other than those convicted of embezzlement, or violation of prohibition and revenue laws, violates the equal protection clause of the Fourteenth Amendment.

Justices concurring specially: Stone, C.J., Jackson.


Calif. Agric. Code provided that the selling and delivery of milk “at less than the minimum wholesale, retail prices effective in a marketing area” was an unfair practice warranting revocation of license or prosecution. Sales and deliveries of milk to the War Department on a federal enclave within a State over which the United States has acquired exclusive jurisdiction are not subject to regulation under a state milk stabilization law.

Justices concurring: Stone, C.J., Roberts, Black, Reed, Douglas, Jackson.

Justices dissenting: Frankfurter, Murphy.


The Florida Commercial Fertilizer Law, a comprehensive regulation of the sale or distribution of commercial fertilizer that required a label or stamp on each bag evidencing the payment of an inspection fee, could not constitutionally be applied to fertilizer that the United States owned and was distributing within the State pursuant to a provision of the Soil Conservation and Domestic Allotment Act. Federal instrumentalities are immune from state taxation and regulation unless Congress provides otherwise, and Congress had not done so.


General Laws of Mississippi, 1943, ch. 178, provided, in part, that the teaching and dissemination of printed matter designed to encourage disloyalty to the national and state governments, and the distribution of printed matter reasonably tending “to create an attitude of stubborn refusal to salute, honor, or respect the flag or Government of the United States, or of the State of Mississippi” was a felony. The
Fourteenth Amendment of the Constitution prohibits the imposition of punishment for: (1) urging and advising on religious grounds that citizens refrain from saluting the flag; and (2) the communication of beliefs and opinion concerning domestic measures and trends in national and world affairs, when this is without sinister purpose and not in advocacy of, or incitement to, subversive action against the Nation or State and does not involve any clear and present danger to our institutions or our Government. Conviction under the statute for disseminating literature reasonably tending to create an attitude of stubborn refusal to salute, honor or respect the national and state flags and governments denies the liberty guaranteed by the Fourteenth Amendment.


Florida Statute of 1941, sec. 817.09 and sec. 817.10, made it a misdemeanor to induce advances with intent to defraud by a promise to perform labor, and further made failure to perform labor for which money had been obtained prima facie evidence of intent to defraud. The statute is violative of the Thirteenth Amendment and the Federal Antipeonage Act for it cannot be said that a plea of guilty is uninfluenced by the statute's threat to convict by its prima facie evidence section.

Justices concurring: Roberts, Black, Frankfurter, Douglas, Murphy, Jackson, Rutledge.

Justices dissenting: Stone, C.J., Reed.


Pennsylvania law provided in part that “The following subjects and property shall be valued and assessed, and subject to taxation,” and that taxes are declared “to be a first lien on said property.” The effect of an ad valorem property tax is to increase the valuation of the land and buildings of a manufacturer by the value of machinery leased to him by the United States and is therefore a tax on property owned by the United States and is violative of the Constitution.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Jackson, Rutledge.

Justices dissenting: Roberts, Frankfurter.


The commerce clause prohibits the imposition of an Arkansas sales tax on sales to residents of the State which are consummated by acceptance of orders in, and the shipments of goods from, another State, in which title passes upon delivery to the carrier.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Jackson.

Justices dissenting: Black, Douglas, Murphy, Rutledge.

A Texas statute required union organizers, before soliciting members, to obtain an organizer’s card from the Secretary of State. As applied in this case, the statute is violative of the First and Fourteenth Amendments in that it imposes a previous restraint upon the rights of free speech and free assembly. The First Amendment’s safeguards are not inapplicable to business or economic activity and restrictions of these activities can be justified only by clear and present danger to the public welfare.

Justices concurring: Black, Douglas, Murphy, Jackson, Rutledge.

Justices dissenting: Stone, C.J., Roberts, Reed, Frankfurter.


An Ohio *ad valorem* tax on Philippine importations was violative of the constitutional prohibition of state taxation of imports for the reason that the place from which the imported articles are brought is not a part of the United States in the constitutional sense.

Justices concurring: Stone, C.J., Roberts, Reed (dissenting in part), Frankfurter, Douglas (concurring in part), Murphy (concurring in part), Jackson, Rutledge (concurring in part).

Justice dissenting: Black.


The Arizona Train Limit Law makes it unlawful to operate a train of more than fourteen passenger or seventy freight cars. As applied to interstate trains, this law contravenes the commerce clause of the Constitution. The state regulation passes beyond what is plainly essential for safety, since it does not appear that it will lessen, rather than increase, the danger of accident.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Murphy, Jackson, Rutledge.

Justices dissenting: Black, Douglas.


Alabama law makes it a crime to enter or remain on the premises of another after having been warned not to do so. A State, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, cannot impose criminal punishment on a person for distributing religious literature on the sidewalk of a company-owned town contrary to regulations of the town’s management, where the town and its shopping district are freely accessible to and freely used by the public in general.

Justices concurring: Black, Frankfurter, Douglas, Murphy, Rutledge.

Justices dissenting: Stone, C.J., Reed, Burton.

Texas Penal Code makes it an offense for any “peddler or hawker of goods or merchandise” willfully to refuse to leave premises after having been notified to do so by the owner or possessor thereof. A State, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, cannot impose criminal punishment upon a person engaged in religious activities and distributing religious literature in a village owned by the United States under a congressional program designed to provide housing for workers engaged in national defense activities, where the village is freely accessible and open to the public.

Justices concurring: Black, Frankfurter, Douglas, Murphy, Rutledge.
Justices dissenting: Stone, C.J., Reed, Burton.


Iowa statute, insofar as it required actions on claims arising under a federal statute not containing any period of limitations, to be commenced within six months, effected a denial of equal protection of law when enforced as to one seeking to recover under the Federal Fair Labor Standards Act; a State may not discriminate against rights accruing under federal laws by imposing as to the former a special period of limitations not applicable to other claims.


Virginia Code required motor carriers, both interstate and intrastate, to separate without discrimination white and colored passengers in their motor buses so that contiguous seats would not be occupied by persons of different races at the same time. Even though Congress has enacted no legislation on the subject, the state provisions are invalid as applied to passengers in vehicles moving interstate because they burden interstate commerce.

Justices concurring: Black (separately), Reed, Frankfurter (separately), Douglas, Murphy, Rutledge.
Justice dissenting: Burton.


The California Retail Sales Tax, measured by gross receipts, cannot constitutionally be collected on exports in the form of oil delivered from appellant’s dockside tanks to a New Zealand vessel in a California port for transportation to Auckland pursuant to a contract of sale with the New Zealand Government.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Jackson, Rutledge, Burton.
Justice dissenting: Black.

A South Dakota Law setting a six-year statute of limitations for commencing actions on contract and declaring void every stipulation in a contract which reduces the time during which a party may bring suit to enforce his rights cannot be applied to an action brought in South Dakota for benefits arising under the constitution of a fraternal benefit society incorporated in Ohio and licensed to do business in South Dakota. The claimant is bound by the limitation prescribed in the society’s constitution barring actions on claims six months after disallowance by the society, and South Dakota is required under the Federal Constitution to give full faith and credit to the public acts of Ohio.

Justices concurring: Vinson, C.J., Frankfurter, Reed, Jackson, Burton.
Justices dissenting: Black, Douglas, Murphy, Rutledge.


California statutes granting permits to California residents to prospect for oil and gas offshore, both within and outside a three-mile marginal belt, are void. California is not the owner of the three-mile marginal belt along its coast; the Federal Government rather than the State has paramount rights in and power over that belt, and full dominion over the resources of the soil under that water area. The United States is therefore entitled to a decree enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

Justices concurring: Vinson, C.J., Black, Douglas, Murphy, Rutledge, Burton.
Justices dissenting: Reed, Frankfurter.


Oklahoma constitutional and statutory provisions barring Negroes from the University of Oklahoma Law School violate the equal protection clause of the Fourteenth Amendment because the University Law School is the only institution for legal education maintained by the State.


The California Alien Land Law, forbidding aliens ineligible for American citizenship to acquire, own, occupy, lease or transfer agricultural land, and providing for escheat of any property acquired in violation of the statutes, cannot constitutionally by applied to effect an escheat of agricultural lands acquired in the name of a minor American citizen with funds contributed by his father, a Japanese alien ineligible for naturalization. The statute deprived the son of the equal protection of the laws and of his privileges as an American citizen, in violation of the Fourteenth Amendment.
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Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge.
Justices dissenting: Reed, Jackson, Burton.


A New York law creating a misdemeanor offense for publishing, selling, or otherwise distributing “any book, pamphlet, magazine, newspaper or other printed matter devoted to the publication, and principally made up of criminal laws, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime. . . .” as construed by the state Court of Appeals to prohibit distribution of a magazine principally made up of news or stories of criminal deeds of bloodshed or lust so massed as to become a vehicle for inciting violent and depraved crimes against the person, is so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press.

Justices concurring: Vinson, Black, Reed, Douglas, Murphy, Rutledge.
Justices dissenting: Frankfurter, Jackson, Burton.


A South Carolina law requiring a license of shrimp boat owners, the fee for which was $25 per boat for residents and $2,500 per boat for nonresidents, plainly discriminated against nonresidents and violated the privileges and immunities clause of Art. IV, § 2. The same law unconstitutionally burdened interstate commerce by requiring all boats licensed to trawl for shrimp in South Carolina waters to dock in the State and to unload their catch, pack, and properly stamp the catch before shipping or transporting it to another State.

Justices concurring: Vinson, C.J., Reed, Douglas, Murphy, Rutledge, Burton, Black (dissenting in part), Frankfurter (dissenting in part), Jackson (dissenting in part).


California’s requirement that every person bringing fish ashore in the State for sale obtain a commercial fishing license, but denying such a license to any person ineligible for citizenship, precluded a resident Japanese alien from earning his living as a commercial fisherman in the ocean waters off the State and was invalid both under the equal protection clause of the Fourteenth Amendment and under federal statutory law (42 U.S.C. § 1981).

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge, Burton.
Justices dissenting: Reed, Jackson.
New York constitutionally may tax gross receipts of a common carrier derived from transportation apportioned as to mileage within the State, but collection of the tax on gross receipts from that portion of the mileage outside the State unduly burdens interstate commerce in violation of the commerce clause of the Constitution.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Rutledge, Burton.
Justices dissenting: Black, Douglas, Murphy.

Denial of a license under the New York Agricultural and Market Law violated the commerce clause of the Constitution and the Federal Agricultural Marketing Act where the denial was based on grounds that the expanded facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served.

Justices concurring: Vinson, C.J., Reed, Douglas, Jackson, Burton.
Justices dissenting: Black, Frankfurter, Murphy, Rutledge.

The Boswell Amendment to the Alabama Constitution, which vested unlimited authority in electoral officials to determine whether prospective voters satisfied the literacy requirement, violated the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment.

Missouri law, providing that a judgment could not be revived after ten years from its rendition, could not be invoked, consistently with the full faith and credit clause, to prevent enforcement in a Missouri court of a Colorado judgment obtained in 1927 and revived in Colorado in 1946.

Justices concurring: Vinson, C.J., Reed, Douglas, Murphy, Jackson, Burton.
Justices dissenting: Black, Frankfurter, Rutledge.

The Ohio *ad valorem* tax levied on accounts receivable of foreign corporations derived from sales of goods manufactured within the State, but exempting receivables owned by residents and domestic corporations, denied foreign corporations equal protection of the laws in violation of the Fourteenth Amendment. The tax was not saved from invalidity by the “reciprocity” provision of the statute imposing it, since this plan is not one which, by credit or otherwise, protects the nonresident or foreign corporation against discrimination.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Murphy, Jackson, Rutledge, Burton.

Insofar as the Wisconsin emergency tax on inheritances is measured by tangible property located outside the State, the tax violates the due process clause of the Fourteenth Amendment.

Justice dissenting: Black.


Notice by publication, as authorized by the New York Banking Law for purposes of enabling banks managing common trust funds to obtain a judicial settlement of accounts binding on all having an interest in such funds, is not sufficient under the due process clause of the Fourteenth Amendment for determining property rights of persons whose whereabouts are known.

Justices concurring: Vinson, C.J., Black, Reed, Jackson, Clark, Minton, Frankfurter.
Justice dissenting: Burton.


Texas constitutional and statutory provisions restricting admission to the University of Texas Law School to white students violate the equal protection clause of the Fourteenth Amendment by reason of the fact that Negro students denied admission are afforded educational facilities inferior to those available at the University.


The Louisiana Constitution provides that the Louisiana boundary includes all islands within three leagues of the coast; and Louisiana statutes provide that the State’s southern boundary is 27 marine miles from the shore line. Since the three-mile belt off the shore is in the domain of the Nation rather than that of the States, it follows that the area claimed by Louisiana extending 24 miles seaward beyond the three-mile belt is also in the domain of the Nation rather than Louisiana. The marginal sea is a national, not a state, concern and national rights are paramount in that area. The United States, therefore, is entitled to a decree upholding such paramount rights and enjoining Louisiana and all persons claiming under it from trespassing upon the area in violation of the rights of the United States, and requiring Louisiana to account for the money derived by it from the area after June 23, 1947.

Justice dissenting: Reed, Minton.

Notwithstanding provisions in Texas laws whereby that State extended its boundary to a line in the Gulf of Mexico 24 marine miles beyond the three-mile limit and asserted ownership of the bed within that area and to the outer edge of the continental shelf, the United States is entitled to a decree sustaining its paramount rights to dominion of natural resources in said area, beyond the low-water mark on the coast of Texas and outside inland waters. Any claim which Texas may have asserted over the marginal belt when she existed as an independent Republic was relinquished upon her admission into the Union on an equal footing with the existing States.


Justices dissenting: Reed, Minton.


Oklahoma law required segregation in educational facilities at institutions of higher learning. As applied to assign an African American student to a special row in the classroom, to a special table in the library, and to a special table in the cafeteria, the law impaired and inhibited the student’s ability to study, engage in discussion, exchange views with other students, and in general to learn his profession. The conditions under which the student was required to receive his education deprived him of his right to equal protection guaranteed by the Fourteenth Amendment.


The Illinois occupation tax, levied on gross receipts from sales of tangible personal property, cannot be collected on orders sent directly by the customer to the head officer of a corporation in Massachusetts and shipped directly to the customers from that office. These sales are interstate in nature and are immune from state taxation by virtue of the commerce clause.

Justices concurring: Vinson, C.J., Black (dissenting in part), Reed (dissenting in part), Frankfurter, Douglas (dissenting in part), Jackson, Burton, Clark (dissenting in part), Minton.


A Connecticut franchise tax for the privilege of doing business in the State, computed at a nondiscriminatory rate on that part of a foreign corporation’s net income which is reasonably attributed to its business activities within the State and not levied as compensation for the use of highways, or collected in lieu of an *ad valorem* property tax, or imposed as a fee for inspection, or as a tax on sales or use, cannot constitutionally be applied to a foreign motor carrier engaged exclusively in interstate trucking. A State cannot exact a franchise tax for the privilege of engaging in interstate commerce.
STATE LAWS HELD UNCONSTITUTIONAL


The Wisconsin Wrongful Death Act, authorizing recovery “. . . only for a death caused in this State,” and thereby blocking recovery under statutes of other states, must give way to the strong unifying principle embodied in the full faith and credit clause looking toward maximum enforcement in each State of the obligations or rights created or recognized by the statutes of sister states.


When boats and barges of an Ohio corporation used in transporting oil along the Mississippi River do not pick up or discharge oil in Ohio, and, apart from stopping therein occasionally for fuel and repairs, are almost continuously outside Ohio and are subject, on an apportionment basis, to taxation by other States, an Ohio tax on their full value violates the due process clause of the Fourteenth Amendment.


A Mississippi privilege tax, levied on the privilege of soliciting business for a laundry not licensed in the State and collected at the rate of $50 on each vehicle used in the business cannot validly be imposed on a foreign corporation operating an establishment in Tennessee and doing no business in Mississippi other than sending trucks thereto to solicit business, and pick up, deliver, and collect for laundry. A tax so administered burdens interstate commerce.


Illinois law provided that “no action shall be brought or prosecuted in this state to recover damages for a death occurring outside of this state where a right of action for such death exists under the laws of the place where such death occurred and services of process in such suit may be had upon the defendant in such place.” In a suit brought in a federal district court in Illinois on grounds of diversity of citizenship to recover under the Utah death statute for a death oc-
curring in Utah, the Illinois statute was held to violate the full faith and credit clause.

Justices concurring: Vinson, C.J., Black, Douglas, Jackson, Burton, Clark, Minton.
Justices dissenting: Reed, Frankfurter.


Insofar as the New York Education Law forbids the commercial showing of any motion picture without a license and authorizes denial of a license on a censor’s conclusion that a film is “sacrilegious,” it is void as a prior restraint on freedom of speech and of the press under the First Amendment, made applicable to the States by the due process clause of the Fourteenth Amendment. The statute authorized designated officers to refuse to license the showing of any film which is obscene, indecent, immoral, inhuman, sacrilegious, or the exhibition of which would tend to corrupt morals or incite to crime.


As construed and applied, Art. 5-C of the New York Religious Corporations Laws, which authorized transfer of administrative control of the Russian Orthodox churches of North America from the Supreme Church Authority in Moscow to the authorities selected by a convention of the North American churches, is invalid. Legislation which determines, in a hierarchical church, ecclesiastical administration or the appointment of the clergy, or transfers control of churches from one group to another, interferes with the free exercise of religion contrary to the Constitution.

Justice dissenting: Jackson.


Oklahoma law requires each state officer and employee, as a condition of his employment, to take a “loyalty oath,” that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as “communist front” or “subversive.” As construed, this statute excludes persons from state employment on the basis of membership in an organization, regardless of their knowledge concerning the activities and purposes of the organization, and therefore violates the due process clause of the Fourteenth Amendment.


The Arkansas Gross Receipts Tax, levied on the gross receipts of sales within the State, cannot be applied to transactions whereby private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a
cost-plus-fixed-fee contract. Applicable federal laws provide that in procuring articles required for accomplishment of the agreement, the contractor shall act as purchasing agent for the Government and that the Government not only acquires title but shall be directly liable to the vendor for the purchase price. The tax is void as a levy on the Federal Government.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Clark, Minton.


A Texas tax on the occupation of “gathering gas” measured by the entire volume of gas “taken,” as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission, is violative of the commerce clause. As here applied, the State delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun, so that the tax is not levied on the capture or production of the gas, but on its introduction into interstate commerce after production, gathering and processing.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Minton.


Where residents of nearby Maryland make purchase from appellant in Delaware, some deliveries being made in Maryland by common carrier and some by appellant’s truck, seizure of the appellant’s truck in Maryland and holding it liable for the Maryland use tax on all goods sold in Delaware to Maryland customers is a denial of due process. The Delaware corporation has not subjected itself to the taxing power of Maryland and has not afforded Maryland a jurisdiction or power to impose upon it a liability for collections of the Maryland use tax.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Minton.


In addition to “taxes on property of express companies,” Virginia provided that “for the privilege of doing business in the State,” express companies shall pay an “annual license tax” upon gross receipts earned in the State “on business passing through, into, or out of, this State.” The gross-receipts tax is in fact and effect a privilege tax, and its application to a foreign corporation doing an exclusively interstate business violated the commerce clause of the Constitution.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Minton.
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Kansas statutory provisions that authorized segregation of white and Negro children in “separate but equal” public schools denies to such Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment.


South Carolina constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.


Virginia constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.


Delaware constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.


An Illinois law providing for a 90-day suspension of a motor carrier upon a finding of 10 or more violations of regulations calling for a balanced distribution of freight loads in relation to the truck’s axles cannot be applied to an interstate motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act. A State may not suspend the carrier’s rights to use the State’s highways in its interstate operations. The Illinois law, as applied to such carrier, also violates the commerce clause.


Levy of Ohio’s property tax against a mutual saving bank and a federal savings and loan association in their own names, measured by the amount of each bank’s capital, surplus, or reserve and undivided profits, without deduction of the value of federal securities owned by each or provision for reimbursement of each bank by its depositors for the tax, is void as a tax upon obligations of the Federal Government (Art. VI, cl. 2).


Illinois statutes provide that a writ of error may be prosecuted on a “mandatory record” kept by the court clerk and consisting of the indictment, arraignment, plea, verdict, and sentence. The “mandatory record” can be obtained free of charge by an indigent defendant. In such instances review is limited to errors on the face of the mandatory record, and there is no review of trial errors such as an erro-
neous ruling on admission of evidence. No provision was made whereby a convicted person in a non-capital case can obtain a bill of exceptions or report of the trial proceedings, which by statute is furnished free only to indigent defendants sentenced to death. Griffin, an indigent defendant convicted of robbery, accordingly was refused a free certified copy of the entire record, including a stenographic transcript of the proceedings, and therefore was unable to perfect his appeal founded upon nonconstitutional errors of the trial court. Petitioner was held to have been denied due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment.


Justices dissenting: Reed, Burton, Minton, Harlan.


New York statutory procedure which sanctioned notice by mail together with the posting of a copy of said notice at a local post office and the publication thereof in two local newspapers of proceedings to foreclose a lien for delinquent real estate taxes, was constitutionally inadequate and effected a taking of property without due process when employed in the foreclosure of the property of a mentally incompetent woman resident in the taxing jurisdiction and known by the officials thereof to be financially responsible but incapable of handling her affairs.

Justice concurring: Frankfurter (separately).


Kansas statutes permitted condemnation proceedings to be instituted by notice either in writing or by publication in an official city paper. Where the commissioners, appointed to determine compensation in condemnation of appellant’s land, gave no notice of a hearing except by publication in the official city newspaper, though appellant was a resident of Kansas and his name was known to the city and on its official records, and there was no reason why direct notice could not be given, the newspaper publication alone did not measure up to the quality of notice the due process clause of the Fourteenth Amendment requires as a prerequisite to this type of proceeding.

Justices concurring: Warren, C.J., Black, Reed, Douglas, Clark, Harlan.

Justices dissenting: Frankfurter, Burton.


The Michigan Penal Code proscribed the sale to the general reading public of any book containing obscene language “tending to the corruption of the morals of youth.” When invoked to convict a proprietor who sold a book having such a potential effect on youth to an adult police officer, the statute violated the due process clause of the
Fourteenth Amendment. Thus enforced, the statute would permit the adult population of Michigan to read only what is fit for children.


Alabama statutes and Montgomery City ordinances which required segregation of “white” and “colored” races on motor buses in the City were violative of the equal protection clause of the Fourteenth Amendment.


A provision of the Illinois Community Currency Exchange Act exempting money orders of a named company, the American Express Company, from the requirement that any firm selling or issuing money orders in the State must secure a license and submit to state regulation, denies equal protection of the laws to those entities that are not exempted. Although the Equal Protection Clause does not require that every state regulation apply to all in the same business, a statutory discrimination must be based on differences that are reasonably related to the purposes of the statute.


Justices dissenting: Black, Frankfurter, Harlan.


Denial of a free trial transcript to an indigent criminal defendant pursuant to a Washington statute that authorized a trial judge to furnish a transcript to an indigent defendant if in the judge’s opinion “justice will thereby be promoted” denied equal protection and due process because the indigent defendant did not have the same opportunity that was available to those who could afford the transcripts to have his case reviewed by an appellate court.


Justices dissenting: Harlan, Whittaker.


The California statutory provisions exacting as a prerequisite for property tax exemption that applicants therefor swear that they do not advocate the forcible overthrow of federal or state governments or the support of a foreign government against the United States during hostilities are unconstitutional insofar as they are enforced by procedures placing upon the taxpayer the burden of proving that he is not guilty of advocating that which is forbidden. Such procedures deprive the taxpayer of freedom of speech without the procedural safeguards required by the due process clause of the Fourteenth Amendment.

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Justice dissenting: Clark.

Accord: First Unitarian Church v. City of Los Angeles, 357 U.S. 545 (1958). Enforcement of the same oath requirement through statutory procedures which place upon taxpayers the burden of proving nonadvocacy violates the due process clause of the Fourteenth Amendment. Same division of Justices as in Speiser v. Randall.

Illinois statute which requires trucks and trailers operating on state highways to be equipped with specified type of rear fender mudguard, which is different from those permitted in at least 45 other States, and which would seriously interfere with “interline operations” of motor carriers cannot validly be applied to interstate motor carriers certified by the Interstate Commerce Commission, for the reason that interstate commerce is unreasonably burdened thereby.

Justices concurring: Harlan (separately), Stewart (separately).

Louisiana statute prohibiting athletic contests between Negroes and white persons was violative of the equal protection clause of the Fourteenth Amendment.

As construed and applied, the New York Education Law, which requires denial of a license to show a motion picture “presenting adultery as being right and desirable for certain people under certain circumstances,” is unconstitutional. Refusal of a license to show a motion picture found to portray adultery alluringly as proper behavior violates the freedom to advocate ideas guaranteed by the First Amendment and protected by the Fourteenth Amendment from infringement by the States.

Justices concurring: Black (separately), Frankfurter (separately), Douglas (separately), Clark (separately), Harlan (separately).

Arkansas statutes which empowered the Governor to close the public schools and to hold an election as to whether or not the schools were to be integrated as well as to withhold public moneys, hitherto allocated to such schools, on the occasion of their closing and to make such funds available to other public schools or nonprofit private schools to which pupils from a closed school might transfer were violative of the due process and equal protection clauses of the Fourteenth Amendment.

Texas statutes discriminated against the United States in violation of Article VI, clause 2, by levying a tax on federally owned land
and improvements used and occupied by a private concern that was more burdensome than the tax imposed on similarly situated lessees of property owned by Texas and its subdivisions.


Property taxes assessed under California law could not be levied on real estate owned by the Reconstruction Finance Corporation after the latter had declared the property to be surplus and surrendered it to the War Assets Administration for disposal; this exemption arose even before execution of a quitclaim deed transferring title from the RFC to the United States and even though a property had been leased to a private lessee in the name of both the RFC and the United States.


Justices dissenting: Douglas, Black.


Alabama statute which altered the boundaries of the City of Tuskegee in such manner as to eliminate all but four or five of its 400 African American voters without eliminating any white voter was violative of the Fifteenth Amendment.

Justice concurring: Whittaker (separately).


Arkansas statute which required every school teacher, as a condition of employment in state-supported schools and colleges, to file an affidavit listing every organization to which he had belonged or contributed within the preceding five years deprived teachers of associational freedom guaranteed by the due process clause of the Fourteenth Amendment.


Justices dissenting: Frankfurter, Clark, Harlan, Whittaker.


The Louisiana interposition statute, which averred that the decision in the school segregation case (*Brown v. Board of Education*, 347 U.S. 483 (1954)) constituted usurpation of state power and which interposed the sovereignty of the State against enforcement of that decision, did not assert “a constitutional doctrine,” and if taken seriously, is legal defiance of constitutional authority.


Louisiana statutes which (1) provided for segregation of races in public schools and the withholding of funds from integrated schools;
(2) conferred on the Governor the right to close all schools upon the integration of any one of them; and (3) directed the Governor to supersede a school board under a court order to desegregate and take over management of public schools, were unconstitutional and denial of equal protection of the laws.


When, by reason of a Georgia law which granted defendant in a criminal trial the right to make an unsworn statement to the jury without subjecting himself to cross-examination, defendant’s counsel was denied the right to ask him any question when he took the stand to make his unsworn statement, such application of the Georgia law deprived the defendant of the effective assistance of counsel without due process of law.

Justices concurring: Frankfurter (separately), Clark (separately).


Louisiana statute which prohibited any “non-trading” association from doing business in Louisiana if it is affiliated with any “foreign or out-of-state non-trading” association, any of the officers or directors of which are members of subversive organizations as cited by a House committee or by the United States Attorney General, and which required every non-trading association with an out-of-state affiliate to file annually an affidavit that none of the officers of the affiliate is a member of such organizations, was void for vagueness and violative of due process.

Justices concurring: Harlan (separately), Stewart (separately), Frankfurter (separately), Clark (separately).


Maryland constitutional provision under which an appointed notary public who would not declare his belief in God was denied his commission imposed an invalid test for public office violative of freedom of belief and religion as guaranteed by the First Amendment, applicable through the due process clause of the Fourteenth Amendment.

Justices concurring: Frankfurter (separately), Harlan (separately).


Missouri statutory procedure which enabled a city police officer, in an ex parte proceeding, to obtain from a trial judge search warrants authorizing seizure of all “obscene” material possessed by wholesale and retail distributors without granting the latter a hearing or even seeing any of such materials in question and without specifying any particular publications, sanctioned search and seizure tactics violative of due process.
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Justices concurring: Black (separately), Douglas (separately).


Louisiana statute which punished the giving to or acceptance by any parent of anything of value as an inducement to sending his child to a school operated in violation of Louisiana law was void for vagueness and was designed to scuttle a desegregation program.


Louisiana statutes which purported to remove New Orleans school board and replace it with a new group appointed by the legislature, which deprived the board of its attorney and substituted the Louisiana Attorney General, and a resolution addressing out of office the school superintendent chosen by the board, were unconstitutional and violative of the equal protection clause of the Fourteenth Amendment.


Florida statute which required state and local public employees to swear that they had never lent their “aid, support, advice, counsel, or influence to the Communist Party,” and which subjected them to discharge for refusal, was void for vagueness and violative of due process.

Justices concurring: Black (separately), Douglas (separately).


Louisiana statute which authorized the school board of a municipally operated school system to close the schools upon a vote of the electors and which provided that the board might then lease or sell any school building, but which subjected to extensive state control and financial aid the private schools which might acquire such buildings was violative of the equal protection of the laws in that it was intended to continue segregation in schools.


Mississippi statutes which required racial segregation at interstate and intrastate transportation facilities denied equal protection of the law.


Tennessee statute, and administrative regulation issued under the authority thereof, insofar as they sanctioned racial segregation in a private restaurant operated on premises leased from a city at its municipal airport, denied equal protection of the law.


Pennsylvania’s capital stock tax, in the nature of a property tax, could not be collected on that portion of a railroad’s cars (158 out of
3074) which represented the daily average of its cars located on a New Jersey railroad's lines during a taxable year; as to the latter portion of its cars the tax was violative of the commerce clause and the due process clause.

Justice concurring: Black (separately).


California statute which, as construed, made the “status” of narcotics addiction a criminal offense, even though the accused had never used narcotics in California and had not been guilty of antisocial behavior in California, was void as inflicting cruel and unjust punishment proscribed by the due process clause of the Fourteenth Amendment.

Justices concurring: Stewart, Warren, C.J., Brennan, Douglas (separately), Harlan (separately), Black.
Justices dissenting: Clark, White.


Louisiana laws which segregated passengers in terminal facilities of common carriers were unconstitutional by reason of conflict with federal law and the equal protection clause.


Virginia law which expanded malpractice by attorneys to include acceptance of employment or compensation from any person or organization not a party to a judicial proceeding and having no pecuniary right or liability in it and which made it an offense for such person or organization to solicit business for an attorney was violative of freedom of expression and association, as guaranteed by the due process clause of the Fourteenth Amendment when enforced against a corporation, including its attorneys and litigants, whose major purpose is the elimination of racial segregation through litigation which it solicits, institutes, and finances.

Justices dissenting: White (in part), Harlan, Clark, Stewart.


Florida statutory provision which did not accord indigent defendants the protection of court appointed counsel in noncapital felony offenses deprived such defendants of due process of law.

Justices concurring: Douglas (separately), Clark (separately), Harlan (separately).


Georgia county unit system for nominating candidates in primaries for state-wide offices, including United States Senators, as set
forth in statutory provisions, violated the principle of “one-person, one vote” as required by the equal protection clause of the Fourteenth Amendment.

Justices concurring: Douglas, Stewart (separately), Clark (separately), Warren, C.J., Brennan, White, Goldberg, Black.
Justice dissenting: Harlan.

Indiana Public Defender Act, insofar as it empowered the Public Defender to refuse to perfect an appeal for an indigent defendant whenever the former believed such an appeal would be unsuccessful and which, independently of such intervention by the Defender, afforded such defendant no alternative means of obtaining a transcript of a *coram nobis* hearing requisite to perfect an appeal from a trial court’s denial of a writ of error coram nobis, effected a discriminatory denial of a privilege available as of right to a defendant with the requisite funds and was violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: Harlan (separately), Clark (separately).

Louisiana use tax, as herein enforced, effected an invalid discrimination against interstate commerce in that the isolated purchase of an item of used equipment in Louisiana was not subject to its sales tax whereas an Oklahoma contractor was subjected to the Louisiana use tax on an item of used equipment employed in servicing wells in Louisiana which had been acquired in Oklahoma; and further that the Louisiana sales or use tax was computed on the cost of components purchased in Louisiana or purchased out of state for assembly and use in Louisiana whereas here the contractor paid a use tax on equipment assembled in Oklahoma which reflected not only the purchase price of the components but also the cost of labor and shop overhead incurred in assembling the components into a usable item of equipment.

Justice dissenting: Clark, Black.

New York statutory procedure governing admission to practice law, insofar as it failed to make provision, in cases of denial of admission, for a hearing on the grounds for rejection to be accorded the applicant, either before the Committee on Character Fitness established by the Appellate Division of its Supreme Court, or before the Appellate Division itself, was defective and amounted to a denial of due process.
Justices dissenting: Harlan, Clark.

When a city ordinance required separation of the races in restaurants, South Carolina trespass statute, when enforced against African Americans who refused to leave a lunch counter in a retail store, amounted to a denial of equal protection of the laws.  
Justice concurring: Harlan (separately).

Justice dissenting: Harlan.

When local community policy, as administered by municipal law enforcement officers, proscribed “sit-in demonstrations” protesting refusal of store proprietors to serve African Americans at lunch counters reserved for white patrons, the Louisiana Criminal Mischief Statute could not be invoked, without violation of the equal protection clause of the Fourteenth Amendment, to punish African Americans who engaged in such demonstrations.  
Justice dissenting: Harlan.

Georgia unlawful assemblies act, which rendered persons open to conviction for a breach of the peace upon their refusal to disperse upon command of police officers, was void for vagueness and violative of due process in that it did not give adequate warning to Negroes that peaceable playing of basketball in a municipal park would expose them to prosecution for violation of said statute.  
Justice concurring: Harlan (separately).

Pennsylvania law which required the reading, without comment, of verses from the Holy Bible at the opening of each public school day was violative of the prohibition against the enactment of any law respecting an establishment of religion as embraced within the due process clause of the Fourteenth Amendment.  
Justices concurring: Clark, Douglas (separately), Brennan (separately), Goldberg (separately), Harlan (concurs with latter), Warren, C.J., White, Black.
Justice dissenting: Stewart.

South Carolina Unemployment Compensation Act, which withheld benefits and deemed ineligible for the receipt thereof a person who has failed without good cause to accept available work when offered to him, if construed as barring a Seventh-Day Adventist from relief because of religious scruples against working on Saturday, abridged the latter’s right to the free exercise of religion contrary to the due process clause of the Fourteenth Amendment.

Justices dissenting: Harlan, White.

Florida statute and regulations implementing it which required milk distributor to purchase its total supply of fluid milk from area producers at a fixed price and to take all milk which these producers offered was invalid under the commerce clause since they interfered with distributor’s purchases of milk from out-of-state producers.

Louisiana statute requiring that in all primary, general, or special elections, the nomination papers and ballots shall designate the race of the candidates violated the equal protection clause.

Georgia statute establishing congressional districts of grossly unequal populations violates Article I, § 2, of the Constitution.

Justices concurring in part and dissenting in part: Clark.
Justices dissenting: Harlan, Stewart.


District court decision holding unconstitutional Louisiana statute requiring segregation of races in public facilities is affirmed.

Illinois unfair competition law cannot be applied to bar or penalize the copying of a product which does not qualify for a federal patent inasmuch as this use of the state law conflicts with the exclusive
power of the Federal Government to grant patents only to true inventions and then only for a limited time.


Washington statutes requiring state employees to swear that they are not subversive persons and requiring teachers to swear to promote by precept and example respect for flag and institutions of United States and Washington, reverence for law and order, and undivided allegiance to Federal Government, are void for vagueness.

Justices concurring: White, Black, Douglas, Brennan, Stewart, Goldberg, Warren, C.J.

Justices dissenting: Clark, Harlan.


New York law regulating sale of alcoholic beverages could not constitutionally be applied to dealer who sold bottled wines and liquors to departing international airline travelers at JFK airport in New York.

Justices concurring: Stewart, Douglas, Clark, White, Warren, C.J.

Justices dissenting: Black, Goldberg.


Kentucky statute providing for a tax of ten cents per gallon on the importation of whiskey into the State, which was collected while the whiskey was in unbroken packages in importer's possession was unconstitutionally applied to the importer of Scotch whiskey from abroad under Art. I, § 10, cl. 2.

Justices concurring: Stewart, Douglas, Clark, White, Warren, C.J.

Justices dissenting: Black, Goldberg.


Florida statute providing for prayer and devotional reading in public schools is unconstitutional.


Alabama constitutional and statutory provisions which do not apportion seats in both houses of legislature on a population basis violated the equal protection clause.


Justices concurring specially: Clark, Stewart.
Justice dissenting: Harlan.

   New York constitutional and statutory provisions which do not
   apportion seats in both houses of legislature on population basis is
   unconstitutional.
   Justices concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg,
   White.
   Justice concurring specially: Clark.
   Justices dissenting: Harlan, Stewart.

548. Accord: Maryland Comm. for Fair Representation v. Tawes, 377 U.S.
   656 (1964). Same division of Justices as in Lomenzo.

   of Justices as in Lomenzo.

   sion of Justices as in Lomenzo, except Justice Stewart concurring spe-
   cially.

   713 (1964).
   Apportionment formula for state legislature written into state
   constitution invalid under equal protection clause even though ap-
   proved by electorate in referendum.
   Justices concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg,
   White.
   Justices dissenting: Clark, Harlan, Stewart.

   ture. Same division of Justices as in Lomenzo, except Justice Stewart
   favored limited remand.

   Same division of Justices as in Reynolds v. Sims.

   lature. Same division of Justices as in Reynolds v. Sims.

   vision of Justices as in Reynolds v. Sims.

   Statute authorizing issuance of ex parte warrant for seizure of al-
   legedly obscene materials prior to a hearing on the issue of obscenity
   is invalid under First and Fourteenth Amendments.
   Justices concurring specially: Black, Douglas; Stewart.
   Justices dissenting: Harlan, Clark.

District court decisions holding unconstitutional Virginia statutes requiring notation of race in divorce decrees and separation by race of names on registration, poll tax, and residence certificate lists, and on assessment rolls are affirmed.


Criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room in the nighttime violates equal protection clause.


Section of law providing for suppression of Communist Party and authorizing issuance of search warrants for subversive books and other materials is constitutionally defective because it does not require a description with particularity of the things to be seized.


Louisian breach of the peace statute is unconstitutionally vague.


Maryland censorship statute requiring prior submission of films for review is invalid in absence of procedural safeguards eliminating dangers of censorship.


Texas constitutional provision prohibiting any member of Armed Forces who moves into the State from ever voting in Texas while a member of the Armed Forces violates the equal protection clause.

   Justices concurring: Stewart, Black, Douglas, Clark, Brennan, White, Goldberg.
   Justice dissenting: Harlan.


Constitutional and statutory provisions requiring prospective voters to satisfy registrars of their ability to understand and give reasonable interpretation of any section of United States or Louisiana Constitutions violate Fourteenth and Fifteenth Amendments.


Ohio statute imposing personal property tax upon furniture and fixtures used by foreign insurance company in doing business in Ohio
but not imposing similar tax upon furniture and fixtures used by domestic insurance companies violates equal protection clause.


Idaho tax statute applied to levy an excise tax on licensed Idaho motor fuel dealer’s sale and transfer of gasoline in Utah for importation into Idaho by purchaser violated due process clause of Fourteenth Amendment.


Justices dissenting: Black.


Louisiana Subversive Activities and Communist Control Law is unconstitutional because of overbreadth of its coverage, violating First Amendment, and because of its lack of procedural due process.


Justices dissenting: Harlan, Clark.


Virginia statute requiring voters in federal election who do not qualify by paying poll tax to file a certificate of residence six months in advance of election is contrary to Twenty-fourth Amendment, which absolutely abolished payment of poll tax as a qualification for voting in federal elections.


District court decision holding unconstitutional California constitutional provisions on apportionment of state senate is affirmed.


Justices dissenting: Harlan, Clark, Stewart.


A Connecticut statute making it a crime for any person to use any drug or article to prevent conception is an unconstitutional invasion of privacy of married couples.

Justices concurring: Douglas, Clark.


Justices dissenting: Black, Stewart.


A Pennsylvania statute permitting jurors to determine whether an acquitted defendant should pay the costs of the trial was void under the due process clause of the Fourteenth Amendment because of vagueness and the absence of any standard that would prevent arbitrary imposition of costs.

New York statutory procedure for civil commitment of persons at the expiration of a prison sentence without the jury review available to all others civilly committed in New York and for commitment to an institution maintained by the Department of Correction beyond the expiration of their terms without a judicial determination of dangerous mental illness such as that afforded to all others violates the equal protection clause.


Virginia constitutional provisions making payment of poll taxes a qualification of eligibility to vote violate the equal protection clause.


Justices dissenting: Black, Harlan, Stewart.


Texas poll tax is unconstitutional.


Arizona loyalty oath is unconstitutionally overbroad and inclusive.


Justices dissenting: White, Clark, Harlan, Stewart.


Alabama statute making it a criminal offense to electioneer or solicit votes on election day as applied to a newspaper editor who published an editorial on election day urging people to vote a certain way on a referendum issue violated First and Fourteenth Amendments.


New Jersey statute requiring an unsuccessful appellant to repay the cost of a transcript used in preparing his appeal out of his institutional earning when he is jailed but which does not apply to unsuccessful appellants given suspended sentences, placed on probation, or fined violates equal protection clause.


Justice dissenting: Harlan.


District court decision holding unconstitutional Maryland congressional districting is affirmed.


District court decision holding unconstitutional under the commerce clause a Texas statute forbidding anyone to withdraw water from any underground sources in State without authorization of legislature is affirmed.

Florida statute apportioning legislative seats falls short of required population equality.

Justices concurring: White, Black, Douglas, Clark, Brennan, Fortas, Warren, C.J.

Justices dissenting: Harlan, Stewart.


District court decision holding unconstitutional Missouri’s 1965 congressional districting law is summarily affirmed.


District court decision holding unconstitutional as violating commerce clause Oregon statute requiring sellers of imported meat to label it with country of origin, post notices in their establishment that it is being sold, and keep record of transactions involving it, is affirmed.


New York statute requiring removal of teachers for “treasonable or seditious” utterances or acts is unconstitutionally vague since it apparently bans mere advocacy of abstract doctrine, and statute which makes Communist Party membership prima facie evidence of disqualification for teaching in public schools is unconstitutionally broad.


Justices dissenting: Clark, Harlan, Stewart, White.


Commerce clause forbids application of Illinois use tax statute to a seller whose only connection with customers in the State is by common carrier or by mail.


Justices dissenting: Fortas, Black, Douglas.


California constitutional provision adopted on referendum repealing “open housing” law and prohibiting state abridgement of realty owner's right to sell and lease, or to refuse to sell and lease, as he pleases violates the equal protection clause.

STATE LAWS HELD UNCONSTITUTIONAL

Justices dissenting: Harlan, Black, Clark, Stewart.

   New York eavesdrop statute that does not require particularity with respect to
   crime suspected and conversations sought, sufficiently limit period of order's
effectiveness, terminate order once desired conversation is overheard, or require notice or showing of exigent circumstances to justify dispensing with notice violates Fourth and Fourteenth Amendments.
   Justices concurring: Clark, Douglas, Brennan, Fortas, Warren, C.J.
   Justices dissenting: Black, Harlan, White.

   Virginia statute prohibiting interracial marriage violates equal protection clause.

   Texas statute prohibiting persons charged as co-participants in the same crime from testifying for one another violated Sixth and Fourteenth Amendments.

   Maryland loyalty oath is unconstitutionally vague when read with surrounding authorization and supplementary statutes which infringe on rights of association.
   Justices dissenting: Harlan, Stewart, White.

   Justices dissenting: Harlan, Stewart.

   District court decision holding unconstitutional New York's congressional districting statute is summarily affirmed.
   Justice dissenting: Harlan.

   Oregon statute which barred alien from taking personal property intestate unless American citizens had reciprocal rights with alien's country, unless American citizens had right to receive payment within United States from estates of decedents dying in that foreign country,
and unless Oregon courts were presented proof that alien heir would receive benefit, use, and control of inheritance without confiscation, was void as an intrusion by State into field of foreign affairs reserved to Federal Government.

Justices concurring: Douglas, Black, Brennan, Stewart, Fortas, Warren, C.J.
Justices concurring specially: Harlan.
Justice dissenting: White.

District court decision holding Massachusetts congressional districting statute unconstitutional is summarily affirmed.

District court decision holding unconstitutional tuition grant statute authorizing payments to children attending private schools as part of an anti-desegregation program is summarily affirmed.

District court decision holding unconstitutional Florida congressional districting statute is affirmed.

District court decision holding unconstitutional Texas loyalty oath statute is summarily affirmed.

District court decisions holding that Alabama statutes requiring racial segregation in prisons and jails violate equal protection clause is summarily affirmed.

District court decision holding unconstitutional as applied to a prisoner who had been sentenced prior to enactment of statute but paroled after its enactment a Massachusetts statute which forbade a prisoner from earning good conduct deductions for the first six months after his reincarceration following violation of parole is summarily affirmed.

Louisiana wrongful death statute creating right of action in surviving child or children as interpreted to mean only legitimate child or children denies illegitimate children equal protection of the laws.

Justices dissenting: Harlan, Black, Stewart.

Louisiana statute barring wrongful death recovery by parents of illegitimate child while allowing recovery by parent of legitimate child violates equal protection.


Provision of New York’s obscenity law is unconstitutionally vague.


Justices dissenting: Harlan.


An Illinois statute, itself no longer in code but held to be incorporated in the general juror challenge statute, which authorizes automatic challenge for cause of any potential juror scrupled against capital punishment in capital cases, is invalid.


Justices concurring specially: Douglas.

Justices dissenting: Black, Harlan, White.


Series of Ohio election statutes which imposed insurmountable obstacles to success of independent parties and candidates obtaining a place on the ballot violate the equal protection clause.


Justices concurring specially: Harlan.


District court decision holding unconstitutional a Louisiana tuition grant statute as part of an anti-desegregation program is summarily affirmed.


Arkansas statute prohibiting the teaching of evolution in public schools of State violates First and Fourteenth Amendments.


New Jersey statute providing for exemption from property taxes only of those nonprofit corporations chartered in New Jersey denies equal protection to Pennsylvania corporation qualified to do business in New Jersey.


Justice dissenting: Black.
District court decision holding unconstitutional South Carolina statute providing for scholarship grants for children attending private schools as part of antidiscrimination program is summarily affirmed.

Missouri congressional districting statute is unconstitutional because the population deviations from precise mathematical equality among districts were not unavoidable.

   Justice concurring specially: Fortas.
   Justices dissenting: Harlan, Stewart, White.


Georgia statute construed to prohibit possession in the home of obscene materials for one’s own private and personal use violates First and Fourteenth Amendments.

Statute insofar as it punishes verbal abuse of the flag violates First and Fourteenth Amendments.

   Five-to-four division of Court not on this issue.

Connecticut statute imposing one-year durational residency requirement on eligibility for welfare assistance infringes right to travel and violates equal protection clause.


Pennsylvania’s one-year durational residence requirement for eligibility for welfare assistance infringes the right to travel and violates equal protection.

Illinois statute requiring independent candidates to present 25,000 signatures, including 200 signatures from each of at least 50 of the State’s 200 counties, violates the equal protection clause.

   Justices dissenting: Stewart, Harlan.

Wisconsin prejudgment garnishment statute which authorizes freezing of defendant’s wages in interim between garnishment and
culmination of suit without affording defendant a hearing violates due process clause.

Justice concurring specially: Harlan.
Justice dissenting: Black.

Ohio’s Criminal Syndicalism Statute, which proscribes advocacy of use of force in absence of requirement that such advocacy be directed to inciting or producing imminent lawless action and be likely to incite or produce such action, violates the First and Fourteenth Amendments.

New York statute limiting eligibility to vote in school district elections to persons who own taxable real property in district or who are parents of children enrolled in the local public schools violates equal protection clause.

Justice dissenting: Stewart, Black, Harlan.

Louisiana statute limiting eligibility to vote on issuance of municipal utility revenue bonds to property owners violates equal protection clause.

Justice concurring specially: Black, Stewart, Harlan.

Georgia statute limiting eligibility for school board membership to property holders violates the equal protection clause.

District court decision holding unconstitutional New York statute denying welfare assistance to persons coming into State with intent to obtain such assistance is summarily affirmed.

Missouri statutory scheme for election of trustees of junior college district which allocated trustees to lesser populated districts rather than those of greater populations violated equal protection clause.


New York statute providing that proof of acts establishing delinquency of a minor must be by a preponderance of the evidence vio-
lates due process clause, which requires proof beyond a reasonable doubt.

Justices dissenting: Burger, C.J., Black, Stewart.


New York statute providing for trial without jury in New York City of misdemeanors punishable upon conviction with sentences of up to one year violates Sixth and Fourteenth Amendments, which require jury trials when possible sentence is six months or more.

Justices concurring specially: Black, Douglas.


Arizona constitutional and statutory provisions which limit eligibility to vote in referendum on issuance of general obligation bonds to property owners violate equal protection clause.


An Illinois statute providing for extension of jail sentences to work off unpaid fine at $5 a day violates the equal protection clause as applied to an indigent convict unable to pay his fine.


District court decision holding unconstitutional New York statutory provisions for geographic dispersion of signatures on candidates' petitions and discriminating against independent candidates' ability to obtain signatures in ways absent from major party candidates is summarily affirmed.


District court decision holding unconstitutional Louisiana constitutional and statutory provisions limiting eligibility to vote in general obligation bond authorization elections is summarily affirmed.


District court decision holding unconstitutional Arizona's one-year residency requirement for treatment in state hospital is summarily affirmed.


District court decision holding unconstitutional a California loyalty oath similar to that condemned in *Baggett v. Bullitt*, 377 U.S. 360 (1964), is summarily affirmed.
Wisconsin statute providing for “posting” of “excessive” drinkers
to bar them from taverns and similar places denies procedural due
process by not requiring notice and opportunity to be heard.

Wisconsin statute which categorically precludes a change of
venue for trial of misdemeanor cases violates Sixth and Fourteenth
Amendments.

   Justices concurring specially: Blackmun, Burger, C.J.
   Justice dissenting: Black.

Connecticut’s statutory imposition of fees as prerequisite to ob-
tain judicial dissolution of marriage violates due process as applied to
persons unable to pay the fees.

   Justices concurring: Harlan, Stewart, White, Marshall, Blackmun.
   Justices concurring specially: Douglas, Brennan.
   Justice dissenting: Black.

Texas statute (and ordinance of City of Houston) which provide
for imprisonment of person unable to pay a fine for period calculated
at $5 a day violate equal protection clause.

Anti-Busing Law which flatly forbids assignment of any student
on account of race and prohibits busing for such purpose is unconsti-
tutional.

Georgia statute providing for automatic suspension of driver’s li-
cense upon involvement in auto accident unless security for amount
of damages is posted violates due process in not first affording driver
a hearing to establish a reasonable possibility that judgment may be
rendered against him as result of accident.

District court decision holding unconstitutional New York anti-
busing law is summarily affirmed.

Legislative apportionment and districting statute of Indiana,
though its multimember features are not unconstitutional, provides
for too much population inequality and is void.

   Justices concurring: White, Black, Douglas, Brennan, Marshall, Blackmun,
   Burger, C.J..
Justices dissenting: Harlan, Stewart.

Florida loyalty oath provision which requires public employee to swear he does not believe in violent overthrow of government or be dismissed violates due process by not providing for an inquiry into his reasons for refusing to take the oath.

   Justices concurring: Burger, C.J., Black, Harlan, White, Blackmun.
   Justice dissenting: Stewart.

Arizona statute that denies welfare assistance to aliens who have not been in the United States for 15 years violates equal protection and intrudes into the Federal Government's exclusive powers over admission of aliens.

A Pennsylvania statute that limits welfare assistance to United States citizens violates equal protection and intrudes into the Federal Government's exclusive powers over admission of aliens.

Pennsylvania statute providing for reimbursement of sectarian schools for expenses of providing certain secular educational services violates the establishment clause of the First Amendment as applied to the States through the Fourteenth.

   Justice dissenting: White.

Rhode Island statute providing for salary supplements to be paid to teachers in sectarian schools violates the establishment clause.

District court decision holding unconstitutional Connecticut Non-public School Secular Education Act is affirmed.

Montana durational residency requirement as condition on eligibility to state-financed public assistance is unconstitutional under *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Idaho statutory provision giving preference to males over females for appointment as administrator of decedent's estate violates equal protection clause.
   District court decision holding unconstitutional Connecticut one-year durational residency requirement for eligibility to welfare assistance is summarily affirmed.

   District court decision holding unconstitutional New York one-year durational residency requirement for eligibility to welfare assistance is summarily affirmed.

   Oregon statutory provision requiring tenants who wish to appeal housing eviction order to file bond in twice the amount of rent expected to accrue during pendency of appeal violates equal protection clause.

   Texas' filing fee system, which imposes on candidates the costs of the primary election operation and affords no alternative opportunity for candidates unable to pay the fees to obtain access to the ballot, violates the equal protection clause.

   Tennessee durational residency requirement of one year as a condition of registration to vote burdens right to travel and violates equal protection clause.

   Justices concurring specially: Blackmun.

   District court decision invalidating Massachusetts statute that imposes as a condition for registering to vote an additional 6-month state residency requirement on persons who have already resided within the town or district for six months as violative of the Equal Protection Clause is summarily affirmed.

   District court decision invalidating, as impermissibly burdening the right to vote and the right to travel, a Vermont one-year residency requirement for voting, is summarily affirmed.

   District court decision invalidating on equal protection grounds a North Carolina one-year residency requirement for voting is summarily affirmed.
District court decision invalidating on equal protection grounds a Minnesota six-month residency requirement for voting is summarily affirmed.

District court decision invalidating as burdening the right to vote and violating equal protection an Indiana six-month residency requirement for voting is summarily affirmed.

District court decision invalidating on equal protection grounds Alabama’s six-month county residency requirement and three-month precinct residency requirement for voting is summarily affirmed.

District court decision holding that Virginia’s one-year residency requirement for voting violates equal protection is summarily affirmed.

Massachusetts statute making it a crime to dispense any contraceptive article to an unmarried person, except to prevent disease, is unconstitutional.

  Justices concurring specially: White, Blackmun.

Georgia statute making it criminal offense to use language of or to another tending to cause a breach of the peace, which is not limited to “fighting words,” is unconstitutionally vague and overbroad.


Illinois statute which presumes without a hearing unfitness of father of illegitimate children to have custody upon death or disqualification of mother denies him due process and equal protection.

  Justices dissenting: Burger, C.J., Blackmun.

Louisiana workmen’s compensation statute, which relegates unacknowledged illegitimate children to a status inferior to legitimate and acknowledged illegitimate children, violates equal protection clause.

Wisconsin's compulsory school attendance law, insofar as it does not exempt Amish children from coverage following completion of the eighth grade, violates the Free Exercise Clause of the First Amendment, applicable via the Fourteenth Amendment.


A Tennessee statute that requires a criminal defendant if he is going to testify to do so before any other witness for him violates the Fifth, Sixth, and Fourteenth Amendments.

Justice concurring specially: Stewart.
Justices dissenting: Burger, C.J., Blackmun, Rehnquist.

Indiana's pretrial commitment procedure for allegedly incompetent defendants, which provides more lenient standards for commitment than the procedure for those persons not charged with any offense, and more stringent standards for release, violates both due process and equal protection.

Kansas statute enabling State to recover in subsequent civil proceedings legal defense fees for indigent defendants violates equal protection clause because it dispenses with the protective exemptions state law has erected for other civil judgment debtors.

Florida's replevin statutes, which permit installment sellers or other persons alleging entitlement to property to cause the seizure of the property without any notice or opportunity to be heard on the issues, violate due process clause.


Pennsylvania replevin statute, which permits installment sellers to cause the seizure of property without affording notice or opportunity to contest to the persons possessing the property, violates the due process clause. Same division of Justices as Fuentes v. Shevin.

District court decision holding unconstitutional under equal protection clause Florida’s denial of welfare assistance to noncitizens is summarily affirmed.


North Carolina statute which authorized creation of a new school district in a city that was part of a larger county school system is void inasmuch as its effect would be to impede the dismantling of the dual school system by affording a refuge to white students fleeing desegregation.


Statutory imposition of capital punishment upon criminal conviction either at discretion of jury or of the trial judge may not be carried out. Georgia’s statute in the view of two Justices is unconstitutional because the death penalty is cruel and unusual punishment per se in violation of the Eighth and Fourteenth Amendments, while in the view of three Justices the statute is unconstitutional as applied because of the discriminatory or arbitrary manner in which death is imposed upon convicted defendants in violation of the Eighth and Fourteenth Amendments.


District court decision holding invalid under equal protection clause Texas statutes prohibiting licensed cosmetologists from working with male customers and prohibiting licensed barbers from working with female customers is summarily affirmed.


District court decision holding void under the establishment clause of the First Amendment an Ohio statute providing a reimbursement grant to parents of children attending nonpublic schools is summarily affirmed.


Illinois statute providing for mailing of vehicle forfeiture proceeding notification to home address of vehicle owner is unconstitutional as applied to person known to the State to be incarcerated and not at home.


District court decision holding unconstitutional Alabama legislative apportionment law is summarily affirmed.

District court decision holding invalid under equal protection clause Virginia statute allowing reimbursement to utilities required by interstate highway construction to relocate their lines in cities and towns but denying reimbursement to utilities required by interstate highway construction to relocate lines in counties is summarily affirmed.


Ohio statute authorizing trial for certain ordinance violations and traffic offenses before mayor responsible for village finances when the fines, forfeitures, costs, and fees imposed in the mayor’s courts provided a substantial portion of village funds denied defendants opportunity for trial before an impartial and disinterested tribunal.


Justice dissenting: White, Rehnquist.


New Mexico’s gross receipts tax is unconstitutionally applied to proceeds from transactions whereby material is produced in State under contract for delivery to out-of-state clients because it impermissibly burdens interstate commerce.


District court decision holding unconstitutional under due process clause Rhode Island prejudgment attachment statute is summarily affirmed.


Texas law denying right of enforced paternal support to illegitimate children while granting it to legitimate children violates equal protection clause.


Texas statute making it a crime to procure or to attempt to procure an abortion except on medical advice to save the life of the mother infringes upon a woman’s right of privacy protected by the due process clause of the Fourteenth Amendment.


Justice dissenting: White, Rehnquist.


Georgia statute permitting abortions under prescribed circumstances nevertheless invalidly imposed a number of procedural limitations: that the abortion be performed in an accredited hospital,
be approved by a staff committee and two licensed physicians other than woman's own doctor, and be available only to residents.


Justices dissenting: White, Rehnquist.


Portion of Virginia apportionment statute assigning large numbers of naval personnel to actual location of station when evidence showed substantial numbers resided in surrounding areas distorted population balance of districts and was void.


District court decision holding invalid under First and Fourteenth Amendments Indiana statute requiring political party to submit oath that party has no relationship to a foreign government as a condition of ballot access is summarily affirmed.


New Mexico use tax may not constitutionally be applied on personal property that Indian tribe purchased out-of-state and installed as permanent improvement on off-reservation ski resort owned and operated by tribe.


Arizona income tax is invalidly applied to Navajo Indian residing on reservation and whose income is wholly derived from reservation sources.


New Jersey statute denying assistance to families in which parents are not ceremonially married denies equal protection to children in such families.


Justice dissenting: Rehnquist.


Wisconsin statute as interpreted to permit revocation of parole without a hearing denies due process of law.


A district court decision voiding as an arbitrary denial of equal protection Louisiana's constitutional provision and statute distributing a property relief fund among political subdivisions is summarily affirmed.
District court decision holding a denial of equal protection New York statute denying jury trial on issue of dangerousness to persons being committed to hospitals for criminally insane after felony indictment but before trial is summarily affirmed.

Connecticut statute creating irrebuttable presumption that student from out-of-state at time of application to state college remained nonresident for tuition purposes for entire student career violated due process clause.

   Justice concurring specially: White.

Oregon statute requiring defendant to give pretrial notice of alibi defense and names of supporting witnesses but denying defendant any reciprocal right of discovery of rebuttal evidence denies him due process of law.

Establishment of multimember legislative districts in certain Texas urban areas in context of pervasive electoral discrimination against blacks and Mexican-Americans denied equal protection of laws.

Texas congressional districting law creates districts with too great a population disparity and is void under equal protection clause.

New York statute to reimburse nonpublic schools for administrative expenses incurred in carrying out state mandated examination and record keeping requirements but requiring no accounting and separating of religious and nonreligious uses violates establishment clause.

   Justice dissenting: White.

New York statute providing that only United States citizens may hold permanent positions in competitive civil service violates equal protection clause.

Justice dissenting: Rehnquist.


New York education and tax laws providing grants to nonpublic schools for maintenance and repairs of facilities and providing tuition reimbursements and income tax benefits to parents of children attending nonpublic schools violate the establishment clause.

Justices concurring and dissenting: Burger, C.J., Rehnquist.
Justice dissenting: White.


Pennsylvania statute providing for reimbursement of parents for portion of tuition expenses in sending children to nonpublic schools violates establishment clause.

Justices dissenting: White, Rehnquist, Burger, C.J.


Ohio statute granting tax credits to parents of private school children violates the Establishment Clause.


South Carolina legislative apportionment statute is invalid.


Arizona constitutional and statutory provisions denying public employment to aliens violates equal protection clause.


Federal court decision that Texas statutory system that denies good time credit to convicted felons in jail pending appeal while allowing good time credit to incarcerated nonappealing felons unconstitutionally burdens right of appeal is summarily affirmed.


An Illinois statute prohibiting anyone who has voted in one party’s primary election from voting in another party’s primary election for at least 23 months violates the First and Fourteenth Amendments.

Justice concurring specially: Burger, C.J.
Justice dissenting: Blackmun, Rehnquist.


New York statute providing for cancellation of public contracts and disqualification of contractors from doing business with the State
for refusal to waive immunity from prosecution and to testify concerning state contracts violates the Fifth Amendment privilege against self-incrimination.

District court decision invalidating Missouri abortion statute is summarily affirmed.

Indiana statute prescribing loyalty oath as qualification for access to ballot violates First and Fourteenth Amendments.

New York election law provisions that permit persons incarcerated outside county of residence while awaiting trial to register and vote absentee while denying absentee privilege to persons incarcerated in county of residence denies equal protection.

Justices dissenting: Blackmun, Rehnquist.

District court decision holding invalid Alabama legislative apportionment statute is summarily affirmed.

Arizona statute imposing one-year county residency requirement for indigents' eligibility for nonemergency medical care at state expense infringes upon right to travel and violates equal protection clause.

Justice dissenting: Rehnquist.

Alaska statute protecting anonymity of juvenile offenders, as applied to prohibit cross-examination of prosecution witness for possible bias, violates confrontation clause.

Justices dissenting: White, Rehnquist.

Massachusetts statute punishing anyone who treats the flag "contemptuously" without anchoring proscription to specified conduct and modes is unconstitutionally vague.

Justice concurring specially: White.
California statute imposing a filing fee as the only means of getting on the ballot denied indigents equal protection.

District court decision holding invalid as burden on interstate commerce Louisiana statute construed to permit commission to regulate prices at which dairy products are sold outside the State to Louisiana retailers is affirmed.

District court decision invalidating Indiana statute limiting real estate dealer licenses to citizens is summarily affirmed.

District court decisions invalidating under the establishment clause New Jersey laws providing reimbursement to parents of nonpublic school children for textbooks and other materials are summarily affirmed.

Florida statute compelling newspapers to publish free replies by political candidates criticized by newspapers violates First Amendment.

Washington State statute prohibiting “improper use” of flag or display of the flag with any emblem superimposed on it was invalidly applied to a person who taped a peace symbol on the flag in a way as not to damage it and who then displayed it upside down from his own property.

Appellate court decision holding invalid on its face a New York statute restricting display of the American flag, and prohibiting superimposition of symbols on a flag, is summarily affirmed.

District court decision striking down under First Amendment a California statute providing state income-tax reductions for taxpayers sending their children to nonpublic schools is summarily affirmed.
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Justices dissenting: White, Rehnquist, Burger, C.J.

Constitutional and statutory provisions that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service violates Sixth Amendment right of defendants to be tried before juries composed of a representative cross section of the community.

Justice concurring specially: Burger, C.J.
Justice dissenting: Rehnquist.

Georgia statutes permitting writ of garnishment to be issued in pending suits on conclusory affidavit of plaintiff, prescribing filing of bond as the only method of dissolving the writ, which deprives defendant of the use of the property pending the litigation, and making no provision for an early hearing violates Fourteenth Amendment’s due process clause.

Justice concurring specially: Powell.
Justices dissenting: Blackmun, Rehnquist, Burger, C.J.

Ohio statute authorizing suspension without a hearing of public school students for up to 10 days for misconduct denies students procedural due process in violation of the Fourteenth Amendment.

Justices dissenting: Powell, Blackmun, Rehnquist, Burger, C.J.

Georgia statute making it a misdemeanor to publish or broadcast the name of a rape victim may not be applied to such publishing or broadcasting when the name is part of a public record; consistent with the First Amendment, publication of such public record information is absolutely privileged.

New Hampshire commuters income tax imposed on nonresidents violates the privileges and immunities clause, Art. IV. § 2, cl. 1, inasmuch as the State imposed no income tax on its residents’ domestic income and exempted from tax income earned by its residents outside the State, since the tax falls exclusively on nonresidents and is not offset even approximately by other taxes imposed upon residents alone.

Utah age of majority statute applied in the context of child support requirements obligating parental support of son to age 21 but daughter only to age 18 is an invalid gender classification under the equal protection clause of the Fourteenth Amendment.


Texas constitution and statutes and city charter limiting the right to vote in city bond issue elections to persons who have listed property for taxation in the election district in the year of the election is void under the equal protection clause of the Fourteenth Amendment.


Pennsylvania laws authorizing direct provision to nonpublic school children of “auxiliary services”, i.e., counseling, testing, speech and hearing therapy, etc., and loans to the nonpublic schools for instructional material and equipment constitute unlawful assistance to religion and are invalid under First Amendment.


Virginia statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion, as applied to the editor of a weekly newspaper who published an advertisement of an out-of-state abortion, is in violation of the First Amendment.


New York statute granting trial judge in a nonjury criminal case the power to deny counsel the opportunity to make a summation of the evidence before the rendition of judgment violates the Sixth Amendment.

Utah statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before expected childbirth until six weeks following violates Fourteenth Amendment due process clause.


Justices dissenting: Rehnquist, Blackmun, Burger, C.J. (from summary action only).


District court decision invalidating as overbroad under the First Amendment New York law prohibiting attacks on candidate based on race, sex, religion, or ethnic background and prohibiting misrepresentations of candidate’s qualifications, positions, or political affiliation is summarily affirmed.


District court decision voiding Pennsylvania election law provision requiring that candidates of “political bodies” collect nominating petition signatures between 10th and 7th Wednesdays prior to primary election and file them no later than 7th Wednesday prior to primary, insofar as it disqualifies papers signed after 7th Wednesday, is affirmed summarily.


State statute declaring it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs violates the First Amendment right of citizens to receive the information thus suppressed.


Justice concurring specially: Burger, C.J.

Justice dissenting: Rehnquist.


District court decision holding violative of the First Amendment a California statute prohibiting the advertisement of the retail price of prescription drugs and prohibiting representation that price is a discount price, is summarily affirmed.


Minnesota laws imposing personal property taxes cannot under the supremacy clause be constitutionally applied to an Indian’s mobile home located on the reservation.


Missouri’s abortion law that required, inter alia, spousal and parental consent before an abortion could be performed in appropriate
circumstances, and that proscribed the saline amniocentesis abortion procedure after the first 12 weeks of pregnancy, was an unconstitutional infringement upon the liberty of pregnant women who wished to terminate their pregnancies.

Justices dissenting: Stevens (on parental consent).


An appellate court decision invalidating the parental and spousal consent requirements of Florida's abortion statute is summarily affirmed on the basis of *Planned Parenthood v. Danforth*.


North Carolina statute making death penalty mandatory upon conviction of first-degree murder violates Eighth Amendment, since determination to impose death must be individualized.

Justices concurring: Stewart, Powell, Stevens.


Louisiana statute making death penalty mandatory upon conviction of first-degree murder violates the Eighth Amendment.


Oklahoma's death penalty statute violates the Eighth Amendment for the same reasons that North Carolina's and Louisiana's were held invalid in *Woodson* and *Roberts*, supra.


Indiana statute requiring all abortions, including those during first trimester of pregnancy, to be performed in hospital or licensed health facility was held unconstitutional by district court and decision is summarily affirmed.

Justices concurring: Brennan, Stewart, Marshall, Blackmun, Powell, Stevens.


District court holding that Nebraska statutory scheme that fails to provide method by which independent candidate for President may appear on ballot other than through certification by political party violates First and Fourteenth Amendments is summarily affirmed.


Oklahoma statutory prohibition of sale of "nonintoxicating" 3.2% beer to males under 21 and to females under 18 constituted an imper-
missible gender-based classification that denied to males 18-20 equal protection.

Justice concurring specially: Stewart.

    District court decision holding invalid as a discrimination against aliens a New York law granting public works employment preference to citizens who have resided in State for at least 12 months is summarily affirmed.

    New York transfer tax on securities transactions structured so that transactions involving an out-of-state sale are taxed more heavily than most transactions involving a sale within the State discriminates against interstate commerce in violation of the commerce clause.

    A district court decision voiding a Louisiana statute that effectively forbade abortions, that prohibited publicizing availability of abortion services, that required spousal or parental consent, and that forbid state employees to recommend abortions, is summarily affirmed.

    District court decision invalidating Indiana parental consent requirement for abortion upon minor during first 12 weeks of pregnancy is summarily affirmed.

    New Hampshire requirement that state license plates bear motto “Live Free or Die” and making it a misdemeanor to obscure the motto coerces dissemination of ideological message by person on his own property and violates First Amendment.

Justices dissenting: Rehnquist, Blackmun.

    Illinois law allowing illegitimate children to inherit by intestate succession only from their mothers while legitimate children may take from both parents denies illegitimates the equal protection of the laws.

Retroactive repeal of a New Jersey statutory covenant under which bonds had been sold by the Port Authority, the covenant having limited the authority's ability to subsidize rail passenger transportation from revenues and reserves pledged as security for the bonds, impaired the obligations of the contract and violated Article I, § 10, cl. 1

Justices concurring: Blackmun, Rehnquist, Stevens, Burger, C.J.

Louisiana statutory qualification of ownership of assessed property in jurisdiction in which airport is located as condition of appointment to airport commission is invalid.

Justice dissenting: Rehnquist.

Louisiana statute imposing mandatory death sentence upon one convicted of first-degree murder of police officer engaged in performance of his duties violates Eighth Amendment.

Justices concurring: Stewart, Powell, Stevens.
Justices dissenting: Burger, C.J., Blackmun, White, Rehnquist.

New York law making it a crime (1) for any person to sell or distribute contraceptives to minors under 16, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over, and (3) for anyone to advertise or display contraceptives violates First and Fourteenth Amendments.

Justices concurring: Brennan, Stewart, Marshall, Blackmun.
Justices concurring specially: White, Powell, Stevens.

New York statute automatically removing from office and disqualifying from any office for next five years any political party officer who refuses to testify or to waive immunity against subsequent criminal prosecution when subpoenaed before an authorized tribunal violates Fifth Amendment self-incrimination clause.

Justice dissenting: Stevens.

New York statutory provision barring from access to state financial assistance for higher education aliens who have not either applied for citizenship or affirmed the intent to apply when they qualify violates equal protection clause.


Washington statute requiring that all apples sold or shipped into State in closed containers be identified by no grade on containers other than applicable federal grade or a designation that apples are ungraded violates commerce clause by burdening and discriminating against interstate sale of Washington apples.


Ohio’s provision of loan of instructional material and equipment to nonpublic religious schools and transportation and services for field trips for nonpublic school pupils violates First Amendment religion clauses.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Stevens.
Justices dissenting: Burger, C.J., White, Rehnquist; Powell (as to field trips only).


Delaware statute authorizing a court of the State to take jurisdiction of a lawsuit by sequestering property of defendant that happens to be located in State violates due process clause because it permits state courts to exercise jurisdiction in the absence of sufficient contacts among defendant, litigation, and State.


District court decision invalidating Arkansas law that requires independent candidate for office to file for office no later than first Tuesday in April is summarily affirmed.


Georgia statute authorizing death penalty as punishment for rape violates Eighth Amendment.

Justices concurring: White, Stewart, Blackmun, Stevens.
Justices concurring specially: Brennan, Marshall, Powell.


New York’s authorization for reimbursement to nonpublic schools for performance of certain state-mandated services for remainder of
school year to replace reimbursement program declared unconstitutional also violates First Amendment religion clause.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell, Stevens.
Justices dissenting: White, Rehnquist, Burger, C.J.


A Wisconsin statute that requires court permission to marry for any resident having minor children in his custody and who is under a court order to support and that conditions permission on a showing that the support obligation has been met and that the children are not and are not likely to become public charges, violates equal protection clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Burger, C.J.
Justices concurring specially: Stewart, Powell, Stevens.
Justice dissenting: Rehnquist.


Provisions of Georgia state law directing certain trials in criminal cases to be before five-person juries unconstitutionally impair the right to trial by jury.


Tennessee's statutory qualification for delegates to state constitutional conventions, which incorporates a constitutional ban on ministers or priests serving as members of the legislature, violates the Free Exercise Clause.


Massachusetts criminal statute that banned banks and business corporations from making expenditures to influence referendum votes on any questions not affecting the property, business, or assets of the corporation violated the First Amendment.

Justices concurring: Powell, Stewart, Blackmun, Stevens, Burger, C.J.


Virginia statute making it a misdemeanor to divulge information regarding proceedings before a state judicial review commission cannot constitutionally be applied to persons who are not parties before the commission.


“Alaska Hire” statute mandating that state residents be preferred to nonresidents in employment on oil and gas pipeline work violates Article IV, § 2, the privileges and immunities clause.

New Jersey law prohibiting importation into State for disposal at landfills of solid or liquid waste violates commerce clause.

Justices dissenting: Rehnquist, Burger, C.J.


Minnesota’s statutory imposition on existing negotiated collective bargaining agreements of different terms respecting pensions impaired the employer’s rights under the obligation of contracts clause.

Justices concurring: Stewart, Powell, Rehnquist, Stevens, Burger, C.J.


Ohio statute authorizing imposition of death penalty upon conviction of first-degree murder unconstitutionally restricted consideration of mitigating factors by the sentencing party.

Justices concurring specially: White, Marshall, Blackmun.
Justices dissenting: Rehnquist.


Missouri statute, implementing a constitutional provision, which provides for the excusal of any women requesting exemption from jury service, operates to violate the fair cross section requirement of Sixth and Fourteenth Amendments because of the underrepresentation of women jurors that results.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, Burger, C.J.
Justice dissenting: Rehnquist.


Provisions of Pennsylvania abortion law that require the physician to make a determination that the fetus is not viable and if it is viable to exercise the same care to preserve the fetus’ life and health as would be required in the case of a fetus intended to be born alive are void for vagueness under the due process clause of the Fourteenth Amendment.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Powell, Stevens.
Justices dissenting: White, Rehnquist, Burger, C.J.


Illinois law requiring new political parties and independent candidates to obtain signatures of 5% of the number of persons who voted
at the previous election for such office in order to get on the ballot in political subdivisions of the State, insofar as it applies to mandate the obtaining of a greater number and proportion of signatures than is required to get on the ballot for statewide office, lacks a rational basis and violates the equal protection clause of the Fourteenth Amendment.

Justices concurring specially: Blackmun, Stevens, Rehnquist, Burger, C.J..

An Alabama statute that imposes alimony obligations on husbands but not wives violates the equal protection clause of the Fourteenth Amendment.

Justices concurring: Brennan, Stewart, White, Marshall, Blackmun, Stevens.

A federal court decision invalidating under the Fourteenth Amendment’s due process clause a Missouri statute requiring doctor to verbally inform any woman seeking abortion that, if live born infant results, woman will lose her parental rights, is summarily affirmed.

District court decision voiding as denial of due process under Fourteenth Amendment Illinois attachment law because it permits attachment prior to filing of complaint and prior to notice to debtor is summarily affirmed.

Statutory implementation of Louisiana constitutional provision permitting conviction for a nonpetty offense by five out of six jurors violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments.

Oklahoma statute prohibiting transportation or shipment for sale outside the State of natural minnows seined or procured from waters within the State violates the commerce clause.


New York law permitting an unwed mother but not an unwed father to block the adoption of their child by withholding consent is an impermissible gender distinction violative of the equal protection clause of the Fourteenth Amendment.


Imposition of California *ad valorem* property tax upon cargo containers which are based, registered, and subjected to property tax in Japan results in multiple taxation of instrumentalities of foreign commerce and violates the commerce clause.


Justice dissenting: Rehnquist.


Federal court decision invalidating New Jersey statute that allowed taxpayers personal deduction from gross income for each of their dependent children attending nonpublic elementary or secondary schools as a violation of the First Amendment’s religion clause is summarily affirmed.


West Virginia statute that makes it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender violates the First and Fourteenth Amendments.


Massachusetts law requiring parental consent for an abortion for a woman under age 18 and providing for a court order permitting abortion for good cause if parental consent is refused violates the due process clause of the Fourteenth Amendment.


Justices concurring specially: Stevens, Brennan, Marshall, Blackmun.

Justice dissenting: White.


Texas public nuisance statute authorizing state judges, on the basis of a showing that a theater exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene is an invalid prior restraint violative of the First and Fourteenth Amendments.

Justices concurring: Brennan, Stewart, Marshall, Blackmun, Stevens.

Justices dissenting (on other grounds): Powell, Burger, C.J..

Justices dissenting: White, Rehnquist.


A Nebraska statute that authorizes authorities to summarily transfer a prison inmate from jail to another institution if a physician finds that he suffers from a mental disease or defect and cannot be
given proper treatment in jail violates the liberty guaranteed by the
due process clause of the Fourteenth Amendment unless the transfer
is accompanied by adequate procedural protections.


New York statute authorizing police officers to enter a private
residence without a warrant and without necessarily exigent cir-
stances to effectuate a felony arrest violates the Fourth and Four-
teenth Amendments.

Justices concurring: Stevens, Brennan, Stewart, Marshall, Blackmun, Powell.

Missouri workers' compensation law denying a widower benefits
on his wife's work-related death unless he either is mentally or phys-
ically incapacitated or proves dependence on her earnings, but grant-
ing a widow death benefits regardless of her dependency, is a gender
discrimination violative of the equal protection clause of the Four-
teenth Amendment.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell,
Burger, C.J..
Justice dissenting: Rehnquist.

Florida statute prohibiting out-of-state banks, bank holding com-
panies, and trust companies from owning or controlling a business
within the State that sells investment advisory services violates the
commerce clause.

Illinois statute that prohibits picketing of residences or dwellings,
but exempts peaceful picketing of such buildings that are places of
employment in which there is a labor dispute, violates the equal pro-
tection clause of the Fourteenth Amendment.


Alabama's capital punishment statute, which forbids giving the
jury the option of convicting a defendant of a lesser included offense
but requires it to convict on the capital offense or acquit, violates the
Eighth and Fourteenth Amendments.

A federal court decision holding that a Minnesota statute authorizing grants for pre-pregnancy family planning to hospitals and health maintenance organizations but prohibiting such grants to other nonprofit organizations if they perform abortions violates equal protection clause is summarily affirmed.


Kentucky statute requiring copy of Ten Commandments, purchased with private contributions, to be posted on the wall of each public classroom in the State violates the establishment clause of the First Amendment.

Justices dissenting: Burger, C.J., Blackmun, Stewart, Rehnquist.


Florida’s statutory authorization for county to retain as its own interest accruing on interpleader fund deposited in registry of county court was a taking violating the Fifth and Fourteenth Amendments.


Florida statute repealing an earlier law and reducing the amount of “gain time” for good conduct and obedience to prison rules deducted from a convicted prisoner’s sentence is an invalid ex post facto law as applied to one whose crime was committed prior to the statute’s enactment.


Court of Appeals decision holding invalid a Colorado statute that imposed use tax on government-owned, contractor operated facility as constituting *ad valorem* general property tax on federal government property and thus contravening the supremacy clause is summarily affirmed.


Wisconsin law mandating national convention delegates chosen at party’s state convention to vote at the national convention for the candidate prevailing in the State’s preference primary, in which voters may participate without regard to party affiliation, violates the First Amendment right of association of the national party, whose rules preclude seating of delegates who were not selected in accordance with national party rules, including the limiting of the selection process to those voters affiliated with the party.

Justices concurring: Stewart, Brennan, White, Marshall, Stevens, Burger, C.J.
Justices dissenting: Powell, Blackmun, Rehnquist.

Louisiana statute giving husband unilateral right to dispose of jointly-owned community property without wife’s consent is an impermissible sex classification and violates equal protection clause.


Iowa statute barring 65-foot double-trailer trucks on State’s highways, while all neighboring States permit them, violates the commerce clause.

Justices concurring: Powell, White, Blackmun, Stevens.


Justices dissenting: Rehnquist, Stewart, Burger, C.J.


Louisiana’s “first-use tax” statute, which, because of exceptions and credits, imposes a tax only on natural gas moving out-of-state, impermissibly discriminates against interstate commerce, and another provision that required pipeline companies to allocate the cost of tax to ultimate consumer is preempted by federal law.


Connecticut statute requiring person in paternity action who requests blood grouping tests to bear cost of tests denies due process in violation of Fourteenth Amendment to an indigent against whom State has required institution of paternity action.


Court of Appeals decision holding violative of First Amendment a Maine statute prohibiting roadside billboards, except for signs announcing place and time of religious or civic events, election campaign signs, and signs erected by historic and cultural institutions, is summarily affirmed.


Court of Appeals decision holding violative of the commerce clause a Louisiana milk industry regulatory statute, which required all dairy product processors, including out-of-state processors, who sell dairy products to retailer or distributor for resale in State to pay assessment per unit of milk for use in administration and enforcement of statute, is summarily affirmed.


Court of Appeals decision holding violative of First Amendment a Washington statute which authorized courts to issue temporary and permanent injunctions, without providing prompt trial on merits, against any business that regularly sells or exhibits “lewd matter” is summarily affirmed.
   Court of Appeals decision holding violative of the First Amendment a Florida statute that restricts size of contributions to political committees organized to support or oppose referenda is summarily affirmed.

   Court of Appeals decision holding violative of First Amendment establishment clause Louisiana statute authorizing school boards to permit students to participate in one-minute prayer period at start of school day, upon parental consent, is summarily affirmed.

   Provision of New York law authorizing termination of parental rights upon proof by only a fair preponderance of the evidence violates the due process clause of the Fourteenth Amendment.
   Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens.

   A court of appeals decision invalidating as an impermissible infringement of the immunity of the United States from state taxation a California sales tax based on gross rentals paid by United States to lessors of data processing and other equipment, which permitted the lessor to maximize profit only by separately stating and collecting a tax from the lessee, is summarily affirmed.

   Kentucky statute prohibiting candidate from offering material benefits to voters in consideration for their votes violates First Amendment speech clause as applied to a candidate’s promise to lower salary of his office if elected.

   Texas statute imposing one-year period from date of birth to bring action to establish paternity of illegitimate child, paternity being necessary for child to obtain support from father at any time during his minority, denies equal protection of the laws.

   Provision of Minnesota charitable solicitations law exempting from registration and reporting only those religious organizations that receive more than half of their total contributions from members or affiliated organizations is an impermissible denominational preference and violates First Amendment establishment clause.
   Justices concurring: Brennan, Marshall, Blackmun, Powell, Stevens.
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STATE LAWS HELD UNCONSTITUTIONAL

Justices dissenting: White, Rehnquist (on merits); O’Connor, Burger, C.J. (on standing).


Kentucky statute authorizing service of process in forcible entry and detainer action by posting summons in a conspicuous place if no one could be found on premises denies due process on showing that notices are often removed before defendants find them.


Alaska law providing a dividend distribution to all State’s adult residents from earnings on oil and mineral development in State denies equal protection of the laws by determining amount of dividend for each person by the length of residency in State.


Justice concurring specially: O’Connor.

Justice dissenting: Rehnquist.


Texas statute withholding state funds from local school districts for the education of any children not legally admitted into United States and authorizing boards to deny enrollment to such children denies the equal protection of the laws.

Justices concurring: Brennan, Marshall, Blackmun, Powell, Stevens.


Massachusetts statute requiring, under all circumstances, exclusion of press and public during testimony of minor victim of a sex offense violates the First Amendment.


Justice concurring specially: O’Connor.


Illinois take-over statute which extensively regulates tender offerors and imposes registration and reporting requirements, because it directly regulates and prevents interstate tender offers and because the burdens on interstate commerce are excessive compared with local interests served, violates the commerce clause.


Justices dissenting: Marshall, Brennan, Rehnquist (all on mootness grounds).
New York statute requiring landlords to permit installation of cable television wiring on their property and limiting fee charged to that determined to be reasonable by a commission (which set a one-time $1 fee) constituted a taking of property in violation of the Fifth and Fourteenth Amendments.

Washington statutory provision, enacted by initiative vote of the electorate, barring school boards from busing students for racially integrative purposes denies the equal protection of the laws.  
Justices concurring: Blackmun, Brennan, Marshall, White, Stevens.  

Florida’s felony-murder statute, authorizing the death penalty solely for participation in a robbery in which another robber kills someone, violates the Eighth Amendment.  
Justices concurring: White, Brennan, Marshall, Blackmun, Stevens.  

A Nebraska state statute requiring a permit before anyone withdraws ground water from any well located in the State and transports it across state line and providing for denial of permit unless the State to which the water will be transported grants reciprocal rights to withdraw and transport water into Nebraska violates the commerce clause.  
Justices dissenting: Rehnquist, O'Connor.

Ohio statute requiring candidates to disclose the names and addresses of campaign contributors and the recipients of campaign expenditures is invalid, under the First Amendment, as applied to a minor political party whose members and supporters may be subjected to harassment or reprisals.  
Justice concurring specially: Blackmun.  
Justices concurring in part and dissenting in part: O'Connor, Rehnquist, Stevens.

Massachusetts statute permitting any church to block issuance of a liquor license to any establishment to be located within 500 feet of the church violates the Establishment Clause by delegating governmental decisionmaking to a church.
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Justice dissenting: Rehnquist.

   Federal district court’s decision invalidating New Mexico legislative reapportionment as violating the one person, one vote requirement of the Equal Protection Clause because the “votes cast” formula resulted in substantial population variances among districts, is summarily affirmed.

   Minnesota ink and paper use tax violates the First Amendment by providing “differential treatment” for the press.
   Justices concurring: O’Connor, Brennan, Marshall, Powell, Stevens, Burger, C.J.
   Justices concurring specially: White, Blackmun.
   Justice dissenting: Rehnquist.

   Ohio statute requiring independent candidates for President and Vice-President to file nominating petitions by March 20 in order to qualify for the November ballot is unconstitutional as substantially burdening the associational rights of the candidates and their supporters.
   Justices concurring: Stevens, Brennan, Marshall, Blackmun, Burger, C.J.
   Justice dissenting: Rehnquist, White, Powell, O’Connor.

   California statute requiring that a person detained in a valid Terry stop provide “credible and reliable” identification is unconstitutionally vague in violation of the Fourteenth Amendment Due Process Clause.
   Justices concurring: O’Connor, Brennan, Marshall, Blackmun, Powell, Stevens.
   Justices dissenting: White, Rehnquist.

   Tennessee’s two-year statute of limitations for paternity and child support actions violates the equal protection rights of illegitimates.

   Missouri statute requiring that all abortions performed after the first trimester of pregnancy be performed in a hospital unreasonably infringes upon the right of a woman to have an abortion.
   Justices concurring (on this issue only): Powell, Brennan, Marshall, Blackmun, Stevens, Burger, C.J.

New Jersey congressional districting statute creating districts in which the deviation between largest and smallest districts was 0.7%, or 3,674 persons, violates Art. I, § 2’s “equal representation” requirement as not resulting from a good-faith effort to achieve population equality.

Justices concurring: Brennan, Marshall, Blackmun, Stevens, O’Connor.


Indiana statute providing for constructive notice to mortgagee of tax sale of real property violates the Due Process Clause of the Fourteenth Amendment; instead, personal service or notice by mail is required.


Justices dissenting: O’Connor, Powell, Rehnquist.


Appeals court decision invalidating as an undue burden on interstate commerce the beer price “affirmation” provisions of Connecticut’s liquor control laws, which restrict out-of-state sales to prices set for in-state sales, is summarily affirmed.


New York corporate franchise tax unconstitutionally discriminates against interstate commerce by allowing an offsetting credit for receipts from products shipped from an in-state place of business.


Appeals court decision holding invalid under the Establishment Clause an Alabama statute authorizing the recitation in public schools of a government-composed prayer is summarily affirmed.


Texas requirement that a notary public be a United States citizen furthers no compelling state interest and denies equal protection of the laws to resident aliens.


Justice dissenting: Rehnquist.


West Virginia gross receipts tax on businesses selling tangible property at wholesale unconstitutionally discriminates against interstate commerce due to exemption granted local manufacturers.
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Justices concurring: Powell, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Burger, C.J.
Justice dissenting: Rehnquist.


Maryland prohibition on charitable organizations paying more than 25% of solicited funds for expenses of fundraising violates the Fourteenth Amendment by creating an unnecessary risk of chilling protected First Amendment activity.

Justices dissenting: Rehnquist, Powell, O'Connor, Burger, C.J.


Federal district court decision that Ohio congressional districting plan is invalid because population variances were shown to be not unavoidable and were not justified by legitimate state interest is summarily affirmed.


Hawaii excise tax on wholesale liquor sales, exempting sales of specified local products, violates Commerce Clause by discriminating in favor of local commerce.

Justices concurring: White, Marshall, Blackmun, Powell, Burger, C.J.
Justices dissenting: Stevens, Rehnquist, O'Connor.


Appeals court holding that California tax on sales by out-of-state beef processors discriminates against interstate commerce in violation of the Commerce Clause, there being no corresponding and comparable tax on in-state processors, is summarily affirmed.


Appeals court decision holding invalid under the First Amendment an Indiana statute punishing as contempt the publication of the name of an individual against whom a sealed indictment or information has been filed is summarily affirmed.


Alabama's domestic preference tax, imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies, violates the Equal Protection Clause.

Justices concurring: Powell, White, Blackmun, Stevens, Burger, C.J.


Court of appeals decision holding unconstitutionally overbroad in violation of the First and Fourteenth Amendments an Oklahoma stat-
ute prohibiting advocating, encouraging, or promoting homosexual conduct is affirmed by equally divided vote.


Provision of Alabama Constitution requiring disenfranchisement for crimes involving moral turpitude, adopted in 1901 for the purpose of racial discrimination, violates the Equal Protection Clause.


Vermont use tax discriminating between residents and non-residents in application of a credit for automobile sales taxes paid to another state violates the Equal Protection Clause.


Justices dissenting: Blackmun, Rehnquist, O'Connor.


Alabama statute authorizing a one-minute period of silence in public schools “for meditation or voluntary prayer” violates the Establishment Clause, the record indicating that the sole legislative purpose in amending the statute to add “or voluntary prayer” was to return voluntary prayer to the public schools.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, Powell.

Justice concurring specially: O'Connor.


Appeals court decision holding invalid Nebraska’s driver’s licensing requirement that applicant be photographed, and that photo be affixed to license, as burdening the free exercise of sincerely held religious beliefs against submitting to being photographed, is affirmed by equally divided vote.


Washington “moral nuisance” statute is invalid under the First Amendment to the extent that it proscribes exhibition of films or sale of publications inciting “lust,” defined as referring to normal sexual desires.


New Mexico property tax exemption for Vietnam War veterans who became residents before May 8, 1976, violates the Equal Protection Clause as not meeting the rational basis test.


Justices dissenting: Stevens, Rehnquist, O'Connor.
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Connecticut statute requiring employers to honor the Sabbath day of the employee’s choice violates the Establishment Clause.


Justice dissenting: Rehnquist.


Pennsylvania statute incorporating the common law rule that defamatory statements are presumptively false violates the First Amendment as applied to a libel action brought by a private figure against a media defendant; instead, the plaintiff must bear the burden of establishing falsity.


Justices dissenting: Stevens, White, Rehnquist, Burger, C.J.


New York affirmation law, having the practical effect of controlling liquor prices in other states, violates the Commerce Clause.

Justices concurring: Marshall, Powell, O’Connor, Burger, C.J.

Justice concurring specially: Blackmun.

Justices dissenting: Stevens, White, Rehnquist.


Pennsylvania statute prescribing a variety of requirements for performance of an abortion, including informed consent, reporting of various information concerning the mother’s history and condition, and standard-of-care and second-physician requirements after viability, infringes a woman’s *Roe v. Wade* right to have an abortion.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens.


New York Civil Service Law employment preference for New York residents who are honorably discharged veterans and were New York residents when they entered military service violates the Equal Protection Clause.


Justices concurring specially: White, Burger, C.J.

Justices dissenting: Stevens, O’Connor, Rehnquist.


Connecticut statute imposing a “closed primary” under which persons not registered with a political party may not vote in its primaries violates the First and Fourteenth Amendments by preventing
political parties from entering into political association with individuals of their own choosing.

Justices dissenting: Stevens, Scalia, O'Connor, Rehnquist, C.J.

Appeals court decision invalidating Arizona statute prohibiting grant of public funds to any organization performing abortion-related services is summarily affirmed.

Appeals court decision holding unconstitutionally vague and overbroad Utah statute barring cable television systems from showing “indecent material” is summarily affirmed.

Arkansas sales tax exemption for newspapers and for “religious, professional, trade, and sports journals” published within the state violates the First and Fourteenth Amendments as a content-based regulation of the press.

Justice concurring specially: Stevens.
Justices dissenting: Scalia, Rehnquist, C.J.

Florida's revised sentencing guidelines law, under which the presumptive sentence for certain offenses was raised, contravenes the ex post facto clause of Article I as applied to someone who committed those offenses before the revision.

Maryland statute requiring preparation of a “victim impact statement” describing the effect of a crime on a victim and his family violates the Eighth Amendment to the extent that it requires introduction of the statement at the sentencing phase of a capital murder trial. Booth was overruled in Payne v. Tennessee, 501 U.S. 808 (1991).

Justices concurring: Powell, Brennan, Marshall, Blackmun, Stevens.
Justices dissenting: White, O'Connor, Scalia, Rehnquist, C.J.

Louisiana statute mandating balanced treatment of “creation-science” and “evolution-science” in the public schools is an invalid establishment of religion in violation of the First Amendment.

Justices concurring: Brennan, Marshall, Powell, Stevens, O'Connor.
Justice concurring specially: White.
Justices dissenting: Scalia, Rehnquist, C.J.
Nevada statute under which a prison inmate convicted of murder while serving a life sentence without possibility of parole is automatically sentenced to death is invalid under the Eighth Amendment as preventing the sentencing authority from considering as mitigating factors aspects of a defendant's character or record.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens, O'Connor.
Justices dissenting: White, Scalia, Rehnquist, C.J..

Washington manufacturing tax, applicable to products manufactured in-state and sold out-of-state, but containing an exemption for products manufactured and sold in-state, discriminates against interstate commerce in violation of the Commerce Clause.

Justices concurring: Stevens, Brennan, White, Marshall, Blackmun, O'Connor.
Justices dissenting: Scalia, Rehnquist, C.J..

Pennsylvania statutes imposing lump-sum annual taxes on operation of trucks on state's roads violate the Commerce Clause as discriminating against interstate commerce.

Justices concurring: Stevens, Brennan, White, Marshall, Blackmun.

Federal appeals court ruling holding unconstitutional a provision of the Illinois Parental Notice Abortion Act requiring that minors wait 24 hours after informing parents before having an abortion is affirmed by equally divided vote.

Federal appeals court decision invalidating as discriminatory against the United States a Virginia statute that imposes a personal property tax on property leased from the United States, but not on property leased from the Virginia Port Authority or from local transportation districts, is summarily affirmed.

Ohio statute granting a tax credit for ethanol fuel if the ethanol was produced in Ohio, or if produced in another state which grants a similar credit to Ohio-produced ethanol fuel, discriminates against interstate commerce in violation of the Commerce Clause.

Oklahoma statutory aggravating circumstances, permitting imposition of capital punishment upon a jury's finding that a murder was "especially heinous, atrocious, or cruel," are unconstitutionally vague in violation of the Eighth Amendment.


Colorado law punishing as felony the payment of persons who circulate petitions for ballot initiative abridges the right to engage in political speech, hence violates First and Fourteenth Amendments.


Pennsylvania 6-year statute of limitations for paternity actions violates the Equal Protection Clause as insufficiently justified under heightened scrutiny review.


Kentucky Supreme Court's rule containing categorical prohibition of attorney direct mail advertising targeted at persons known to face particular legal problems violates First and Fourteenth Amendments.


Justices dissenting: O'Connor, Scalia, Rehnquist, C.J.


Ohio statute tolling its 4-year limitations period for breach of contract and fraud actions brought against out-of-state corporations that do not appoint an agent for service of process within the state--and thereby subject themselves to the general jurisdiction of Ohio courts--violates the Commerce Clause.

Justices concurring:: Kennedy, Brennan, White, Marshall, Blackmun, Stevens, O'Connor.

Justice concurring specially: Scalia.

Justice dissenting: Rehnquist, C.J.


Virginia Supreme Court rule imposing residency requirement for admission to the bar on motion, without taking the bar exam, by persons licensed to practice law in other jurisdictions, violates the Privileges and Immunities Clause of Article IV, § 2.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, Stevens, O'Connor.

Justice dissenting: Rehnquist, C.J., Scalia.


Three different aspects of North Carolina's Charitable Solicitations Act unconstitutionally infringe freedom of speech. These aspects
are: limitations on reasonable fees that professional fundraisers may charge; a requirement that professional fundraisers disclose to potential donors the percentage of donated funds previously used for charity; and a requirement that professional fundraisers be licensed.

Justice concurring in part and dissenting in part: Stevens.
Justices dissenting: Rehnquist, C.J., O'Connor.

Oklahoma statutory scheme, setting no minimum age for capital punishment, and separately providing that juveniles may be tried as adults, violates Eighth Amendment by permitting capital punishment to be imposed for crimes committed before age 16.

Justices concurring: Stevens, Brennan, Marshall, Blackmun.
Justice concurring specially: O'Connor.
Justices dissenting: Scalia, White, Rehnquist, C.J.

Iowa procedure, authorized by statute, placing a one-way screen between defendant and complaining child witnesses in sex abuse cases, thereby sparing witnesses from viewing defendant, violates the Confrontation Clause right to face-to-face confrontation with one's accusers.

Justices concurring: Scalia, Brennan, White, Marshall, Stevens, O'Connor.
Justice dissenting: Blackmun, Rehnquist, C.J.

West Virginia county’s tax assessments denied equal protection to property owners whose assessments, based on recent purchase price, ranged from 8 to 35 times higher than comparable neighboring property for which the assessor failed over a 10-year period to readjust appraisals.

A Texas sales tax exemption for publications published or distributed by a religious faith and consisting of teachings of that faith or writings sacred to that faith violates the Establishment Clause of the First Amendment.

Justices concurring: Brennan, Marshall, Stevens.
Justices concurring specially: White, Blackmun, O'Connor.
Justice dissenting: Scalia, Kennedy, Rehnquist, C.J.

Provisions of California Elections Code forbidding the official governing bodies of political parties from endorsing or opposing can-
didates in primary elections, and imposing other requirements on the organization and composition of the governing bodies, are invalid under the First Amendment. The ban on endorsements violates free speech and associational rights; the organizational restrictions violate associational rights.


Virgin Islands' rule requiring one year's residency prior to admission to the bar violates the Privileges and Immunities Clause of Art. IV, § 2. Justifications for the rule do not constitute "substantial" reasons for discriminating against nonresidents, nor does the discrimination bear a "substantial relation" to legitimate objectives.

Justices concurring: Kennedy, Brennan, Marshall, Blackmun, Stevens, Scalia.
Justices dissenting: Rehnquist, C.J., White, O'Connor.


Michigan's income tax law, by providing exemption for retirement benefits of state employees but not for retirement benefits of Federal employees, discriminates against federal employees in violation of 4 U.S.C. § 111 and in violation of the constitutional doctrine of intergovernmental tax immunity.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, O'Connor, Scalia, Rehnquist, C.J.
Justice dissenting: Stevens.


A provision of the Missouri Constitution, interpreted by the Missouri Supreme Court as requiring property ownership as a qualification for appointment to a "board of freeholders" charged with making recommendations for reorganization of St. Louis city and county governments, violates the Equal Protection Clause.


Connecticut's beer price affirmation law, requiring out-of-state shippers to affirm that prices charged in-state wholesalers are no higher than prices charged contemporaneously in three bordering states, violates the Commerce Clause.

Justice concurring specially: Scalia.
Justices dissenting: Rehnquist, C.J., Stevens, O'Connor.


Texas' flag desecration statute, prohibiting any physical mistreatment of the American flag that the actor knows would seriously offend other persons, is inconsistent with the First Amendment as applied to an individual who burned an American flag as part of a political protest.
Justices concurring: Brennan, Marshall, Blackmun, Scalia, Kennedy.

A Florida statute making it unlawful to print the name of a sexual assault victim is invalid under the First Amendment as applied to uphold an award of damages against a newspaper for publishing a sexual assault victim's name when the information was truthful, was lawfully obtained, and was otherwise publicly available as a result of a botched press release from the sheriff's department.

Justice concurring specially: Scalia.
Justices dissenting: White, O'Connor, Rehnquist, C.J.

North Carolina's capital sentencing statute, interpreted to prevent a jury from considering any mitigating factor that the jury does not unanimously find, violates the Eighth Amendment. Instead, each juror must be allowed to consider and give effect to what he or she believes to be established mitigating evidence.

Justices concurring: Marshall, Brennan, White, Blackmun, Stevens.
Justice concurring specially: Kennedy.
Justices dissenting: Scalia, O'Connor, Rehnquist, C.J.

A Florida statute prohibiting the disclosure of grand jury testimony violates the First Amendment insofar as it prohibits a grand jury witness from disclosing, after the term of the grand jury has ended, information covered by his own testimony.

An Illinois rule of professional responsibility violates the First Amendment by completely prohibiting an attorney from holding himself out as a civil trial specialist certified by the National Board of Trial Advocacy.

Justices concurring: Stevens, Brennan, Blackmun, Kennedy.
Justices dissenting: White, O'Connor, Scalia, Rehnquist, C.J.

Minnesota's requirement that a woman under 18 years of age notify both her parents before having an abortion is invalid as a denial of due process because "it does not reasonably further any legitimate state interest." However, an alternative judicial bypass system saves the statute as a whole.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, O'Connor.
Justices dissenting: Kennedy, White, Scalia, Rehnquist, C.J.

A Connecticut statute authorizing a private party to obtain pre-judgment attachment of real estate without prior notice to the owner, and without a showing of extraordinary circumstances, violates the Due Process Clause of the Fourteenth Amendment as applied in conjunction with a civil action for assault and battery.


New York State’s “Son of Sam” law, under which a criminal’s income from works describing his crime is placed in escrow and made available to victims of the crime, violates the First Amendment. The law establishes a financial disincentive to create or publish works with a particular content, and is not narrowly tailored to serve the state’s compelling interests in ensuring that criminals do not profit from their crimes, and that crime victims are compensated.

Justices concurring: O’Connor, White, Stevens, Scalia, Souter, Rehnquist, C.J.

Justices concurring specially: Blackmun, Kennedy.


Two provisions of Illinois’ election law unconstitutionally infringe on the right of ballot access guaranteed under the First and Fourteenth Amendments. The first provision, as interpreted by the Illinois Supreme Court, prevented a “new political party” in Cook County from using the name of a party already “established” in the city of Chicago. The second required that new political parties qualify for the ballot by submitting petitions signed by 25,000 voters from each voting district to be represented in a multi-district political subdivision.

Justices concurring: Souter, White, Blackmun, Stevens, O’Connor, Kennedy, Rehnquist, C.J.

Justice dissenting: Scalia.


An Oklahoma statute requiring that all coal-fired Oklahoma utilities burn a mixture containing at least 10% Oklahoma-mined coal discriminates against interstate commerce in violation of the implied “negative” component of the Commerce Clause.

Justices concurring: White, Blackmun, Stevens, O’Connor, Kennedy, Souter.


A Louisiana statute allowing an insanity acquittee no longer suffering from mental illness to be confined indefinitely in a mental institution until he is able to demonstrate that he is not dangerous to himself or to others violates due process.
Justices concurring: White, Blackmun, Stevens, O'Connor, Souter.
Justices dissenting: Kennedy, Thomas, Scalia, Rehnquist, C.J..

Application of the State's use tax to mail order sales by an out-
of-state company with neither outlets nor sales representatives in the
State places an undue burden on interstate commerce in violation of
the “negative” or “dormant” Commerce Clause. A physical presence
within the taxing state is necessary in order to meet the “substantial
nexus” requirement of the Commerce Clause.

Alabama’s fee for in-state disposal of hazardous wastes generated
out-of-state is invalid as a direct discrimination against interstate
commerce. Alabama failed to establish that the discrimination against
interstate commerce is justified by any factor other than economic
protectionism, and failed to show that its valid interests (e.g., protec-
tion of health, safety, and the environment) can not be served by less
discriminatory alternatives. The fee is not supportable by analogy to
quarantine laws, since the state permits importation of hazardous
wastes if the fee is paid.

Waste import restrictions of Michigan’s Solid Waste Management
Act violate the Commerce Clause. The restrictions, which prohibit
landfills from accepting out-of-county waste unless explicitly author-
ized by the county’s solid waste management plan, directly discrimi-
nate against interstate commerce and are not justified as serving any
valid health and safety purposes that can not be served adequately
by nondiscriminatory alternatives.

An Iowa statute imposing a business tax on corporations facially
discriminates against foreign commerce in violation of the Commerce
Clause by allowing corporations to take a deduction for dividends re-
ceived from domestic, but not foreign, subsidiaries.

897. Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833
One aspect of the Pennsylvania Abortion Control Act of 1982--a
requirement for spousal notification--is invalid as an undue inter-
ference with a woman’s right to an abortion.

A rule of the Florida Board of Accountancy banning “direct, in-
person, uninvited solicitation” of business by certified public account-
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ants is inconsistent with the free speech guarantees of the First Amendment.

Justices concurring: Kennedy, White, Blackmun, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J.
Justice dissenting: O'Connor.


Oregon’s imposition of a surcharge on in-state disposal of solid waste generated in other states—a tax three times greater than the fee charged for disposal of waste that was generated in Oregon—constitutes an invalid burden on interstate commerce. The tax is facially discriminatory against interstate commerce, is not a valid compensatory tax, and is not justified by any other legitimate state interest.

Justices concurring: Thomas, Stevens, O’Connor, Scalia, Kennedy, Souter, Ginsburg.
Justice dissenting: Rehnquist, C.J., Blackmun.


Missouri’s uniform, statewide use tax constitutes an invalid discrimination against interstate commerce in those counties in which the use tax is greater than the sales tax imposed as a local option, even though the overall statewide effect of the use tax places a lighter aggregate tax burden on interstate commerce than on intrastate commerce.


Montana’s tax on the possession of illegal drugs, to be “collected only after any state or federal fines or forfeitures have been satisfied,” constitutes punishment, and violates the prohibition, derived from the Double Jeopardy Clause, against successive punishments for the same offense.

Justices concurring: Stevens, Blackmun, Kennedy, Souter, Ginsburg.


A Massachusetts milk pricing order, imposing an assessment on all milk sold by dealers to Massachusetts retailers, is an unconstitutional discrimination against interstate commerce because the entire assessment is then distributed to Massachusetts dairy farmers in spite of the fact that about two-thirds of the assessed milk is produced out of state. The discrimination imposed by the pricing order is not justified by a valid factor unrelated to economic protectionism.

Justices concurring: Stevens, O’Connor, Kennedy, Souter, Ginsburg.
Justices concurring specially: Scalia, Thomas.
Justice dissenting: Rehnquist, C.J., Blackmun.

A provision of the Oregon Constitution, prohibiting judicial review of the amount of punitive damages awarded by a jury unless the court can affirmatively say there is no evidence to support the verdict, is invalid under the Due Process Clause of the Fourteenth Amendment. Judicial review of the amount awarded was one of the few procedural safeguards available at common law, yet Oregon has removed that safeguard without providing any substitute procedure, and with no indication that the danger of arbitrary awards has subsided.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter, Thomas.

Justices dissenting: Ginsburg, Rehnquist, C.J.


A New York State law creating a special school district for an incorporated village composed exclusively of members of one small religious sect violates the Establishment Clause.

Justices concurring: Souter, Blackmun, Stevens, O'Connor, Ginsburg.

Justice concurring specially: Kennedy.

Justices dissenting: Scalia, Thomas, Rehnquist, C.J.


Ohio's prohibition on the distribution of anonymous campaign literature abridges the freedom of speech. The law, aimed at speech designed to influence voters in an election, is a limitation on political expression subject to exacting scrutiny. Neither of the interests asserted by Ohio justifies the limitation.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer.

Justice concurring specially: Thomas.

Justices dissenting: Scalia, Thomas, Rehnquist, C.J.


An amendment to the Arkansas Constitution denying ballot access to congressional candidates who have already served three terms in the House of Representatives or two terms in the Senate is invalid as conflicting with the qualifications for office set forth in Article I of the U.S. Constitution, (specifying age, duration of U.S. citizenship, and state inhabitancy requirements). Article I sets the exclusive qualifications for a United States Representative or Senator.

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer.

Justices dissenting: Thomas, O'Connor, Scalia, Rehnquist, C.J.


Application of Massachusetts' public accommodations law to require the private organizers of a St. Patrick's Day parade to allow participation in the parade by a gay and lesbian group wishing to pro-
claim its members’ gay and lesbian identity violates the First Amendment because it compels parade organizers to include in the parade a message they wish to exclude.


Georgia’s congressional districting plan violates the Equal Protection Clause. The district court’s finding that race was the predominant factor in drawing the boundaries of the Eleventh District was not clearly erroneous. The State did not meet its burden under strict scrutiny review to demonstrate that its districting was narrowly tailored to achieve a compelling interest.

Justices concurring: Kennedy, O’Connor, Scalia, Thomas, Rehnquist, C.J..

Justices dissenting: Stevens, Ginsburg, Breyer, Souter.


North Carolina’s intangibles tax on a fraction of the value of corporate stock owned by North Carolina residents inversely proportional to the corporation’s exposure to the State’s income tax, violates the “dormant” Commerce Clause. The tax facially discriminates against interstate commerce, and is not a “compensatory tax” designed to make interstate commerce bear a burden already borne by intrastate commerce.


Rhode Island’s statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages abridges freedom of speech protected by the First Amendment, and is not shielded from constitutional scrutiny by the Twenty-first Amendment. There is not a “reasonable fit” between the blanket prohibition and the State’s goal of reducing alcohol consumption.

Justices concurring: Stevens, Scalia (in part), Kennedy (in part), Souter (in part), Thomas (in part), Ginsburg (in part).

Justices concurring specially: Scalia, Thomas, O’Connor, Souter, Breyer, Rehnquist, C.J.


Amendment 2 to the Colorado Constitution, which prohibits all legislative, executive, or judicial action at any level of state or local government if that action is designed to protect homosexuals, violates the Equal Protection Clause of the Fourteenth Amendment. The amendment, adopted by statewide referendum in 1992, does not bear a rational relationship to a legitimate governmental purpose.

Justices concurring: Kennedy, Stevens, O’Connor, Souter, Ginsburg, Breyer.

Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

North Carolina’s congressional districting law, containing the racially gerrymandered 12th Congressional District as well as another majority-black district, violates the Equal Protection Clause because, under strict scrutiny applicable to racial classifications, creation of District 12 was not narrowly tailored to serve a compelling state interest. Creation of District 12 was not necessary to comply with either section 2 or section 5 of the Voting Rights Act, and the lower court found that the redistricting plan was not actually aimed at ameliorating past discrimination.

Justices concurring: Rehnquist, C.J., O’Connor, Scalia, Kennedy, Thomas.
Justices dissenting: Stevens, Ginsburg, Souter, Breyer.


Three congressional districts created by Texas law constitute racial gerrymanders that are unconstitutional under the Equal Protection Clause. The district court correctly held that race predominated over legitimate districting considerations, including incumbency, and consequently strict scrutiny applies. None of the three districts is narrowly tailored to serve a compelling state interest.

Justices concurring: O’Connor, Kennedy, Rehnquist, C.J..
Justices concurring specially: O’Connor, Kennedy, Thomas, Scalia.
Justices dissenting: Stevens, Ginsburg, Breyer, Souter.


Virginia’s exclusion of women from the educational opportunities provided by Virginia Military Institute denies to women the equal protection of the laws. A state must demonstrate “exceedingly persuasive justification” for gender discrimination, and Virginia has failed to do so in this case.

Justices concurring: Ginsburg, Stevens, O’Connor, Kennedy, Souter, Breyer.
Justice concurring specially: Rehnquist, C.J..
Justice dissenting: Scalia.


Mississippi statutes that condition appeals from trial court decrees terminating parental rights on the affected parent’s ability to pay for preparation of a trial transcript violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Justices concurring: Ginsburg, Stevens, O’Connor, Souter, Breyer.
Justice concurring specially: Kennedy.
Justice dissenting: Rehnquist, C.J., Thomas, Scalia.


A Florida statute canceling early release credits awarded to prisoners as a result of prison overcrowding violates the Ex Post Facto
Clause, Art. I, § 10, cl. 1, as applied to a prisoner who had already been awarded the credits and released from custody.

Justice concurring specially: Thomas, Scalia.

A Georgia statute requiring that candidates for state office certify that they have passed a drug test effects a “search” that is plainly not tied to individualized suspicion, and does not fit within the “close-ly guarded category of constitutionally permissible suspicionless searches,” and hence violates the Fourth Amendment. Georgia has failed to establish existence of a “special need, beyond the normal need for law enforcement,” that can justify such a search.

Justices concurring: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer.
Justice dissenting: Rehnquist, C.J..

Maine’s property tax law, which contains an exemption for charitable institutions but limits that exemption to institutions serving principally Maine residents, is a form of protectionism that violates the “dormant” Commerce Clause as applied to deny exemption status to a nonprofit corporation that operates a summer camp for children, most of whom are not Maine residents.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Breyer.

A New York law that effectively denies only nonresident taxpayers an income tax deduction for alimony paid violates the Privi-leges and Immunities Clause of Art. IV, § 2. New York did not ade-quately justify its failure to treat resident and nonresident taxpayers with substantial equality.

Justices concurring: O'Connor, Stevens, Scalia, Souter, Thomas, Breyer.

An Iowa statute authorizing law enforcement officers to conduct a full-blown search of an automobile when issuing a traffic citation violates the Fourth Amendment. The rationales that justify a search incident to arrest do not justify a similar search incident to a traffic citation.

Three conditions that Colorado placed on the petition process for ballot initiatives -- that petition circulators be registered voters, that
they wear identification badges, and that initiative sponsors report the names and addresses of circulators and the amounts paid to each -- impermissibly restrict political speech in violation of the First and Fourteenth Amendments.

Justices concurring: Ginsburg, Stevens, Scalia, Kennedy, Souter.
Justice concurring specially: Thomas.

Alabama's franchise tax law discriminates against foreign corporations in violation of the Commerce Clause. The law establishes a domestic corporation's tax base as the par value of its capital stock, a value that the corporation may set at whatever level it chooses. The tax base of a foreign corporation, on the other hand, contains balance sheet items that the corporation cannot so manipulate.

A provision of California's Welfare and Institutions Code limiting new residents, for the first year they live in California, to the level of welfare benefits that they would have received in the state of their prior residence abridges the right to travel in violation of the Fourteenth Amendment.

Justices concurring: Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer.

A provision of the Hawaii Constitution restricting the right to vote for trustees of the Office of Hawaiian Affairs to persons who are descendants of people inhabiting the Hawaiian Islands in 1778 is a race-based voting qualification that violates the Fifteenth Amendment. Ancestry can be -- and in this case is -- a proxy for race.

Justices concurring: Kennedy, Rehnquist, C.J., O'Connor, Scalia, Thomas.
Justices concurring specially: Breyer, Souter.
Justices dissenting: Stevens, Ginsburg.

A Texas law that eliminated a requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses violates the Ex Post Facto Clause of Art. I, § 10 as applied to a crime committed while the earlier law was in effect. So applied, the law falls into the category of an ex post facto law that requires less evidence in order to convict. Under the old law, the petitioner could have been convicted only if the victim's testimony had been corroborated by two witnesses, while under the amended law the petitioner was convicted on the victim's testimony alone.
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Justices concurring: Stevens, Scalia, Souter, Thomas, Breyer.


A Washington State law allowing “any person” to petition a court “at any time” to obtain visitation rights whenever visitation “may serve the best interests” of a child is unconstitutional as applied to an order requiring a parent to allow her child’s grandparents more extensive visitation than the parent wished. Because no deference was accorded to the parent’s wishes, the parent’s due process liberty interest in making decisions concerning her child’s care, custody, and control was violated.

Justices concurring specially: Souter, Thomas.
Justices dissenting: Stevens, Scalia, Kennedy.


A New Jersey “hate crime” statute that allows a judge to extend a sentence upon finding by a preponderance of the evidence that the defendant, in committing a crime for which he has been found guilty, acted with a purpose to intimidate because of race, violates the Fourteenth Amendment’s Due Process Clause and the Sixth Amendment’s requirements of speedy and public trial by an impartial jury. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and established beyond a reasonable doubt.

Justices concurring: Stevens, Scalia, Souter, Thomas, Ginsburg.


California’s “blanket primary” law violates the First Amendment associational rights of political parties. The law lists all candidates on one ballot and allows primary voters to choose freely among candidates without regard to party affiliation. The law “adulterates” a party’s candidate-selection process by forcing the party to open up that process to persons wholly unaffiliated with the party, and is not narrowly tailored to serve a compelling state interest.

Justices concurring: Scalia, Rehnquist, C.J., O'Connor, Kennedy, Souter, Thomas, Breyer.
Justices dissenting: Stevens, Ginsburg.


Application of New Jersey’s public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as a member and assistant scout master violates the organization’s First Amendment associational rights. The general mission of the Scouts,
to instill values in young people, is expressive activity entitled to First Amendment protection, and requiring the Scouts to admit a gay scout leader would contravene the Scouts’ asserted policy disfavoring homosexual conduct.

Justices dissenting: Stevens, Souter, Ginsburg, Breyer.


Nebraska’s statute criminalizing the performance of “partial birth abortions” is unconstitutional under principles set forth in *Roe v. Wade* and *Planned Parenthood v. Casey*. The statute lacks an exception for instances in which the banned procedure is necessary to preserve the health of the mother, and, because it applies to the commonplace dilation and evacuation procedure as well as to the dilation and extraction method, imposes an “undue burden” on a woman’s right to an abortion.

Justices concurring: Breyer, Stevens, O'Connor, Souter, Ginsburg.
Justices dissenting: Rehnquist, C.J., Scalia, Kennedy, Thomas.


Provisions of the Missouri Constitution requiring identification on primary and general election ballots of congressional candidates who failed to support term limits in the prescribed manner are unconstitutional. States do not have power reserved by the Tenth Amendment to give binding instructions to their congressional representatives, and the “Elections Clause” of Article I, section 4, does not authorize the regulation. The Missouri ballot requirements do not relate to “times” or “places,” and are not valid regulations of the “manner” of holding elections.

Justices concurring: Stevens, Scalia, Kennedy, Ginsburg, Breyer.
Justices concurring specially: Rehnquist, C.J., Kennedy, Thomas, O'Connor, Souter.


A Pennsylvania prohibition on disclosure of the contents of an illegally intercepted electronic communication violates the First Amendment as applied in this case. The defendants, a talk show host and a community activist, played no part in the illegal interception, and obtained the tapes lawfully. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was “a matter of public concern.”

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer.


Massachusetts’ restrictions on outdoor advertising and point-of-sale advertising of smokeless tobacco and cigars violate the
First Amendment. The regulations prohibit outdoor advertising within 1,000 feet of a school, park, or playground, and prohibit “point-of-sale” advertising placed lower than five feet above the floor of retail establishments. These restrictions do not satisfy the fourth step of the Central Hudson test for regulation of commercial speech. That step requires a “reasonable fit” between the means and ends of a regulation, yet the regulations are not “narrowly tailored” to achieve such a fit.

Justices concurring: O’Connor, Scalia, Kennedy, Souter, (point-of-sale restrictions only) Thomas.

Justices dissenting: Stevens, Ginsburg, Breyer, Souter. (outdoor advertising only)


Arizona’s capital sentencing law violates the Sixth Amendment right to jury trial by allowing a sentencing judge to find an aggravating circumstance necessary for imposition of the death penalty. The governing principle was established in Apprendi v. New Jersey, 530 U.S. 466 (2000), holding that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The required finding of an aggravating circumstance exposed the defendant to a greater punishment than that authorized by the jury’s guilty verdict.

Justices concurring: Ginsburg, Stevens, Scalia, Kennedy, Souter, Thomas.

Justice concurring specially: Breyer.

Justices dissenting: O’Connor, Rehnquist, C.J..


Virginia’s capital punishment law is invalid to the extent that it authorizes execution of the mentally retarded. Execution of a mentally retarded individual constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Circumstances have changed since the Court upheld the practice in Penry v. Lynaugh, 492 U.S. 302 (1989); since that time 16 states have prohibited the practice, none have approved it, and thus “a national consensus” has developed against execution of the mentally retarded. The Court’s “independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures” that have created this national consensus.

Justices concurring: Stevens, O’Connor, Kennedy, Souter, Ginsburg, Breyer.

II. ORDINANCES HELD UNCONSTITUTIONAL

   City ordinance which levied a tax on stock issued by the United States impaired the federal borrowing power and was void (Art. VI).
   Justices dissenting: Johnson, Thompson.

   New Orleans ordinance of 1852, imposing a charge for use of piers measured by tonnage of vessel, levied an invalid tonnage duty.

   Charleston, South Carolina, tax ordinance which withheld from interest payments on municipal bonds a tax levied after issuance of such bonds at a fixed rate of interest impaired the obligation of contract (Art. I, § 10).
   Justices dissenting: Miller, Hunt.

   Ordinance of New Orleans, so far as it imposed license tax upon persons owning and running towboats to and from the Gulf of Mexico, was an invalid regulation of commerce.

   Municipal ordinance granting to a public utility an exclusive right to supply the city with gas, and state constitutional provision abolishing outstanding monopolistic grants, impaired the obligation of contract when enforced against a previously chartered utility which, through consolidation, had inherited the monopolistic, exclusive privileges of two utility corporations chartered prior to the constitutional proviso and ordinance.

   When a utility is chartered with an exclusive privilege of supplying a city with water, a subsequently enacted ordinance authorizing an individual to supply water to a hotel impaired the obligation of contract.

   San Francisco ordinance regulating certain phases of the laundry business, as arbitrarily enforced against Chinese, held to violate the equal protection of the laws.
   A Mobile, Alabama, ordinance which levied an occupational license tax on a telegraph company doing an interstate business was void.

   San Francisco ordinance which imposed a license tax on a soliciting agent for a foreign corporation was void as levying a tax on interstate commerce.
   Justices concurring: Lamar, Miller, Field, Bradley, Harlan, Blatchford.
   Justices dissenting: Fuller, C.J., Gray, Brewer.

    An ordinance of a Pennsylvania city requiring a license tax of a soliciting agent for a manufacturer in another State was held invalid as imposing a tax upon interstate commerce.

    A Washington city ordinance which authorized construction of a municipal water works impaired the obligation of a contract previously negotiated with a private utility providing the same service.

    Ordinance expanding city limits beyond those to be served by a utility leasing a municipality's water works and effecting diminution of the rates stipulated in the original agreement without any equivalent compensation impaired the obligation of contract between the utility and the city.

    City ordinances, which adjusted the rate of fare stipulated in agreements made with a street railway company, held to impair the obligation of contract.

    Greensboro ordinance imposing a license on photographic business, as applied to an agent of an out-of-state corporation, was held an invalid regulation of commerce.

    Ordinance of Taylor, Pennsylvania authorizing an inspection fee on telegraph companies doing an interstate business held to be an unreasonable and invalid regulation of commerce.
   Justices concurring: Peckham, Fuller, C.J., Brown, White, McKenna, Holmes, Day.
   Justices dissenting: Harlan, Brewer.
   Ordinance reducing the rate of fares to be charged by railway companies lower than cited in previous ordinances held to impair the obligation of contract.

   No change in the neighborhood having occurred between passage of two zoning ordinances, the second, which excluded a gas company from erecting a plant within the area authorized by the first ordinance, was held to effect an arbitrary deprivation of property without due process of law.

   Ordinance according to a consolidated municipal railway an extension of the duration date of franchises issued to its predecessors, in consideration of which substantial sums were expended on improvements, gave rise to a new contract, which was impaired by later attempt on the part of the city to reduce the rate stipulated in the franchises thus extended.

   A Sunbury, Pennsylvania ordinance imposing a license fee for the solicitation of orders for the sale of merchandise not of the parties own manufacture imposed an invalid burden on interstate commerce when applied to a Pennsylvania agent of an Ohio company who solicited orders for the latter's products and upon receipt of the latter, consigned to a designated purchaser, consummated the sale by delivering the merchandise to such purchaser and, upon the latter's approval of the parcel delivered, collected the purchase price for transmission to the Ohio employer.

   Municipal contract with utility fixing the maximum rate to be charged for supplying water to inhabitants was invalidly impaired by subsequent ordinances altering said rates.

   The due process requirements of notice and hearing in connection with the assessment of taxes were violated by a municipal assessment ordinance which afforded the taxpayer the privilege of filing objections but no opportunity to support his objections by argument and proof in open hearing.

   Justices concurring: Moody, Harlan, Brewer, White, Peckham, McKenna, Day.
   Justices dissenting: Fuller, C.J., Holmes.

Minneapolis ordinance of 1907, directing the sale of six train tickets for 25¢, was void as impairing the contract which arose from passage of the ordinance of 1875 granting to a railway a franchise expiring in 1923 and establishing a fare of not less than 5¢.


Municipal ordinance requiring authorities to establish building lines on separate blocks back of the public streets and across private property upon the request of less than all the owners of the property affected invalidly authorized the taking of property, not for public welfare but, for the convenience of other property owners; and therefore was violative of due process.


A $100 license fee imposed by ordinance of an Alabama city on a foreign telegraph company, part of whose business income was derived from the transmission of messages for the Federal Government was void as a tax on a federal instrumentality (Art. VI).


South Bend, Indiana, ordinance of 1901 repealing a portion of an ordinance of 1866 authorizing a railroad to lay double tracks on one of its streets impaired the obligation of contract contrary to Art. I, § 10.

Justices concurring: Lamar, Holmes, White, C.J., Lurton, Van Devanter, McKenna, Day (separately).

Justices dissenting: Hughes, Pitney.


An ordinance of a Kentucky municipality which required a telephone company to remove from the streets poles and wires installed under a prior ordinance granting permission to do so, without restriction as to the duration of such privilege, or, in the alternative, pay a rental not prescribed in the original ordinance impaired an obligation of contract contrary to Art. I, § 10.


Justices dissenting: Day, McKenna, Hughes, Pitney.


An ordinance of an Idaho municipality adopted in 1906 which subjected a water company to monthly rental fees for the use of its streets invalidly impaired the obligation of contract arising under an ordinance of 1889 which granted a predecessor company the privilege of laying water pipes under the city streets without payment of any charge for the exercise of such right.

An ordinance of a Nebraska municipality adopted in 1908 requiring, without any showing of the necessity therefor, a utility to remove its poles and wires from the city streets invalidly impaired an obligation of contract arising from an ordinance of 1884 granting in perpetuity the privilege of erecting and maintaining poles and wires for the transmission of power.


New York city ordinances requiring an express company to obtain a local license, exacting license fees for express wagons and drivers, and requiring drivers to be citizens, to the extent that they extended to interstate commerce, imposed invalid burdens on such commerce.


Michigan city municipal ordinance which compelled operator of a ferry between Canadian and Michigan points to take out a license imposed an invalid burden on the privilege of engaging in foreign commerce.


Kentucky municipal ordinance, insofar as it sought to regulate the number of street cars to be run, and the number of passengers allowed in each car, between interstate points imposed an unreasonable burden on interstate commerce. Also, the requirement that temperature in the cars never be permitted to be below 50° was unreasonable and violative of due process.


St. Louis ordinance which levied one-fourth of the cost of paving on property fronting on the street and the remaining three-fourths upon all property in the taxing district according to area and without equality as to depth denied equal protection of the laws.


A Louisville, Kentucky, ordinance which forbade "colored" persons to occupy houses in blocks where the majority of the houses were occupied by whites was deemed to prevent sales of lots in such blocks to African Americans and to deprive the latter of property without due process of law.


Resolution of Stark County commissioners in 1912 purporting to revoke an electric railway franchise previously granted in perpetuity by appropriate county authorities in 1892 amounted to state action impairing the obligation of contract.

Justices dissenting: Clarke, Brandeis.


Rates fixed by a Denver ordinance pertaining to the charges to be collected for services by a water company deprived the latter of its property without due process of law by reason of yielding a return of 4.3% compared with prevailing rates in the city of 6% and higher obtained on secured and unsecured loans.

Justices dissenting: Holmes, Brandeis, Clarke.


Kentucky city ordinance of 1913 purporting to grant a 25-year franchise for a street railway over certain streets to the best bidder impaired the obligation of contract of an older street railway accorded a perpetual franchise over the same street.

Justices dissenting: Clarke, Brandeis.


Detroit ordinance which compelled street railway company to carry passengers on continuous trips over franchise lines to and over nonfranchise lines, and vice versa, for a fare no greater than its franchises entitled it to charge upon the former alone impaired the obligation of the franchise contracts; and insofar as its enforcement would result in a deficit, also deprived the company of its property without due process.

Justices dissenting: Clarke, Holmes, Brandeis.


Los Angeles ordinance authorizing city to establish lighting system of its own could not effect removal of fixtures of a lighting company occupying streets pursuant to rights granted by a prior franchise without paying compensation required by due process clause.

Houston ordinance was void inasmuch as the rates fixed thereunder were confiscatory and deprived the utility of its property without due process of law.


Fares prescribed by ordinance of Kentucky city were confiscatory and deprived the utility of property without due process of law.


New Orleans license tax ordinance could not be validly enforced as to the business of a corporation employed as agent by owners of vessels engaged exclusively in interstate and foreign commerce, where its business was a necessary adjunct of said commerce and consisted of the soliciting and engaging of cargo, the nomination of vessels to carry it, arranging for delivery on wharf and for stevedores, payment of ships' disbursements, issuing bills of lading, and collecting freight charges.


Portland, Oregon, ordinance which exacted a license fee and a bond for insuring delivery from solicitors who go from place to place taking orders for goods for future delivery and receiving deposits in advance was invalid as unduly burdening interstate commerce when enforced against solicitors taking orders for an out-of-state corporation which confirmed the orders, shipped the merchandise directly to the customers, and permitted the solicitors to retain the deposited portion of the purchase as compensation.


Ordinance of Louisiana municipality which exacted license as a condition precedent for operation of a ferry across boundary waters separating two States imposed an invalid burden on interstate commerce.


New Jersey municipal ordinance which compelled use of railroad station grounds for a public hackstand without compensation deprived the railroad of property without due process.


Justices dissenting: Pitney, Clarke.

Justices concurring: Sutherland, Taft, C.J., Sanford, McReynolds, Butler, McKenna, Van Devanter.

Justices dissenting: Brandeis, Holmes.

Justices concurring: Brandeis, Holmes (separately).
47. Sprout v. City of South Bend, 277 U.S. 163 (1928).

Indiana municipal ordinance which exacted from motor bus operators a license fee adjusted to the seating capacity of a bus could not be validly enforced against an interstate carrier, for the fee was not exacted to defray expenses of regulating traffic in the interest of safety, or to defray the cost of road maintenance or as an occupation tax imposed solely on account of intrastate business.


Massachusetts municipal zoning ordinance which placed owner's land in a residential district with resulting inhibition of use for commercial purposes deprived the owner of property without due process because the requirement did not promote health, safety, morals, or general welfare.


Municipal (Washington) zoning ordinance which conditioned issuance of a permit to enlarge a home for the aged in a residential area upon the approval of the owners of two-thirds of the property within 400 feet of the proposed building was unconstitutional and violative of due process because the condition bore no relationship to public health, safety, and morals and entailed an improper delegation of legislative power to private citizens.


Griffin, Georgia, ordinance which exacted a permit for the distribution of literature by hand or otherwise was violative of freedom of press as guaranteed by the due process clause of the Fourteenth Amendment by imposing censorship in advance of publication.


A Jersey City ordinance forbidding distribution of printed matter and the holding, without permits, of public meetings in streets and other public places withheld freedom of speech and assembly contrary to the due process clause of the Fourteenth Amendment.


Justices dissenting: McReynolds, Butler.


Irvington, New Jersey ordinance prohibiting solicitation and distribution of circulars by canvassing from house to house, unless licensed by the police, violates the First Amendment as applied to one who delivered religious literature and solicited contributions door to door.

Justices concurring: Hughes, C.J., Butler, Stone, Roberts, Reed, Frankfurter, Douglas, Black.
Justice dissenting: McReynolds.

    Los Angeles ordinance invalid on same basis.

    Milwaukee ordinance invalid on same basis.

    Worcester, Massachusetts ordinance invalid on same basis.

    The New York City sales tax cannot be collected on sales to ves-
    sels engaged in foreign commerce of fuel oil manufactured from im-
    ported crude petroleum in bond. Thus enforced, the city ordinance is
    invalid as an infringement of congressional regulations of foreign and
    interstate commerce (Art. I, § 8, cl. 3).

    A Shasta County, California, ordinance making it unlawful for
    any person to carry or display any sign or badge in the vicinity of any
    place of business for the purpose of inducing others to refrain from
    buying or working there, or for any person to loiter or picket in the
    vicinity of any place of business for such purpose, is unconstitutional
    and is violative of freedom of speech and press guaranteed by the due
    process clause of the Fourteenth Amendment.

    Justices concurring: Hughes, C.J., Stone, Roberts, Black, Reed, Frankfurter,
    Douglas, Murphy.
    Justice dissenting: McReynolds.

    A Dallas ordinance made it unlawful to throw any handbills, cir-
    culars, cards, newspapers or any advertising material upon any street
    or sidewalk in the city. As applied, the ordinance prohibited the dis-
    semination of information, a denial of the freedom of the press, and
    where the handbills contained an invitation to participate in a reli-
    gious activity, a denial of freedom of religion, in violation of the First
    and Fourteenth Amendments of the Constitution.

    Justice dissenting: McReynolds.

    A Paris City ordinance which made it unlawful for any person to
    solicit orders or to sell books, wares or merchandise within the resi-
    dential portion of Paris without a permit is invalid as applied. The
    ordinance abridges the freedom of religion, speech and press guaran-
    teed by the Fourteenth Amendment of the Constitution in that it for-
    bids the distribution of religious publications without a permit, the
    issuance of which is in the discretion of a municipal officer.

An Opelika, Alabama, ordinance imposing licenses and taxes on various businesses cannot constitutionally be applied to the business of selling books and pamphlets on the streets or from house to house. As applied the ordinance infringes liberties of speech and press and religion guaranteed by the due process clause of the Fourteenth Amendment.

Justices concurring: Stone, C.J., Black, Douglas, Murphy, Rutledge.

Justices dissenting: Reed, Roberts, Frankfurter, Jackson.


An ordinance of the City of Jeanette stated that all persons soliciting therein orders for merchandise of any kind, or persons delivering such articles under orders so obtained must procure a license and pay a prescribed fee therefor in an amount measured by the time for which the license is granted. When applied to religious colporteurs engaged in dissemination of their religious beliefs through the sale of books and pamphlets from house to house, the ordinance invades freedom of religion, speech and press contrary to the First and Fourteenth Amendments of the Constitution.

Justices concurring: Stone, C.J., Black, Douglas, Murphy, Rutledge.

Justices dissenting: Roberts, Reed, Frankfurter, Jackson.


An ordinance of Struthers, Ohio, made it unlawful for any person distributing handbills, circulars, or other advertisements to ring the door bell, sound the door knocker, or otherwise summon occupants of any residence to the door for the purpose of receiving such handbills, etc. The ordinance, as applied to one distributing leaflets advertising a religious meeting, interfered with the rights of freedom of speech and press guaranteed by the First Amendment. The ordinance, by failing to distinguish between householders who are willing to receive the literature and those who are not, extended further than was necessary for protection of the community.

Justices concurring: Stone, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge.

Justices dissenting: Roberts, Reed, Jackson.


A McCormick, South Carolina, ordinance required agents selling books to pay a license fee of $1.00 per day or $15.00 per year. The constitutional guaranty of religious freedom under the First and Fourteenth Amendments of the Constitution precludes exacting a book agent's license fee from a distributor of religious literature notwithstanding that his activities are confined to his hometown and his
livelhood is derived from contributions requested for the literature distributed.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Rutledge.

Justices dissenting: Roberts, Frankfurter, Jackson.


Richmond, Va., City Code imposed upon persons “engaged in business as solicitors an annual license tax of $50.00 plus one-half of one per centum of their gross receipts or commissions for the preceding license year in excess of $1,000.00.” Permit of Director of Public Safety was required before issuance of the license. The ordinance violated the commerce clause in that it discriminated against out-of-state merchants in favor of local ones and operated as a barrier to the introduction of out-of-state merchandise.

Justices concurring: Stone, C.J., Reed, Frankfurter, Rutledge, Burton.

Justices dissenting: Black, Douglas, Murphy.


A New York City law provided that for the privilege of carrying on within the city any trade, business, or profession, every person shall pay a tax of one-tenth of one per centum upon all receipts received in and/or allocable to the city during the year. The excise tax levied on the gross receipts of a stevedoring corporation is invalid since it would burden interstate and foreign commerce in violation of the commerce clause of the Constitution.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas (dissenting in part), Murphy (dissenting in part), Jackson, Rutledge (dissenting in part), Burton.

Justice dissenting: Black.


A Lockport ordinance forbidding use of sound amplification excepted public dissemination, through loudspeakers, of news, matters of public concern, and athletic activities, provided that the latter be done under permission obtained from the Chief of Police. The ordinance is unconstitutional on its face as a previous restraint on the right of free speech in violation of the First Amendment of the Constitution, made applicable to the States by the Fourteenth Amendment. No standards were prescribed for the exercise of discretion by the Chief of Police.

Justices concurring: Vinson, C.J., Black, Douglas, Murphy, Rutledge.

Justices dissenting: Reed, Frankfurter, Jackson, Burton.


A Chicago ordinance proscribed the making of improper noises or other conduct contributing to a breach of the peace. Petitioner was
convicted of violating said ordinance by reason of the fact that he had addressed a large audience in an auditorium where he had vigorously criticized various political and racial groups as well as the disturbances produced by an angry and turbulent crowd protesting his appearance. At this trial, the judge instructed the jury that any behavior which stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, violates the ordinance. As construed and applied by the trial court the ordinance violates the right of free speech guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment.

Justices concurring: Black, Reed, Douglas, Murphy, Rutledge.
Justices dissenting: Vinson, C.J., Frankfurter, Jackson, Burton.


Because of prior denunciation of other religious beliefs, appellant’s license to conduct religious meetings on New York City streets was revoked. A local ordinance forbade the holding of such meetings without a license but contained no provisions for revocation of such licenses and no standard to guide administrative action in granting or denying permits. Appellant was convicted for holding religious meetings without a permit. The ordinance was held to grant discretionary power to control in advance the right of citizens to speak on religious issues and to impose a prior restraint on the exercise of freedom of speech and religion.

Justices concurring: Vinson, C.J., Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton.
Justices dissenting: Jackson.


A Madison, Wisconsin, ordinance prohibited the sale of milk as pasteurized unless it had been processed and bottled at an approved plant within a radius of five miles from the central square of Madison. An Illinois corporation, engaged in gathering and distributing milk from farms in Illinois and Wisconsin was denied a license to sell milk within the City solely because its pasteurization plants were more than five miles away. The ordinance unconstitutionally discriminated against interstate commerce in violation of the commerce clause of the Constitution.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark.


Marshall City, Texas, motion picture censorship ordinance, as enforced, was unconstitutional as denying freedom of speech and press protected by the due process clause of the Fourteenth Amendment.

A Pawtucket ordinance read as follows: “No person shall address any political or religious meeting in any public park, but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.” Because services of a Jehovah’s Witnesses sect differed from those conducted by other religious groups, in that the former were marked by lectures rather than confined to orthodox rituals, that sect was prevented from holding religious meetings in parks. Thus applied, the ordinance was held to violate the First and Fourteenth Amendments of the Federal Constitution, including the equal protection clause of the latter.


Section 903 of the New York City Charter provides that whenever a city employee invokes the privilege against self-incrimination to avoid answering inquiries into his official conduct by a legislative committee, his employment shall terminate. The summary dismissal thereunder, without notice and hearing, of a teacher at City College who was entitled to tenure and could be discharged only for cause and after notice, hearing and appeal, violated the due process clause of the Fourteenth Amendment. Invocation of the privilege to justify refusal to answer questions of a congressional committee concerning membership in the Communist Party in 1948-1949 cannot be viewed as the equivalent either to a confession of guilt or a conclusive presumption of perjury.


Justices dissenting: Reed, Burton, Minton, Harlan.


Atlanta ordinance which reserved certain public parks and golf courses for white persons only was violative of the equal protection clause of the Fourteenth Amendment.


Ordinance of Opelika, Alabama, provided that a wholesale grocery business which delivers groceries in the City from points without the City must pay an annual privilege tax of $250. As applied to a Georgia corporation which solicits orders in the City and consummates purchases by deliveries originating in Georgia, the tax is invalid under the commerce clause of the Constitution.


Justice dissenting: Black.

Los Angeles Municipal Code made it unlawful for a person who has been convicted of a crime punishable in California as a felony to remain in the city longer than five days without registering with the Chief of Police. Applied to a person who is not shown to have had actual knowledge of his duty to register, this ordinance violates the due process clause of the Fourteenth Amendment of the Constitution.

Justices dissenting: Frankfurter, Burton, Harlan, Whittaker.


Baxley, Georgia, made it an offense to “solicit” membership in any “organization, union or society” requiring the payment of “fees [or] dues” without first receiving a permit from the Mayor and Council. Issuance or refusal may occur after the character of the applicant, the nature of the organization in which memberships are to be solicited, and its effect upon the general welfare of the City have been considered. Appellant had been convicted for soliciting memberships in a labor union without a license. The ordinance is void on its face because it makes enjoyment of freedom of speech contingent upon the will of the Mayor and City Council and thereby constitutes a prior restraint upon that freedom contrary to the Fourteenth Amendment of the Constitution.

Justices dissenting: Frankfurter, Clark.


A Los Angeles City ordinance making it unlawful for any book-seller to possess any obscene publication denies him freedom of press, as guaranteed by the due process clause of the Fourteenth Amendment, when it is judicially construed to make him absolutely liable criminally for mere possession of a book, later adjudged to be obscene, notwithstanding that he had no knowledge of the contents thereof. Such construction would tend to restrict the books he sells to those he has inspected and thereby to limit the public’s access to constitutionally protected publications.

Justices concurring: Clark, Warren, C.J., Whittaker, Brennan, Stewart, Black (separately), Frankfurter (separately), Douglas (separately), Harlan (dissenting in part; separately).


Little Rock and North Little Rock, Arkansas, ordinances which, as a condition of exempting charitable organizations from an annual business license tax, required the disclosure of the identity of the officers and members of said organizations, as enforced against the
N.A.A.C.P., denied members of the latter freedom of association, press, and speech as guaranteed by the due process clause of the Fourteenth Amendment.


Los Angeles ordinance which forbade distribution under any circumstance of any handbill which did not have printed thereon the name and address of the person who prepared, distributed, or sponsored it was void on its face as abridging freedom of speech and press guaranteed by the due process clause of the Fourteenth Amendment. Such ordinance is not limited to identifying those responsible for fraud, false advertising, libel, disorder, or littering.

Justices dissenting: Clark, Frankfurter, Whittaker.

New York City Water Supply Act, insofar as it authorized notification of land owners, whose summer resort property would be adversely affected by city’s diversion of water, by publication of notices in January in New York City official newspaper and in newspapers in the county where the resort property was located as well as by notices posted on trees and poles along the waterway adjacent to such property, did not afford the quality of notice, i.e., to the owners’ permanent home address, required by the due process clause of the Fourteenth Amendment.

San Francisco ordinance authorizing warrantless entry of residential property to inspect for housing code violations violates Fourth and Fourteenth Amendments.

82. See v. City of Seattle, 387 U.S. 541 (1967).
Seattle ordinance authorizing warrantless entry of commercial property to inspect for fire code violations violates Fourth and Fourteenth Amendments.

Chicago motion picture censorship ordinance is unconstitutional in several procedural aspects.

Enactment of Midland County, Texas commissioners court drawing boundaries for districts of election of members does not comply with required “one-man, one-vote” standard.
Dallas ordinance providing for classification of motion pictures as not suitable for viewing by young persons does not provide adequate standards and is void for vagueness.

Amendment to Akron, Ohio city charter providing that any ordinance enacted by council dealing with discrimination in housing was not to be effective until approved by referendum whereas no other enactment had to be so submitted violated equal protection clause.

Cincinnati ordinance making it unlawful for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by is unconstitutionally vague and violates rights to assembly and association.

Jacksonville, Florida vagrancy ordinance is void for vagueness because it fails to give a person fair notice that his contemplated conduct is forbidden, because it encourages arbitrary and erratic enforcement of the law, because it makes criminal activities which by modern standards are normally innocent, and because it vests unfettered discretion in police.

Chicago ordinance prohibiting all picketing within certain distance of any school except labor picketing violates equal protection clause by impermissibly distinguishing between types of peaceful picketing.

Columbus, Ohio ordinance prohibiting use of abusive language toward another as applied by court below without limitation to fighting words cannot sustain conviction.

New Orleans ordinance interpreted by state courts to punish the use of opprobrious words to police officer without limitation of offense to uttering of fighting words is invalid.

Justice concurring specially: Powell.
Justices dissenting: Blackmun, Rehnquist, Burger, C.J.


A Jacksonville, Florida ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights.

Justices dissenting: White, Rehnquist, Burger, C.J.


Oradell, New Jersey ordinance requiring that advance written notice be given to local police by any person desiring to canvass, solicit, or call from house to house for a charitable or political purpose held void for vagueness.

Justice dissenting: Rehnquist.


Wilingboro, New Jersey ordinance prohibiting posting of real estate “For Sale” and “Sold” signs for the purpose of stemming what the township perceived as flight of white homeowners violated the First Amendment.


East Cleveland zoning ordinance that limited housing occupancy to members of single family and restrictively defined family so as to prevent an extended family, i.e., two grandchildren by different children residing with grandmother, violated due process clause.

Justices concurring: Powell, Brennan, Marshall, Blackmun.
Justice concurring specially: Stevens.
Justices dissenting: Stewart, Rehnquist, White; Burger (on other grounds).


Lower court’s invalidation on equal protection grounds of Chicago ordinance that permanently denies public chauffeur’s license to applicants previously convicted of certain crimes while making revocation of previously licensed persons convicted of same offenses discretionary is affirmed by an equally divided Court.

Schaumburg, Illinois ordinance prohibiting door-to-door or on-the-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for “charitable purposes” violates First and Fourteenth Amendment speech protections.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, Burger, C.J.

Justice dissenting: Rehnquist.


Court of Appeals decision voiding on commerce clause grounds an ordinance of St. Mary Parish, Louisiana requiring non-local job seekers and local workers seeking new jobs to obtain identification card and to provide fingerprints, photograph, and pay fee is summarily affirmed.


Court of Appeals decision invalidating on First Amendment grounds an ordinance of Southampton, New York barring door-to-door solicitation without prior consent of occupant, but excepting canvassers who have lived in the municipality at least six months is affirmed.


Mount Ephraim, New Jersey zoning ordinance construed to bar the offering of live entertainment within the township violated the First Amendment.


Justice concurring specially: Stevens.


Complex ban on billboard displays within the City of San Diego, excepting certain onsite signs and 12 categories of particular signs, violates First Amendment.


Justices concurring specially: Brennan, Blackmun; Stevens (in part).


Berkeley, California ordinance limiting to $250 any contributions to committees formed to support or oppose ballot measures submitted to popular vote violates First Amendment.


Justices concurring specially: Marshall, Blackmun, O’Connor.

Justice dissenting: White.

    Court of Appeals decision holding violative of the First Amendment an Albuquerque, New Mexico ordinance regulating solicitation by charitable organizations but exempting solicitation by religious groups for “evangelical, missionary or religious” but not secular purposes is summarily affirmed.


    Federal district court decision holding that New York City's plan for apportioning 10 at-large seats for the City Council among the City's five boroughs violates the one person, one vote requirements of the Equal Protection Clause, summarily affirmed by the U.S. Court of Appeals for the Second Circuit, is summarily affirmed.


    Akron, Ohio ordinance regulating the circumstances of abortions is unconstitutional in the following respects: by requiring all abortions performed after the first trimester to be performed in a hospital, by requiring parental consent or court order for abortions performed on minors under age 15, by requiring the attending physician to provide detailed information on which “informed consent” may be premised, by requiring a 24-hour waiting period, and by requiring disposal of fetal remains in a “humane and sanitary manner.”

        Justices concurring: Powell, Brennan, Marshall, Blackmun, Stevens, Burger, C.J.
        Justices dissenting: O'Connor, White, Rehnquist.


    Cleburne, Texas zoning requirement of a special use permit for operation of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses are permitted without such special use permits is a denial of equal protection as applied, the record containing no rational basis for the distinction.

        Justices concurring: White, Powell, Rehnquist, Stevens, O'Connor, Burger, C.J.
        Justices concurring specially: Marshall, Brennan, Blackmun.


    Appeals court decision holding invalid under the First Amendment an Indianapolis ordinance prohibiting as pornography “graphic sexually explicit subordination of women” without regard to appeal to prurient interests or offensiveness to community standards is summarily affirmed.
    Houston ordinance making it unlawful to “oppose, molest, abuse, or interrupt” police officer in performance of duty is facially overbroad in violation of the First Amendment.
    
    Justices concurring: Brennan, White, Marshall, Blackmun, Stevens.
    Justices concurring specially: Powell, O’Connor, Scalia.
    Justice dissenting: Rehnquist, C.J..

    Los Angeles Board of Airport Commissioners resolution banning all “First Amendment activities” at airport is facially overbroad in violation of the First Amendment.

    Lakewood, Ohio ordinance vesting in the mayor unbridled discretion to grant or deny a permit for location of newsracks on public property violates the First Amendment.
    
    Justices concurring: Brennan, Marshall, Blackmun, Scalia.
    Justices dissenting: White, Stevens, O’Connor.

    Richmond, Virginia requirement that contractors awarded city construction contracts must subcontract at least 30% of the dollar amount to “minority business enterprises” violates the Equal Protection Clause.
    
    Justices concurring: O’Connor, White, Stevens, Kennedy, Rehnquist, C.J..
    Justice concurring specially: Scalia.
    Justices dissenting: Marshall, Brennan, Blackmun.

    New York City Charter procedures for electing City’s Board of Estimate, consisting of three members elected citywide (the Mayor, the comptroller, and the president of the City Council) and the elected presidents of the city’s five boroughs, violate the one-person, one-vote requirements derived from the Equal Protection Clause.
    
    Justices concurring specially: Blackmun, Brennan, Stevens.

    Dallas licensing scheme for “sexually oriented” businesses, as applied to businesses that engage in protected First Amendment activity, constitutes an invalid prior restraint on protected activity. The ordinance fails to place a time limit within which the licensing authority must act, and fails to provide a prompt avenue for judicial review.
    
    Justices concurring: O’Connor, Stevens, Kennedy.
    Justices concurring specially: Brennan, Marshall, Blackmun.

St. Paul, Minnesota’s Bias-Motivated Crime Ordinance, which punishes the display of a symbol which one knows will arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender, is facially invalid under the First Amendment because it discriminates solely on the basis of the subjects that speech addresses.

Justices dissenting: White, Scalia, Rehnquist, C.J..

Justices concurring: Scalia, Kennedy, Souter, Thomas, Rehnquist, C.J..

Justices concurring specially: White, Blackmun, O’Connor, Stevens.


Providence, Rhode Island’s use of members of the clergy to offer prayers at official public secondary school graduation ceremonies violates the First Amendment's Establishment Clause. The involvement of public school officials with religious activity was “pervasive,” to the point of creating a state-sponsored and state-directed religious exercise in a public school; officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of non-sectarian prayers.

Justices concurring: Kennedy, Blackmun, Stevens, O’Connor, Souter.

Justices dissenting: Scalia, White, Thomas, Rehnquist, C.J..


A regulation of the Port Authority of New York and New Jersey banning leafletting (“the sale or distribution of . . . printed or written material” to passers-by) within the airport terminals operated by the facility is invalid under the First Amendment.

Justices concurring (per curiam): Blackmun, Stevens, O’Connor, Kennedy, Souter.


Cincinnati’s refusal, pursuant to an ordinance prohibiting distribution of commercial handbills on public property, to allow the distribution of commercial publications through freestanding newsracks located on public property, while at the same time allowing similar distribution of newspapers and other noncommercial publications, violates the First Amendment.

Justices concurring: Stevens, Blackmun, O’Connor, Scalia, Kennedy, Souter.


Hialeah, Florida’s ordinances banning the killing of animals in a ritual sacrifice are unconstitutional as infringing the free exercise of religion by members of the Santeria religion.

Justices concurring: Kennedy, White, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J.

Justices concurring specially: Blackmun, O’Connor.


Clarkstown, New York’s “flow control” ordinance, which requires all solid waste within the town to be processed at a designated transfer station before leaving the municipality, discriminates against interstate commerce and is invalid under the Commerce Clause.

Justices concurring: Kennedy, Stevens, Scalia, Thomas, Ginsburg.

Justice concurring specially: O’Connor.

Justices dissenting: Souter, Blackmun, Rehnquist, C.J.


Ladue, Missouri’s ordinance, which prohibits all signs but makes exceptions for several narrow categories, violates the First Amendment by prohibiting a resident from placing in the window of her home a sign containing a political message. By prohibiting residential signs that carry political, religious, or personal messages, the ordinance forecloses “a venerable means of communication that is both unique and important.”


Chicago’s Gang Congregation Ordinance, which prohibits “criminal street gang members” from “loitering” with one another or with other persons in any public place after being ordered by a police officer to disperse, violates the Due Process Clause of the Fourteenth Amendment. The ordinance violates the requirement that a legislature establish minimal guidelines for law enforcement.

Justices concurring: Stevens, O’Connor, Kennedy, Souter, Ginsburg, Breyer.

Justices dissenting: Scalia, Thomas, Rehnquist, C.J.


The Ohio village’s ordinance making it a misdemeanor offense to engage in door-to-door advocacy without first registering with the mayor and receiving a permit, required to be shown to an officer or resident who so requests, violates the First Amendment. The free and unhampered distribution of pamphlets is “an age-old form of missionary evangelism,” and is also important for the dissemination of ideas unrelated to religion. The ordinance is not narrowly tailored to serve the village’s “important,” interests in preventing crime, preventing fraud, and protecting privacy.
ORDINANCES HELD UNCONSTITUTIONAL

Justices concurring: Stevens, O’Connor, Kennedy, Souter, Ginsburg, Breyer.
Justices concurring specially: Scalia, Thomas.
Justice dissing: Rehnquist, C.J.
III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

   The property of a charitable corporation chartered by the Crown, being specifically protected by the treaty of peace of 1783, an act of Vermont adopted in 1794 and purporting to convey such property to local subdivisions was void.

   By reason of conflict with the federal licensing act of 1793 authorizing vessels to navigate coastal waters, a New York statute granting to certain persons an exclusive right to navigate New York waters was void.

   A Georgia law which imposed penalties on white persons who, without first obtaining a license therefor, established a residence within the limits of the Cherokee Nation, was unenforceable by reason of conflict with treaties negotiated by the United States with such Indian tribes and by virtue of extending to an area beyond the jurisdiction of the State.

   A Pennsylvania statute (1826) which penalized an owner's recovery of a runaway slave was violative of Art. IV, § 2, cl. 3, and federal legislation implementing the latter provision.
   Justices concurring: Story, Catron, McKinley, Taney, C.J. (separately), Thompson (separately), Baldwin (separately), Wayne (separately), Daniel (separately), McLean (separately).

   Inasmuch as under federal acts ceding to Pennsylvania that part of the Cumberland Road within its limits, and Pennsylvania laws accepting the same, the carriage of mail over said road was to be free from toll, later Pennsylvania law imposing tolls on coaches transporting passengers could not extend to the mail carried therein.
   Justices dissenting: McLean, Daniel.

   Ohio toll levied on passengers transported on mail coaches traversing Cumberland Road in that State, but which exempted passengers traveling on other coaches, was void by reason of conflict with
the terms of federal and Ohio acts adopted in relation to transfer and acceptance of said part of the road by Ohio.

Justice dissenting: Daniel.

   An Alabama statute requiring owners of steamboats navigating the waters of that State to register under the penalty of a $500 fine for each offense was in conflict with the act of Congress providing for the enrollment and license of vessels engaged in the coastwise trade and therefore inoperative.
   Accord: Foster v. Davenport, 63 U.S. (22 How.) 244 (1860), which held that this statute also was inoperative when applied to a lighter and a towboat assisting the movement wholly within Alabama territorial waters of vessels engaged in foreign and interstate commerce.

   A New York law authorizing localities to tax as personal property national bank stock held by residents, but which imposed no comparable tax on shares of state banks, was violative of federal legislation authorizing state taxation of national bank stock at rates no higher than those imposed on state bank shares. Taxation of the capital of state banks did not provide such equality, for that part of the capital of state banks invested in federal securities was exempt.
   Justices concurring: Grier, Davis, Nelson, Clifford, Miller, Field.

9. Accord: Bradley v. Illinois, 71 U.S. (4 Wall.) 459 (1867), voiding a similar Illinois tax law on the ground that a tax on the capital of state banks was not the equivalent of the state tax on shares of national banks and accordingly the tax on the latter was in conflict with federal law consenting to taxation of national bank shares at rates not in excess of those imposed on shares of state banks.

    A California statute vesting state courts with in rem jurisdiction over vessels for causes of action cognizable in admiralty invalidly infringed the admiralty jurisdiction exclusively conferred upon federal courts by § 9 of the Judiciary Act.

    Iowa statute providing an in rem remedy in state courts for maritime causes of action was void by reason of conflict with § 9 of the Judiciary Act of 1789, which vested admiralty jurisdiction exclusively in the federal courts.
When a treaty with Indian tribes exempted their lands from levy, sale, and forfeiture, Kansas could not validly collect its tax on lands held in severalty by members of such tribes under patents issued them pursuant to such treaty. Tribal Indians thus recognized by the National Government are exempt from the jurisdiction of the State.

A New York statute imposing a tax on lands reserved to an Indian tribe by treaty was void, notwithstanding provision therein that sale of land for nonpayment of the tax would not affect the right of occupancy by the Indians.

New York tax could not be collected on United States notes expressly exempted from state taxation by federal law authorizing their issuance as legal tender.

15. The Belfast, 74 U.S. (7 Wall.) 624 (1869).
Inasmuch as a shipper's lien under a contract of carriage between ports within the same State is a maritime lien enforceable by in rem proceedings exclusively within the admiralty jurisdiction of federal court, an Alabama law creating a maritime lien enforceable by in rem proceedings in its own courts was void.

Florida legislative grant of a telegraphic monopoly held "inoperative" as in conflict with a congressional act dealing with the construction of telegraph lines and based on its commerce and postal power.

Justices dissenting: Field, Hunt.

Georgia law requiring out-of-state coastal vessels, subject to certain discriminating exemptions, to take on a pilot upon entering Georgia ports, was void by reason of conflict with federal pilotage law.

18. Western Union Tel. Co. v. Massachusetts, 125 U.S. 530 (1888).
Massachusetts law, authorizing an injunction to restrain tax delinquents from doing business until payments are made, could not be validly invoked to restrain a telegraph company operating lines over United States military and post roads pursuant to federal authorization.

A Chicago ordinance imposing a license tax on tug boats licensed under federal authority and engaged in interstate commerce held invalid.

Texas statute regulating railroad rates, when applied to interstate freight transportation, was held to conflict with Interstate Commerce Act.


Ohio statute which regulated the use of oleomargarine in the State held void as applied to a soldiers’ home in Ohio created by Congress and administered as a federal institution.


An Iowa law levying a tax on a state bank, assessed on its shares measured by the value of its capital, surplus, and individual earnings, was void insofar as the assessment embraced federal bonds owned by the bank and was in conflict with a federal enactment exempting such bonds from state taxes.

Justices concurring: Moody, Brewer, White, McKenna, Holmes, Day.
Justices dissenting: Fuller, C.J., Harlan, Peckham.


Consistent with doctrine of national supremacy and preemption, state laws, including one of the State of Washington, regulating hours of service embracing employees of interstate carriers, became inoperative immediately upon the adoption of the Federal Hours of Service Law notwithstanding that the latter did not go into effect until a year after its passage.


A North Carolina statute requiring carriers to transport interstate freight as soon as it was received was unenforceable due to conflict with § 2 of the Hepburn Act of 1906 (34 Stat. 584), forbidding interstate railway carriers to make shipments until rates had been fixed and published by the Interstate Commerce Commission, which had not yet acted on this matter.

Justices concurring: McKenna, Holmes, Hughes, Van Devanter, Lamar, White, C.J.
Justice dissenting: Lurton.


Congress, by enactment of the Hepburn Act (34 Stat. 584 (1906)) having preempted the field of regulation pertaining to the duty of carriers to deliver cars in interstate commerce, a Minnesota Reciprocal Demurrage Law imposing like regulations was void.
   Arkansas Demurrage Law of 1907 penalizing carriers for failure to notify consignees of arrival of shipments was similarly held void.

   A Kentucky law which precluded an interstate carrier from contracting to limit its liability to an agreed or declared value was void as conflicting with the Carmack Amendment, which preempted the field of regulation pertaining to the liability of interstate carriers for loss and damage to interstate shipments.

   An Iowa law and a provision of the Nebraska Constitution were held to have been superseded by the Carmack Amendment.

   Nebraska constitutional provision was held to have been superseded by the Carmack Amendment.

   Wisconsin food labeling law was invalid insofar as it exacted labeling requirements as to articles in interstate commerce which were in conflict with those required under the Federal Pure Food and Drug Act. imposed an invalid burden on interstate commerce.

   Inasmuch as the federal Carmack Amendment preempted the field of regulation pertaining to determination of an interstate railroad's liability for loss or damages to goods in transit, Texas law outlawing contractual stipulations specifying a period of limitations for filing of claims by a shipper which was briefer than that sanctioned by the federal law was unenforceable.
   Justice dissenting: Pitney.

   When the Federal Employers’ Liability Act was applicable, by reason that the injured employee was engaged in interstate commerce, a Texas law affording a remedy for said injuries was superseded by reason of the supremacy of the former.
   Justices concurring: Van Devanter, McKenna, Holmes, Day, Lurton, Hughes, Pitney, White, C.J..
   Justice dissenting: Lamar.

   Congress having expressly included ferries used in connection with interstate railroads in its legislation regulating interstate com-
merce, two New Jersey municipal ordinances fixing passenger rates
for travel on ferries between New Jersey and New York points were
superseded and therefore invalid.

   Iowa law pertaining to attachment of wages of a railroad worker
   adjudicated bankrupt within less than four months thereafter was in
   conflict with federal bankruptcy law nullifying liens obtained within
   four months prior to the filing of a petition in bankruptcy and hence
   was not entitled to full faith and credit in Nebraska courts.

   Congress having completely preempted the field by its Hours of
   Service Act of 1907, notwithstanding that it did not take effect until
   1908, a New York labor law of 1907 regulating hours of service of
   railroad telegraph operators engaged in interstate commerce was in-
   valid.

   Attachments and liens on real estate of a bankrupt, acquired pur-
   suant to Kentucky laws within four months prior to the filing of a pe-
   tition in bankruptcy under federal law, were null and void, and dis-
   tribution of the proceeds from the sale of such real estate was gov-
   erned by federal rather than by state law.

   An Indiana statute requiring railway companies to place grab-
   irons and hand-holds on the sides and ends of every car having been
   superseded by the Federal Safety Appliance Act, penalties imposed
   under the former could not be recovered as to cars operated on inter-
   state railroads, although engaged only in intrastate traffic.

   Kansas prohibition law could not be validly enforced to prevent
   Kansas dealer from accepting orders for alcoholic beverages which
   were to be completed by interstate delivery to Kansas purchasers
   from a point in Missouri; under the federal Wilson Act the interstate
   transportation did not end until delivery to the consignee was com-
   pleted.

   South Carolina law which imposed a penalty on carriers for their
   failure to adjust claims within 40 days imposed an invalid burden on
   interstate commerce and also was in conflict with the federal
   Carmack Amendment.

   Pennsylvania liquor law could not be enforced against one who
   solicited orders for the delivery of alcoholic beverages to be shipped
to the consignee from another State; under the federal Wilson Act of 1890 liquor shipped in interstate commerce did not become subject to State regulation until after delivery to the consignee.

   Congress, by enactment of the Federal Employees' Liability Act, having preempted the field as to determination of the liability of interstate railroad carriers to compensate employees for injuries sustained while engaged in interstate commerce, award under New York Workmen’s Compensation Act for injuries sustained in interstate commerce by railway employee could not be upheld.
   
   Justices concurring: Van Devanter, Holmes, Pitney, McReynolds, Day, McKenna, White, C.J.
   
   Justices dissenting: Brandeis, Clarke.

   For the same reason, a New Jersey Workmen’s Compensation Act was held inapplicable to a railway worker injured while engaged in interstate commerce.
   
   Justices concurring: Van Devanter, Holmes, Day, Pitney, McKenna, McReynolds, White, C.J.
   
   Justices dissenting: Brandeis, Clarke.

   New York Workmen’s Compensation Act was unconstitutional as applied to employees engaged in maritime work, for it afforded a remedy unknown to common law, and hence was not among the common law remedies saved to suitors from exclusive federal admiralty jurisdiction by the Judiciary Act of 1789.
   
   Justices concurring: McReynolds, Day, Van Devanter, McKenna, White, C.J.
   
   Justices dissenting: Holmes (separately), Pitney (separately), Brandeis, Clarke.
   
   
   Justices concurring: McReynolds, Day, Van Devanter, McKenna, White, C.J.
   
   Justices dissenting: Holmes, Pitney, Brandeis, Clarke.


   Consistent with national supremacy, a South Dakota law regulating advance of interstate rates could not be applied to changes in intrastate rates which a carrier put into effect pursuant to an order of the Interstate Commerce Commission to abate discrimination against interstate traffic.
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Justice dissenting: McKenna.

    Mississippi “Prima Facie” act, relieving plaintiff of burden of proof to establish negligence, could not constitutionally be applied by a state court in suits under the Federal Employees’ Liability Act.  

    Pennsylvania law, as applied to an interstate train terminated by a mail car, forbidding operation of any train consisting of United States mail, or express, cars without rear end of car being equipped with a platform with guard rails and steps was inoperative by reason of conflict with federal legislation and regulations which preempted the field.  
    Justice dissenting: Clarke.

    By virtue of federal legislation preempting the field, Mississippi law could not be applied to determine validity of a contract by a telegraph company limiting its responsibility when its lower rate is paid for unrepeated interstate messages.  
    Justices concurring: Holmes, McKenna, Day, Van Devanter, McReynolds, Brandeis, Clarke, White, C.J..  
    Justice dissenting: Pitney.

    Federal legislation having preempted the field, Indiana law no longer was operative to subject a telegraph company to a penalty for failure to deliver promptly in Indiana a message sent from a point in Illinois.

    Richmond, Virginia, ordinance and Virginia statute which, as construed, levied a tax on state and national bank shares at the aggregate rate of $1.75 per $100 of valuation and upon intangibles at the aggregate rate of 85 per $100 valuation, a substantial proportion of which property was in the hands of individual taxpayers, were void as in conflict with federal law prohibiting discriminatory taxation of national bank shares for the reason that the tax was imposed on the national bank stocks to the aggregate value of more than $8,000,000 whereas the value of state bank stocks taxed was only $6,000,000.

California law which escheated to a state bank deposits un-claimed for 20 years, notwithstanding that no notice of residence has been filed with the bank by the depositor or any claimant, was invalid as applied to deposits in national banks by reason of conflict with applicable federal law.


When lease of an Indian allotment, made by the allottee in excess of the powers of alienation granted by federal law, is declared null and void by federal law, Oklahoma statute, as judicially applied, which gave the lease the effect of a tenancy at will and as controlling the amount of compensation which the allottee may recover for use and occupation by the lessees also was void, consistently with the principle of national supremacy.


Oklahoma law which required that the execution of a lease on the family homestead also must be executed by the wife was inoperative, consistently with the principle of national supremacy, to the extent that under federal law Congress had empowered a Cherokee Indian to make an oil or gas lease on his restricted “homestead” allotment subject only to the approval of the Secretary of the Interior.


Because the Federal Reserve Act authorizes national banks to act as executors, a Missouri law was ineffective, under the principle of national supremacy, to withhold such powers from such banks.

Justices concurring: Holmes, Sanford, Brandeis, McKenna, Van Devanter, Butler, Taft, C.J.

Justices dissenting: Sutherland, McReynolds.


A Seattle ordinance which limited the pawnbroking business to citizens was void as applied to a Japanese alien lawfully admitted into the United States and protected by a treaty with Japan according to nationals of the latter country the right to carry on a “trade.”


When carrier had two routes by which freight might move between two points in a State, the second of which was partly inter-state, a suit against the carrier for discrimination in the furnishing of cars which arose out of use of the interstate route in conformity with the carrier’s practice was governed by the Interstate Commerce Act, and the Missouri law governing such discrimination was superseded and inapplicable (Art. VI).

Federal law (39 Stat. 441 (1916)) which authorized carriers to limit liability upon property received for transportation to value declared by shipper, where the rates were based on such value pursuant to authority of Interstate Commerce Commission, superseded Texas law in respect to a claim for damage to goods shipped intrastate between Texas points for the reason that the tariff and classification had been adopted by the carrier pursuant to an order of the Commission requiring it to remove discrimination against interstate commerce which had resulted from lower Texas intrastate rates.


When the Federal Transportation Act of 1920 provided that suits on claims arising out of federal wartime control of the railroads might be brought against a federal agent, if instituted within two years after federal control had ended, Massachusetts law allowing amendments of proceedings prior to judgment, could not be invoked to substitute the Agent as defendant more than two years after federal control had ended; the suit in which the substitution was attempted had erroneously been filed against the railroad rather than against the Federal Director General during the period of federal control, and since the substitution amounted to filing a new action, invocation of the Massachusetts law was repugnant to the Federal Transportation Act's provisions as to limitations.


As applied to national banks, Iowa tax law providing for a levy on shares of such banks at rates less favorable than the rates applied to moneyed capital invested in competition with such banks was repugnant to federal law prohibiting such discrimination (Art. VI).


Federal legislation having preempted the field, a Washington law which established a quarantine against importation of hay and alfalfa meal, except in sealed containers, coming from areas in other States harboring the alfalfa weevil, was inoperative.


Justices dissenting: McReynolds, Sutherland.


The Federal Boiler Inspection Act having occupied the field of regulation pertaining to locomotive equipment on interstate highways, a Georgia law requiring cab curtains and automatic fire box doors was preempted.
    Congress having occupied the field by its own legislation, an Arkansas law which prohibited carriers from incorporating into their bills of lading stipulations exempting the carriers from liability for loss of shipments by fire not due to the carriers’ negligence was preempted.

    Wisconsin tax law, as imposed on shares of a national bank, was in conflict with federal law prohibiting state taxation of such shares at rates in excess of those levied on moneyed capital employed in competition with the business of such banks and was therefore inoperative as to the shares of said banks.

64. Accord: Minnesota v. First Nat’l Bank, 273 U.S. 561 (1927), holding inoperative for the same reason a Minnesota law taxing national bank shares.


    Montana law which levied tax on national bank shares was inconsistent with federal law prohibiting levy on such shares as rates higher than those assessed on moneyed capital in hands of individual citizens.

    Arizona game laws were not enforceable in a national game preserve and could not be invoked to prevent the killing of wild deer therein as ordered by federal officers acting under authority conferred by federal law.

    Arkansas insolvency law was superseded by the Federal Bankruptcy Act to the extent that a creditor of one who invoked the state laws was entitled to have his claim paid by the state receiver in conformity with the order of distribution sanctioned by the federal law.
    Justices concurring: Butler, Holmes, Stone, Sanford, Van Devanter, Taft, C.J.
    Justices dissented: McReynolds, Brandeis, Sutherland.

    Iowa inheritance tax law discriminating against nonresident alien heirs was violative of a treaty with Denmark.
Oklahoma law which imposed a 3% tax on the gross value of royalties from oil and gas was void as a tax on the right reserved to Indians as owners and lessors of the fee when applied to Indians who had received allotments exempted under the Atoka agreement and leased by them for production of oil and gas (Art. VI).

The right of action given under the Federal Merchant Marine Act to the personal representative to recover damages on behalf of beneficiaries for the death of a seaman resulting from negligence was exclusive and precluded a right of recovery by reason of unseaworthiness predicated upon the death statute of Virginia, where the injury was sustained.

Pennsylvania Workmen's Compensation Act could not be invoked to obtain recovery for injuries sustained by a workman while painting angle irons in the engine room of a ship tied to a pier in navigable waters; recovery was controlled exclusively by federal maritime law.

Justices concurring: McReynolds, Sutherland, Butler, Van Devanter.
Justices dissenting: Stone, Holmes, Brandeis.

Texas workman's compensation law inapplicable for the same reason.

Justices concurring: McReynolds, Butler, Sutherland, Van Devanter, Stone (separately), Holmes (separately), Brandeis (separately).

New York law pertaining to the descent of property of an alien decedent was inoperative as to the property of an alien by reason of the conflicting provisions of a treaty negotiated with the nation to which the decedent owed allegiance.

Federal bankruptcy courts are empowered to sell the real estate of bankrupts free from liens for state taxes; lien laws of Ohio stipulating that the liens were to attach to the property were ineffective to prevent the federal court from transferring the liens from the property to the proceeds of the sale.

Minnesota statute fixing amounts to be paid as compensation or in fees to expert witnesses could not be applied to determine costs in a federal court proceeding inasmuch as the statute was superseded by a federal enactment determining the fees to be paid witnesses.

Washington Workman’s Compensation Act, adopted after the United States had acquired exclusive jurisdiction over a tract which became Puget Sound Navy Yard, could not be invoked by the widow and child of a worker fatally injured while working for a contractor in said Yard for the reason that Congress by law had consented only to the institution of suits by a personal representative under the Washington Wrongful Death Statute.


Section of Indiana Bank Collection Code which purported to make the owners of paper which a bank had collected, but which it had not satisfied, preferred claimants in the event of the bank's failure, regardless of whether the funds representing such paper could be traced or identified as part of the bank's assets or intermingled with or converted into other assets of the bank, was inoperative as to a national bank by reason of conflict with applicable federal law.


Pennsylvania law which levied a tax on trust companies was in conflict with provisions of federal law proscribing discriminatory taxation of national bank shares by virtue of deductions allowed trust company for amounts represented by shares owned in Pennsylvania corporations already taxed or exempted, without any corresponding deduction on account of nontaxable federal securities owned or on account of national bank shares already taxed.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Butler, McReynolds, Sutherland.

Justices dissenting: Cardozo, Brandeis, Stone.


Oklahoma law which levied a tax on the gross production of oil, as applied to oil produced by lessees of lands of Indian tribes, was not authorized by a federal law consenting to levy of a different tax, and hence was inoperative as a tax on a federal instrumentality.


North Carolina property tax law could not be enforced so as to levy a tax on bank deposits made by petitioner as guardian of an incompetent veteran of World War I; by the terms of applicable federal law bank deposits which resulted from the receipt of federal veterans benefits payments were exempted from local taxation.

A Pennsylvania alien registration statute, imposing requirements at variance with those set forth in the Federal Alien Registration Act of 1940 containing a comprehensive scheme for the regulation of aliens, is rendered unenforceable by reason of conflict with federal legislative and treaty-making powers.

Justices concurring: Roberts, Black, Reed, Frankfurter, Douglas, Murphy.

Justices dissenting: Stone, Hughes, C.J., McReynolds.


Inasmuch as the Federal Farm Loan Act exempts federal land banks from state taxes, other than those on property acquired in the course of dealings, the North Dakota sales tax cannot validly be collected on the sale of materials to a federal land bank to be used in improving real estate (Art. VI, cl. 2).


Consistently with the national supremacy clause, federal laws and regulations relating to the entire process of manufacture of renovated butter supersede state laws whereunder Alabama officials inspected and seized packing stock butter acquired by a manufacturer of renovated butter for interstate commerce.

Justices concurring: Roberts, Black, Reed, Douglas, Jackson.

Justices dissenting: Stone, C.J., Frankfurter, Murphy, Byrnes.


Being repugnant to the terms of a treaty concluded with the Yakima Indians reserving to the members of the tribe the right to take fish at all usual places in common with the citizens of Washington Territory, a Washington law requiring such Indians to pay license fees for the exercise of such privilege cannot be enforced.


Florida Statute of 1941, sec. 817.09 and sec. 817.10, made it a misdemeanor to induce advances with intent to defraud by a promise to perform labor, and further made failure to perform labor for which money had been obtained prima facie evidence of intent to defraud. The statute is violative of the Thirteenth Amendment and the Federal Antipeonage Act for it cannot be said that a plea of guilty is uninfluenced by the statute's threat to convict by its prima facie evidence section.

Justices concurring: Roberts, Black, Frankfurter, Douglas, Murphy, Jackson, Rutledge.

Justices dissenting: Stone, C.J., Reed.

A Florida law providing that no one shall be licensed as a “business agent” of a labor union without meeting certain specified standards and that all labor unions in the State must file annual reports disclosing certain information and pay an annual fee circumscribes the “full freedom” to choose collective bargaining agents secured to employees by the National Labor Relations Act.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Jackson, Rutledge.

Justices dissenting: Roberts, Frankfurter.


An Iowa statute requiring a permit for construction of a dam in navigable waters is preempted to the extent that it purports to authorize a state veto of a hydro-electric project licensed by the Federal Power Commission pursuant to the Federal Power Act. While the Federal Power Act authorizes the Commission to require a licensee to comply with requirements of state law that are not inconsistent with federal purposes, these federal purposes may not be subordinated to state control through operation of the state permitting requirement.

Justices concurring: Burton, Stone, C.J., Black, Reed, Douglas, Murphy, Rutledge.

Justice dissenting: Frankfurter.


Where the National Labor Relations Board had asserted general jurisdiction over unions of foreman employed by industries subject to the National Labor Relations Act but had refused to certify such unions as collective bargaining representatives on the ground that to do so at the time would obstruct rather than further effectuation of the purposes of the Act, certification of such unions by the New York Employment Relations Board under a state act is invalid as in conflict with the National Labor Relations Act and the commerce clause of the Constitution.


A decision of the Wisconsin Supreme Court upholding a similar action by the Wisconsin Employment Relations Board is summarily reversed.


By amendments of the United States Warehouse Act, Congress terminated the dual system of regulation and substituted an exclusive system of federal regulations of warehouses licensed under the federal act. Such warehouses therefore no longer need to obtain Illinois licenses or comply with Illinois laws regulating those phases of the
warehouse business which have been regulated under the federal act. Compliance with Illinois law is limited to those phases of the business which the federal act expressly subjects to state law.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Murphy, Jackson, Burton.
Justices dissenting: Frankfurter, Rutledge.


A South Carolina law providing that any railroad line within the State must be owned and operated only by state-created corporations may not be applied to prevent a Virginia corporation, so authorized by the Interstate Commerce Commission under § 5 of the Interstate Commerce Act, from owning and operating an entire railway system with mileage in South Carolina.


California's requirement that every person bringing fish ashore in the State for sale obtain a commercial fishing license, but denying such a license to any person ineligible for citizenship, precluded a resident Japanese alien from earning his living as a commercial fisherman in the ocean waters off the State and was invalid both under the equal protection clause of the Fourteenth Amendment and under federal statutory law (42 U.S.C. § 1981).

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge, Burton.
Justices dissenting: Reed, Jackson.


Certification by the state employment relations board under a Wisconsin labor relations act of a union as the collective bargaining representative of employees engaged in interstate commerce is invalid as in conflict with the National Labor Relations Act; the employer is onenvalid as applied to deny utility employees the right to strike. As applied, the law conflicts with the National Labor Relations Act.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Jackson, Clark.
Justices dissenting: Frankfurter, Burton, Minton.


Denial of a license under the New York Agricultural and Market Law violated the commerce clause of the Constitution and the Federal Agricultural Marketing Act where the denial was based on grounds that the expanded facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served.

Justices concurring: Vinson, C.J., Reed, Douglas, Jackson, Burton.
Justices dissenting: Black, Frankfurter, Murphy, Rutledge.

The California community property law could not be invoked to sustain an award to a deceased soldier's widow of one-half of the proceeds of an insurance policy issued under the National Life Insurance Act; the federal law accords the insured soldier the right to designate his beneficiary, in this instance, his mother, and his widow, not having been designated, is expressly precluded from acquiring a vested right to these proceeds.


Collection by a New Jersey taxing district of a tax on intangible property of a stock insurance company, computed without deducting the principal amount of certain United States bonds and accrued interest thereon was invalid by reason of conflict with federal law exempting federal obligations from state and local taxation.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark, Minton.

Justice dissenting: Black.


The strike vote provision of the Michigan Mediation Law, which prohibits the calling of a strike unless a state-prescribed procedure for mediation is followed and unless a majority of the employees in a state-defined bargaining unit authorizes the strike, conflicts with the National Labor Relations Act and is invalid.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Jackson, Clark.

Justice dissenting: Frankfurter, Burton, Minton.


The Wisconsin Public Utility Anti-Strike Law, which substituted arbitration upon order of the Wisconsin Employment Relations Board for collective bargaining whenever an impasse is reached in the bargaining process, is invalid as applied to deny utility employees the right to strike. As applied, the law conflicts with the National Labor Relations Act.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Jackson, Clark.

Justice dissenting: Frankfurter, Burton, Minton.


Tennessee Retailers' Sales Tax Act could not be enforced as to sales of commodities to a contractor employed by the Atomic Energy Commission; the contractor's activities were those of the Commission and exempt under federal law.


Where a serviceman domiciled in one State is assigned to military duty in another State, the latter state (here Colorado) is barred by § 514 of the Soldiers and Sailor’s Civil Relief Act of 1940 from imposing a tax on his tangible personal property temporarily located within its borders, even when the State of his domicile has not taxed such property.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark, Minton.

Justices dissenting: Black, Douglas.


Insofar as the New York Banking Law forbids national banks to use the word “saving” or “savings in their business or advertising,” it conflicts with federal laws expressly authorizing national banks to receive deposits and to exercise incidental powers and is void.


Justice dissenting: Reed.


An Illinois law providing for a 90-day suspension of a motor carrier upon a finding of 10 or more violations of regulations calling for a balanced distribution of freight loads in relation to the truck’s axles cannot be applied to an interstate motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act. A State may not suspend the carrier’s rights to use the State’s highways in its interstate operations. The Illinois law, as applied to such carrier, also violates the commerce clause.


The Smith Act, as amended, 18 U.S.C. § 2385, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act, which proscribes the same conduct. The scheme of federal regulation is so pervasive as to make reasonable the inference that the Congress left no room for the States to supplement it--enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program.


Justices dissenting: Reed, Burton, Minton.


A “right to work” provision of the Nebraska Constitution cannot be invoked to invalidate a “union shop” agreement between an inter-
state railroad and unions of its employees for the reason that such “union shop” agreement is expressly authorized by § 2(11) of the Railway Labor Act.

An Arkansas statute requiring licensing of contractors cannot be applied to a federal contractor operating pursuant to a contract issued under authority of the Armed Services Procurement Act of 1947.

The Utah Labor Board, acting pursuant to Utah law, may not exercise jurisdiction over a labor dispute involving an employer engaged in interstate commerce if the NLRB declined to exercise jurisdiction and had not ceded jurisdiction to the state board pursuant to § 10(a) of the National Labor Relations Act.

Justices dissenting: Burton, Clark.

A California statute making contingent upon prior approval by its Public Utilities Commission of the Federal Government’s practice, sanctioned by federal procurement law, of negotiating special rates with carriers for the transportation of federal property in California is void as conflicting with the federal practices.

Justices concurring: Black, Frankfurter, Douglas, Clark, Brennan, Whitaker.

As applied to a newly organized motor carrier hired by interstate railroads operating in and out of Chicago to transfer interstate passengers and their baggage between different railway terminals in that City, the provision in the Chicago Municipal Code requiring any new transfer service to obtain a certificate of convenience and necessity plus approval of the City Council is unconstitutional. Chicago has no power to decide whether the new motor carrier can operate a service which is an integral part of interstate railway transportation subject to regulations under the Federal Interstate Commerce Act.

Justices dissenting: Frankfurter, Burton, Harlan.

An Ohio antitrust law cannot be invoked to prohibit enforcement of a collective bargaining agreement between a group of interstate motor carriers and local labor unions, which agreement stipulates
that truck drivers owning and driving their own vehicles shall be paid the prescribed wages plus at least a prescribed minimum rental for the use of their vehicles. The state antitrust law, insofar as it is applied to prevent contracting parties from enforcing agreement upon a subject matter as to which the National Labor Relations Act directs them to bargain, is invalid.

Justices concurring: Black, Douglas, Clark, Harlan, Brennan.
Justice dissenting: Whittaker.


The failure of the NLRB to assume jurisdiction does not leave California free to apply its laws defining torts and regulating labor relations for purposes of awarding damages to an employer for economic injuries resulting from the picketing of his plant by labor unions not selected by his employees as their bargaining agent. Since the employer is engaged in interstate commerce, California laws cannot be applied to matters falling within the compass of the National Labor Relations Act.

Justices concurring: Harlan, Clark, Whittaker, Stewart (separately).


Justice dissenting: Clark, Harlan, Whittaker, Stewart.


Justice concurring: Harlan (separately).


Justices dissenting: Douglas, Clark.


   Justices dissenting: Douglas, Clark.


   A Virginia statute making it a misdemeanor for any person to remain on the premises of another after having been forbidden to do so could not be enforced against a Negro for refusing to leave the section reserved for white people in a restaurant in a bus terminal by reason of conflict with provision of Interstate Commerce Act forbidding interstate motor vehicle bus carriers from subjecting persons to unjust discrimination.


   Justices dissenting: Whittaker, Clark.


   Oregon escheat law could not be applied to support State's claim to property of a resident who died without a will or heirs in a Veterans' Hospital in Oregon; the United States has asserted title thereto under a superseding federal law.


   Justices dissenting: Douglas, Whittaker.


   Pennsylvania Deficiency Judgment Act had been displaced by applicable provisions of the Federal Servicemen's Readjustment Act of 1944, and regulations issued thereunder, and could not be invoked to bar suit by the Veterans' Administration against a veteran to recover the indemnity for a defaulted home loan which it had guaranteed and which had been foreclosed by the lender.


   Justices dissenting: Black, Douglas.


   A Kansas statute declaring that oil and gas leases and the royalties derived therefrom were taxable as personal property could not be applied to subject to local taxation an oil and gas lease and income therefrom derived by a Federal Land Bank from property acquired in satisfaction of a debt; under supervening federal law such Land Banks were exempted from all taxes “except taxes on real estate.”

   Justice concurring specially: Black.
Michigan law regulating the manner in which a federal tax lien must be recorded was in conflict with applicable provisions of the Internal Revenue Code and therefore was ineffective for purposes of withholding priority to the Government’s lien.

Justice dissenting: Douglas.

Congress having preempted the field by enactment of the Federal Tobacco Inspection Act establishing uniform standards for classification of tobacco, a Georgia law which required Type 14 tobacco grown in Georgia to be identified with a white tag could not be enforced.

Justices dissenting: Black, Frankfurter, Harlan.

Treasury regulations creating a right of survivorship in United States Savings Bonds preempted application of conflicting provisions of Texas Community Property Law which prohibited a married couple from taking advantage of such survivorship regulations whenever the purchase price of said bonds was paid out of community property.

A Texas law imposing a premium tax on insured parties who purchased insurance from insurers not licensed to sell insurance in Texas could not be collected, consistently with the Federal McCarran-Ferguson Act, on insurance contracts purchased in New York from a London insurer by the terms of which premiums thereon and claims thereunder were payable in New York.

Justice dissenting: Black.

Louisiana laws which segregated passengers in terminal facilities of common carriers were unconstitutional by reason of conflict with federal law and the equal protection clause.

A New York law which provided that payments out of proceeds of a foreclosure of property to discharge state tax liens should be deemed “expenses” of the mortgage foreclosure sale was ineffective to defeat priority accorded by federal law to federal tax liens antedating liens for state and local real property taxes and assessments.

A California statute which authorized the fixing of minimum wholesale and retail prices for milk could not be enforced as to purchases of milk for military consumption or for resale at commissaries at federal military installations in California; conflicting federal statutes and regulations governing procurement with appropriated funds of goods for the Armed Forces required competitive bidding or negotiation reflecting active competition which would be nullified by minimum prices determined by factors not specified in federal law.


Justices dissenting: Stewart, Harlan, Goldberg.


Suitability of an out-of-state national bank in courts of Nebraska is determined by applicable provisions of the federal banking laws and not by recourse to a Nebraska statute defining the venue of local actions involving liability under the Nebraska Installment Loan Act.

Justices concurring: Black (separately), Douglas (separately).


Justices dissenting: Harlan, Douglas, Black.


A Florida law regulating admission to the Bar could not be enforced, consistently with the principle of national supremacy, to prevent a person admitted to practice before the United States Patent Office as a Patent Attorney from serving clients in the latter capacity in Florida.


Missouri’s King-Thompson Act, which authorized the governor to seize and operate a public utility when the public welfare was jeopardized by a strike threat, was inconsistent with 29 U.S.C. § 157 of the National Labor Relations Act defining the rights of employees as to collective bargaining and, consistently with national supremacy, could not be enforced.


Iowa’s reciprocal inheritance law conditioning the right of non-resident aliens to take Iowa real property by intestate succession upon existence of a reciprocal right of United States citizens to take...
real property upon same terms and conditions in alien’s country could not under United States-Greece treaty and supremacy clause bar Greek national from inheriting property.

Florida unemployment compensation law disqualifying for benefits any person unemployed as a result of a labor dispute when applied to disqualify a person who has filed an unfair labor practice charge against her employer because of her discharge conflicts with federal labor law and is void under supremacy clause.

A New York statute changing levels of benefits and deleting items to be included in levels of benefit which reduced moneys to recipients conflicted with federal law which required States to adjust upward in terms of increases costs of living amounts deemed necessary for subsistence.

Justices dissenting: Black, Burger, C.J.

A California statute reducing the amount of dependent children funds going to any household by the amount of funds imputed to presence of a “man-in-the-house” who was not legally obligated to support the child or children conflicts with federal law as interpreted by valid HEW regulations.

Justices dissenting: Burger, C.J., Black.

A California statute providing for suspension of unemployment compensation if the former employer appeals an eligibility decision of a departmental examiner, the suspension to last until decision of the appeal, conflicts with the federal act’s requirement that compensation must be paid when due.

An Arizona statute providing that a discharge in bankruptcy shall not operate to relieve a judgment creditor under the Motor Vehicle Safety Responsibility Act of any obligation under the Act conflicts with the provision of the federal bankruptcy law which discharges a debtor of all but specified judgments.

An Illinois statute and implementing regulations which made needy dependent children 18 through 20 years old eligible for welfare
benefits if they were attending high school or vocational training school but not if they were attending college or university conflicts with federal social security law.

A district court decision holding invalid as in conflict with the federal Social Security Act an Indiana statute denying benefits to persons aged 16 to 18 who are eligible but for the fact that they are not regularly attending school is summarily affirmed.

A New Jersey statute providing for recovery by the State of reimbursement for financial assistance when the recipient subsequently obtains funds cannot be applied to obtain reimbursement out of federal disability insurance benefits inasmuch as federal law bars subjecting such funds to any legal process.

A Burbank, California ordinance placing an 11 p.m. to 7 a.m. curfew on jet take-offs from its local airport is invalid as in conflict with the regulatory scheme of federal statutory control.


A Washington State statute construed to prohibit net fishing by members of the Tribe conflicts with the Tribe’s treaty rights and is invalid.

North Carolina’s right-to-work law giving employees discharged by reason of union membership a cause of action against their employer cannot be applied to supervisors in view of 29 U.S.C. § 164(a), which provides that no law should compel an employer to treat a supervisor as an employee.

Virginia statute creating cause of action for “insulting words” as construed to permit recovery for use in labor dispute of words “scab” and similar words is preempted by federal labor law.

Justice concurring specially: Douglas.

Montana laws imposing personal property taxes, vendor license fees, and a cigarette sales tax may not constitutionally be applied to reservation Indians under supremacy clause because federal statutory law precludes such application.

A New Mexico law providing for the roundup and sale by a state agency of “estrays” cannot under the supremacy clause be constitutionally applied to unbranded and unclaimed horses and burros on public lands of the United States that are protected by federal law.


A Wisconsin statute proscribing concerted efforts by employees to interfere with production, except through actual strikes, cannot under the supremacy clause be constitutionally applied to union members’ concerted refusal to work overtime during negotiations for renewal of an expired contract since such conduct was intended by Congress to be regulable by neither the States nor the NLRB.

Justices concurring: Brennan, White, Marshall, Blackmun, Power, Burger, C.J.

Justices dissenting: Stevens, Stewart, Rehnquist.


California’s statutory imposition of weight requirements in packaging for sale of bacon and flour which did not allow for loss of weight resulting from moisture loss during distribution while the applicable federal law does is invalid (1) as to bacon because of express federal law and (2) as to flour because adherence to state law would defeat a purpose of the federal law.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Stevens, Burger, C.J.

Justices dissenting: Rehnquist, Stewart as to flour.


A Virginia statute prohibiting nonresidents from fishing within certain state waters is preempted by federal enrollment and licensing laws that grant an affirmative right to fish in coastal waters.


Alabama statutory height and weight requirements for prison guards have an impermissible discriminatory effect upon women, and under the supremacy clause must yield to the federal fair employment law.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, Burger, C.J.

Justice dissenting: White.


A Connecticut statutory rule rendering ineligible for welfare benefits individuals who have transferred assets within seven years of applying for benefits unless they can prove the transfer was made for “reasonable consideration” is inconsistent with the Social Security Act and therefore void.

Certain provisions of a Washington statute imposing design or safety standards on oil tankers using state waters and banning operation in those waters of tankers exceeding certain weights, as well as certain pilotage requirements, are invalid as conflicting with federal law.

Justices concurring: Ginsburg, Kennedy, Souter, Breyer, Rehnquist, C.J.

Justices concurring specially: O'Connor, Thomas.

Justice dissenting: Stevens.


California community property statute, under which property acquired during the marriage by either spouse belongs to both, may not be applied to award a divorced spouse an interest in the other spouse’s pension benefits under the Railroad Retirement Act, because the Act precludes subjecting benefits to any legal process to deprive recipients.

Justices concurring: Blackmun, Brennan, White, Marshall, Powell, Stevens, Burger, C.J.

Justices dissenting: Stewart, Rehnquist.


An Illinois law differentiating between children who reside in foster homes with relatives and those who do not reside with relatives and giving the latter greater benefits than the former conflicts with federal law, which requires the same benefits be provided regardless of whether the foster home is operated by a relative.


Arizona’s imposition of tax upon electricity produced in State and sold outside the State, which is not offset against other taxes as is the case with electricity sold within State, violates federal statute prohibiting any State from taxing the generation or transmission of electricity in a manner that discriminates against out-of-state consumers, and thus is unenforceable.


A California statute requiring all wine producers and wholesalers to file fair trade contracts or price schedules with the State and to follow the price lists is a resale price maintenance scheme that violates the Sherman Act.


Ventura County, California zoning ordinances governing oil exploration and extraction activities cannot be applied to a company which holds a lease from the United States Government because federal law preempts the field.

Imposition of a Washington state motor vehicle excise tax and mobile home, camper, and trailer taxes on vehicles owned by the Tribe or its members and used both on and off the reservation violates federal law and cannot stand under the supremacy clause.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, Stevens, Burger, C.J.

Justices dissenting: Stewart, Rehnquist.


Imposition of Arizona's motor carrier license tax and use fuel tax on a non-Indian enterprise authorized to do business in Arizona but operating entirely on reservation conflicts with federal law and cannot stand under the supremacy clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Burger, C.J.

Justices dissenting: Stevens, Stewart, Rehnquist.


Arizona's imposition of tax upon on-reservation sale of farm machinery to Indian tribe by non-Indian, off-reservation enterprise conflicts with federal law and is invalid under the supremacy clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Burger, C.J.

Justices dissenting: Stewart, Powell, Rehnquist, Stevens.


An Iowa statute subjecting to damages a common carrier who abandons service and thereby injures shippers is preempted by the Interstate Commerce Act, which empowers the ICC to approve cessation of service on branch lines upon carrier petitions.


A New Jersey workmen's compensation provision denying employers the right to reduce retiree's pension benefits by the amount of a compensation award under the act is preempted by federal pension regulation law.


Louisiana's "first-use tax" statute which, because of exceptions and credits, imposes a tax only on natural gas moving out-of-state, impermissibly discriminates against interstate commerce, and another provision that required pipeline companies to allocate cost of the tax to the ultimate consumer is preempted by federal law.
    California community property statute, to the extent it treated
    retired pay of Army officers as property divisible between spouses on
    divorce, is preempted by federal law.
    Justices concurring: Blackmun, White, Marshall, Powell, Stevens, Burger,
    C.J.
    Justices dissenting: Rehnquist, Brennan, Stewart.

    A court of appeals decision holding preempted by federal pension
    law Hawaii law requiring employers to provide their employees with
    a comprehensive prepaid health care plan is summarily affirmed.

    A provision of New York's emergency assistance program pre-
    cluding assistance to persons receiving AFDC to replace a lost or sto-
    len AFDC grant is contrary to valid federal regulations proscribing in-
    equitable treatment under the emergency assistance program.

    California's prohibition on unreasonable restraints on alienation,
    construed to prohibit “due-on-sale” clauses in mortgage contracts, is
    preempted by Federal Home Loan Bank Board regulations permitting
    federal savings and loan associations to include such clauses in their
    contracts.
    Justices concurring: Blackmun, Brennan, White, Marshall, O'Connor, Burger,
    C.J.
    Justices dissenting: Rehnquist, Stevens.

    A New Mexico tax imposed on the gross receipts that a non-In-
    dian construction company received from a tribal school board for con-
    struction of a school for Indian children on reservation is preempted
    by federal law.
    Justices concurring: Marshall, Brennan, Blackmun, Powell, O'Connor, Burger,
    C.J.
    Justices dissenting: Rehnquist, White, Stevens.

    A Tennessee tax on the net earnings of banks, applied to interest
    earned on obligations of the United States, is void as conflicting with

    A federal district court decision that Georgia's congressional re-
    districting plan is invalid as having a racially discriminatory purpose
    in conflict with the Voting Rights Act is summarily affirmed.
A federal district court decision holding that federal statutes (the Federal Railroad Safety Act and the locomotive boiler inspection laws) preempt a Pennsylvania law requiring locomotives to maintain speed records and indicators, summarily affirmed by an appeals court, is summarily affirmed.

Prohibition on pass-through to consumers of an increase in Alabama’s oil and gas severance tax is invalid as conflicting with the Natural Gas Act to the extent that it applies to sales of gas in interstate commerce.

An Illinois statute recognizing the validity of an unrecorded, oral sale of an aircraft is preempted by the Federal Aviation Act’s provision that unrecorded “instruments” of transfer are invalid.

The New York Human Rights Law is preempted by ERISA to the extent that it prohibits practices that are lawful under the federal law.

A Texas property tax on bank shares, computed on the basis of a bank’s net assets without any deduction for the value of United States obligations held by the bank, is invalid as conflicting with Rev. Stat. § 3701 (31 U.S.C. § 3124).

Justices concurring: Blackmun, Brennan, White, Marshall, Powell, Burger, C.J.
Justices dissenting: Rehnquist, Stevens.

An appeals court holding that a Connecticut statute requiring employers to provide health and life insurance to former employees is preempted by ERISA as related to an employee benefit plan, is summarily affirmed.

A Hawaii “property tax” on the gross income of airlines operating within the State is preempted by a federal prohibition on state taxes on carriage of air passengers “or on the gross receipts derived therefrom.”

California’s franchise law, requiring judicial resolution of certain claims, is preempted by the United States Arbitration Act, which precludes judicial resolution in state or federal courts of claims that contracting parties agree to submit to arbitration.
STATE AND LOCAL LAWS HELD PREEMPTED

Justice concurring in part and dissenting in part: Stevens.
Justices dissenting: O'Connor, Rehnquist.


An appeals court holding that a Texas statute regulating the broadcast of political advertisements is preempted by the Federal Election Campaign Act of 1971 to the extent that it imposes sponsor-ship identification requirements on advertising for candidates for federal office, and to the extent that it conflicts with federal regulation of political advertising rates, is summarily affirmed.


A Michigan statute making agricultural producers’ associations the exclusive bargaining agents and requiring payment of service fees by non-member producers is preempted as conflicting with federal policy of the Agricultural Fair Practices Act of 1967, protecting the right of farmers to join or not join such associations.


The Oklahoma Constitution’s general ban on advertising of alcoholic beverages, as applied to out-of-state cable television signals carried by in-state operators, is preempted by federal regulations implementing the Communications Act.


A South Dakota statute requiring local governments to distribute federal payments in lieu of taxes in the same manner that they distribute general tax revenues conflicts with the Payment in Lieu of Taxes Act, which provides that the recipient local government may use the payment for any governmental purpose.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, O'Connor, Burger, C.J.
Justices dissenting: Rehnquist, Stevens.


An appeals court decision holding that federal laws (the Food, Drug, and Cosmetic Act; the Meat Inspection Act; and the Poultry Products Act) preempt a New York requirement that cheese alternatives be labeled “imitation” is summarily affirmed.


A Wisconsin statute debarring from doing business with the state persons or firms guilty of repeat violations of the National Labor Relations Act is preempted by that Act.
   A New Jersey statute creating an oil spill compensation fund is preempted by the Comprehensive Environmental Response, Compensation, and Liability Act to the extent that the state fund is used to finance cleanup activities at sites listed in the National Contingency Plan.
   Justices concurring: Marshall, Brennan, White, Blackmun, Rehnquist, O'Connor, Burger, C.J.
   Justice dissenting: Stevens.

   A North Dakota statute disclaiming jurisdiction over actions brought by tribal Indians suing non-Indians in state courts over claims arising in Indian country is preempted by federal Indian law (Pub. L. 280).
   Justices concurring: O'Connor, White, Marshall, Blackmun, Powell, Burger, C.J.
   Justices dissenting: Rehnquist, Brennan, Stevens.

   Louisiana's wrongful death statute is preempted by the Death on the High Seas Act as applied to a helicopter crash 35 miles off shore.
   Justices concurring: O'Connor, White, Blackmun, Rehnquist, Burger, C.J.
   Justices dissenting: Powell, Brennan, Marshall, Stevens.

   An appeals court holding that New York severance pay requirements were preempted by ERISA is summarily affirmed.

   An appeals court holding that North Carolina severance pay requirements were preempted by ERISA is summarily affirmed.

   North Carolina's legislative redistricting plan, creating multi-member districts having the effect of impairing the opportunity of black voters to participate in the political process, is invalid under § 2 of the Voting Rights Act.
   Justices concurring: Brennan, White, Marshall, Blackmun, Stevens.
   Justices concurring in part and dissenting in part: Stevens, Marshall, Blackmun.

   A provision of Arkansas' workers' compensation act requiring that death benefits be reduced by the amount of any federal benefits paid is preempted by a federal requirement that federal benefits be
“in addition to any other benefit due”; a contrary ruling by an Arizona appeals court is summarily reversed.

A section of New York’s alcoholic beverage control law establishing retail price maintenance violates section 1 of the Sherman Act, and is not saved by the Twenty First Amendment.

   Justices dissenting: O’Connor, Rehnquist, C.J..

A California statute governing the operation of bingo games is preempted as applied to Indian tribes conducting on-reservation games.

   Justices dissenting: Stevens, O’Connor, Scalia.

A Riverside County, California ordinance regulating the operation of bingo and various card games is preempted as applied to Indian tribes conducting on-reservation games.

   Justices dissenting: Stevens, O’Connor, Scalia.

The Federal Arbitration Act preempts a section of California Labor Code providing that actions for collection of wages may be maintained “without regard to the existence of any private agreement to arbitrate.”

   Justices dissenting: Stevens, O’Connor.

A federal appeals court decision that Montana’s coal severance and gross proceeds taxes, as applied to Indian-owned coal produced by non-Indians, are preempted by federal Indian policies underlying the Mineral Leasing Act of 1938, is summarily affirmed.

A Michigan statute requiring approval of the Michigan Public Service Commission before a natural gas company may issue long-term securities is preempted as applied to companies subject to FERC regulation under the Natural Gas Act.

An Arkansas statute authorizing seizure of prisoners’ property in order to defray costs of incarceration is invalid as applied to Social Security benefits, exempted from legal process by 42 U.S.C. § 407(a).


A Georgia statute barring garnishment of funds or benefits of employee benefit plans subject to ERISA is preempted by ERISA § 514(a) as a state law that “relates to” covered plans.

Justices concurring: White, Brennan, Marshall, Stevens, Rehnquist, C.J.

Justices dissenting: Kennedy, Blackmun, O'Connor, Scalia.


Wisconsin’s notice-of-claim statute, requiring that persons suing state or local governments or officials in state court must give notice and then refrain from filing suit for an additional period, is preempted as applied to civil rights actions brought in state court under 42 U.S.C. § 1983.


Justices dissenting: O'Connor, Rehnquist, C.J.


Virginia tort law governing product design defects is preempted by federal common law as applied to suits against government contractors for damages resulting from design defects in military equipment if the equipment conformed to reasonably precise specifications and if the contractor warned the government of known dangers.

Justices concurring: Scalia, White, O'Connor, Kennedy, Rehnquist, C.J.

Justices dissenting: Brennan, Marshall, Blackmun, Stevens.


A Florida statute prohibiting the use of the direct molding process to duplicate unpatented boat hulls, and creating a cause of action in favor of the original manufacturer, is preempted by federal patent law as conflicting with the balance Congress has struck between patent protection and free trade in industrial design.


Michigan’s income tax law, by providing exemption for retirement benefits of state employees but not for retirement benefits of Federal employees, discriminates against federal employees in violation of 4 U.S.C. § 111 and in violation of the constitutional doctrine of inter-governmental tax immunity.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, O'Connor, Scalia, Rehnquist, C.J.
Justice dissenting: Stevens.


A provision of Pennsylvania’s motor vehicle financial responsibility law prohibiting subrogation and reimbursement from a claimant’s tort recovery for benefits received from a self-insured health care plan is preempted by ERISA as “relat[ing] to [an] employee benefit plan.”


Justice dissenting: Stevens.


A Texas common law claim that an employee was wrongfully discharged to prevent his attainment of benefits under a plan covered by ERISA is preempted as a “State law” that “relates to” a covered benefit plan. The state cause of action also “conflicts directly” with an exclusive ERISA cause of action.


The County of Yakima, Washington’s excise tax on sales of allotted Indian land does not constitute permissible “taxation of land” within the meaning of § 6 of the General Allotment Act, and is invalid.


A Kansas tax on military retirement benefits is inconsistent with 4 U.S.C. § 111, which allows states to tax federal employees’ compensation if the tax does not discriminate “because of the source” of the compensation. No similar tax is applied to state and local government retirees, and there are no significant differences between the two classes of taxpayers that justify the different tax treatment.


Illinois’ “dual impact” laws designed to protect both employees and the general public by requiring training and licensing of hazardous waste equipment operators are preempted by § 18(b) of the Occupational Safety and Health Act, 29 U.S.C. § 667(b), which requires states to obtain federal approval before enforcing occupational safety and health standards relating to issues governed by federal standards.


Two claims, based on New Jersey law and brought against cigarette companies for damages for lung cancer allegedly resulting from smoking, are preempted under the Federal Cigarette Labeling and Advertising Act: failure-to-warn claims requiring a showing that the tobacco companies’ post-1969 advertising should have included addi-
tional warnings, and fraudulent misrepresentation claims predicated on state law restrictions on advertising.


   Oklahoma may not impose income taxes or motor vehicle taxes on members of the Sac and Fox Nation who live in “Indian country,” whether the land is within reservation boundaries, on allotted lands, or in dependent communities. Such tax jurisdiction is considered to be preempted unless Congress has expressly provided to the contrary.


   An Ohio statute setting priority of claims against insolvent insurance companies is preempted by the federal priority statute, 31 U.S.C. § 3713, which accords first priority to the United States, to the extent that the Ohio law protects the claims of creditors who are not policyholders. Insofar as it protects the claims of policyholders, the law is saved from preemption by section 2(b) of the McCarran-Ferguson Act.

   Justices concurring: Blackmun, White, Stevens, O'Connor, Rehnquist, C.J.
   Justices dissenting: Kennedy, Scalia, Souter, Thomas.


   The Illinois Consumer Fraud Act, to the extent that it authorizes actions in state court challenging as “unfair or deceptive” marketing practices an airline company’s changes in its frequent flyer program, is preempted by the Airline Deregulation Act, which prohibits states from “enact[ing] or enforc[ing] any law ... relating to [air carrier] rates, routes, or services.”

   Justices concurring: Ginsburg, Kennedy, Souter, Breyer, Rehnquist, C.J.
   Justices concurring specially: O'Connor, Thomas.
   Justice dissenting: Stevens.


   Oklahoma may not impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on tribal trust land. The legal incidence of the motor fuels tax falls on the retailer, located within Indian country, and the petitioner did not properly raise the issue of whether Congress had authorized such taxation in the Hayden-Cartwright Act.


   A federal law empowering national banks in small towns to sell insurance (12 U.S.C. § 92) preempt a Florida law prohibiting banks from dealing in insurance. The federal law contains no explicit statement of preemption, but preemption is implicit because the state law stands as an obstacle to the accomplishment of one of the federal law’s purposes.

A Montana law declaring an arbitration clause unenforceable unless notice that the contract is subject to arbitration appears in underlined capital letters on the first page of the contract is preempted by the Federal Arbitration Act.

Concurring Justices: Ginsburg, Stevens, O’Connor, Scalia, Kennedy, Souter, Breyer, Rehnquist, C.J.
Justice dissenting: Thomas.


A Louisiana statute that provides for an “open primary” in October for election of Members of Congress and that provides that any candidate receiving a majority of the vote in that primary “is elected,” conflicts with the federal law, 2 U.S.C. §§ 1 and 7, that provides for a uniform federal election day in November, and is void to the extent of conflict. “[A] contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day . . . clearly violates § 7.”


Four Washington State regulations governing oil tanker operations and manning are preempted. Primarily through Title II of the Ports and Waterways Safety Act of 1972, Congress has occupied the field of regulation of general seaworthiness of tankers and their crews, and there is no room for these state regulations imposing training and English language proficiency requirements on crews and imposing staffing requirements for navigation watch. State reporting requirements applicable to certain marine incidents are also preempted.
SUPREME COURT DECISIONS
OVERRULED BY SUBSEQUENT DECISION
SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

While the Supreme Court sometimes expressly overrules a prior decision, in other instances the overruling must be deduced from the principles of related cases. Obviously, there is a chance here for a difference of opinion and this will be reflected in any listing.

The present compilation was initially based primarily upon the following sources:


Emmet E. Wilson, “Stare Decisis, Quo Vadis?” 33 Geo. L.J. 251, 254 n.17, 265 (1945);


Asterisks (*) identify cases expressly overruled.

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<td>42. Fox Film Corp. v. Doyal 286 U.S. 123 (1932)</td>
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Johnson v. Lankford 245 U.S. 541 (1918) (in part); Numerous other cases fall more or less under the Pennhurst doctrine. See 465 U.S. 109–111 nn.17–21, 117–121 (maj.op.), and id. at 130–37, 159–163, 165–166 nn.50 & 52 (dis- sent) (listing 28 cases).

Coffey v. United States 116 U.S. 436 (1886).


Ex parte Bain 121 U.S. 1 (1887) (in part).


Enelow v. New York Life Ins. Co. 293 U.S. 379 (1935);


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